

Dorothy Sue Cobble

LABOR LAW REFORM AND POSTINDUSTRIAL UNIONISM

The Clinton administration's 1993 decision to establish a Commission on the Future of Worker-Management Relations has opened a far-ranging debate about the U.S. collective bargaining system. Organized labor generally argues that its priority should be strengthening workers' rights to organize and bargain under the current system. But most academic commentators—and probably a majority of the commissioners—emphasize the need to foster worker-management cooperation and to extend "employee representation" to the 85 percent of workers without unions.

I for one don't see the two streams of reform as necessarily opposed: workers do deserve greater protections in exercising both their collective and their individual rights to representation. At the same time, all of the most prominent labor law reform proposals have a common failing: they do not fully respond to the representational needs of the new service work force, a majority of whom are women and minorities.

In large part, this failure is a result of a policy discourse mired in the present. Ironically enough—given the ever-mounting stacks of labor history monographs and the flurry of scholarship on "postindustrialism"—neither a sufficient sense of the past nor the future

informs the debates over worker representation and labor law reform. It is as if labor history began with the organization of mass production workers in the 1930s. The wide range of representational forms devised by workers before the dominance of New Deal industrial unionism has been forgotten. Paralleling this historical amnesia is a blindness to the dramatic ways in which the employment relationships of today (and tomorrow) differ from those of the recent past. The factory floor can no longer be the sole basis upon which generalizations are made. Our current labor relations system must be reconceived in light of the realities of the new service work force.

Weaknesses of the Industrial Model

The labor relations system dominant since the 1930s and 1940s assumed a long-term full-time commitment to a single employer—a fundamentally "worksite" orientation. Union benefits were tied to individual employers and often limited to long-term, full-time employees.

This worksite orientation clearly is inadequate for the new contingent work force, many of whom are highly mobile and only tenuously attached to a single employer. This contingent work force—part-time, temporary, leased, on-call, subcontracted workers—makes up an estimated 25 percent of the work force, and most experts expect the proportion to rise. A disproportionate number of these workers are female. Women account for almost two-thirds of temporary help services employees, and Diana Pearce estimates that 52 percent of

women, but only 33 percent of men, work part time or part year.

In addition, firm-based bargaining is not an effective approach for small employers with limited resources. This problem affects women and service workers in particular. In contrast to manufacturing, the service sector (with the exception of governmental services) is often characterized by small firms operating in local competitive markets. And, in the private sector, women are much more likely than men to work for small firms and at worksites with fewer people.

Moreover, many women's jobs in the service sector and throughout the economy are occupationally based, not worksite-based. Women move from employer to employer and from industry to industry more frequently than men do. Women thus rely less on training and promotional opportunities within a firm; they find a better firm or a better employer rather than a better job within the same firm. A collective bargaining system that weds higher wages, benefits, skill upgrading, and employee participation to a specific firm will deny basic employment rights to large numbers of workers, many of whom will be women.

The New Deal labor relations framework is also marred by its adherence to the managerial principles advocated by Frederick Winslow Taylor. Taylorism assumed that production is organized most efficiently through a hierarchically structured, micro-managed workplace with narrow job titles, detailed work rules, and strict separation of managerial and worker functions. In this context, unions were adversaries, not partners with management. In a classic division of labor, management retained authority over the design and organization of work; the union declined (and in some cases was denied) responsibility for supervisory functions, efficiency, and productivity.

As manufacturing shifts toward team work and more flexible computer-based technologies, Taylorist management practices have come under fire. Yet Taylorist notions have always been ill-suited to the realities of the service and white-collar work world, where workers tend to be in situations of close personal contact with their immediate boss.

The line between employee and employer is more indistinct than in the traditional blue-collar, mass-production factory; employee-employer relations are largely personal and collaborative rather than adversarial, formalized, and highly bureaucratic.

Management efforts to Taylorize service workers, particularly those involved in direct service encounters, were never as successful or as widespread as in mass production manufacturing. At times, even management realized that friendly service and attentive caring are not best extracted through authoritarian, top-down supervision, and that creativity and problem-solving in white-collar employees cannot be "mandated" from above. Indeed, many non-factory workers, professional and nonprofessional alike, have always engaged in certain "managerial" functions; they work more autonomously or in self-managing teams where the senior member takes responsibility for organizing the flow of work, supervising less skilled co-workers, and maintaining work quality.

Given these realities, a labor relations system that allowed workers to exercise certain managerial prerogatives would be a better match with the practices of service and white-collar workplaces. Organizing and representational processes that emphasized greater participation, less adversarial proceedings, and more consensus-style "win-win" bargaining also would be more appropriate.

Yet efforts to move toward this kind of transformed labor relations system are on a collision course with the Taylorist legacies embedded in our current labor law—a point underscored in the AFL-CIO's recent report, *The New American Workplace: A Labor Perspective* (1994). Under our current legal framework, if unions agree to transform work practices and empower individual workers, they risk bargaining away their members' rights to union representation. The Supreme Court, for example, recently barred a group of licensed practical nurses from organizing because they exercised "independent judgment" in assigning tasks and directing the work of nurses' aides. In the eyes of the court, these

A more extended version of this essay, "Making Postindustrial Unionism Possible," appeared in *Restoring the Promise of American Labor Law*, ed. by Sheldon Friedman, Richard W. Hurd, Rudolph Oswald, and Ronald Seeber (Ithaca: Cornell University ILR Press, 1994). The research on which this work is based was supported by a grant from the Women's Bureau, U.S. Department of Labor.

"supervisory" functions made them ineligible for coverage under the National Labor Relations Act. If this precedent holds, increasing numbers of workers, factory as well as nonfactory, will lose their legal rights to collective representation as we move toward a post-Taylorist workplace.

Why Unionism is Still Necessary

Despite the deep-seated problems with the New Deal framework we have inherited, there are tenets of that same system worth preserving. Let me specify three.

- *First, the old system rightly recognized that collective power for employees was essential for a genuinely collaborative relationship between labor and management.* As Adrienne Eaton and Paula Voos argue in *Unions and Economic Competitiveness*, the most productive partnerships are between those relatively equal in power. Yet the inequities of power between individual employees and their employers have widened since the 1930s. Employee representational schemes that fail to ensure collective employee participation or that create joint committees in which management retains ultimate decision-making authority are out of touch with the realities of today's workplace. Unionism and collective bargaining, albeit as transformed institutions, should remain at the heart of labor policy.

- *Second, the New Deal framework acknowledged the need for adversarial as well as cooperative encounters between employers and employees.* That need still exists. Arrangements that do not provide a way to express conflict and exert pressure for its resolution would deny the fundamental realities of our economic system.

The issue is not how to do away with "adversarialism" but how to minimize unhealthy and unnecessary adversarialism. Unions must be encouraged to accept more responsibility for the health of the enterprises with which they are linked, whether schools, hospitals, or auto factories. Yet the destructive adversarialism that has thrived in the last twenty years has been fueled not just by a limited unionism but by a

management culture deeply skeptical of the benefits of power-sharing and democracy at the workplace. The true American exceptionalism, as Sanford Jacoby noted in *Masters to Managers*, is American management's penchant for unilateral control. Public policy must dampen the current adversarial culture by ensuring the institutional security of unions. Introducing "employee participation committees" or plant-level work councils might help close the "representation gap" for those without union representation. But the widening "union gap" between the United States and other industrialized countries must also be closed if these committees are to function effectively and if a realignment of power and decision-making is to occur.

- *Third, strong, autonomous unions act to overcome gender, class, and racial divisions in our society and to further economic justice.* Unionization raises wages more for women and minorities than for white men; it also helps close the gender and race wage gap. Unions with large female constituencies have pushed for pay equity, family and medical leave, and other advantageous policies for women.

Historical and Contemporary Alternatives

Much of the current critique of the New Deal system equates all unionism with the form of unionism that became dominant in the 1940s. Thus, the argument goes, if industrial unionism is obsolete, so is unionism per se. This historical blindness hampers attempts to create new forms of collective representation. Postindustrial unionism does not need to be invented out of whole cloth; rather, we can reshape and extend elements of past and current institutional practice. The practices of what I have termed "occupational unions" and the nontraditional approaches to representation taken by female-dominated groups such as teachers, nurses, and clericals offer the best guide to a postindustrial unionism.

Occupational unionism, the primary model of unionism before the New Deal, was neither Taylorist nor worksite-based. Although not every trade adopted occupational unionism in toto, before the New Deal most organized

trades, and virtually every trade that successfully organized mobile workers, relied upon some of its elements. Occupational unions recruited and gained recognition on an occupational/local market basis rather than by industry or individual job site; they emphasized occupationally based rights, benefits, and identity rather than worksite-based protections. Longshoremen, janitors, agricultural laborers, food servers, and garment workers, as well as such classic craft unionists as printers, building tradesmen, and performing artists strove for control over hiring through the closed shop and through union-run hiring halls; they stressed employment security rather than "job rights" at an individual worksite; they offered portable benefits and privileges; and they took responsibility for monitoring workplace performance. The line between employee and employer was blurred as well. Not only did unions take responsibility for personnel decisions, but many organizations (teamsters, musicians, retail workers, for example) included supervisors and small employers.

Occupational unionism flourished because it met the needs of workers and employers outside of mass-production settings. In local labor markets populated with numerous small employers, the unionization of garment workers, restaurant employees, teamsters, and others brought stability and inhibited cutthroat competition. Employers gained a steady supply of skilled, responsible labor and an outside agency (the union) that ensured the competence of its members. Workers did not gain long-term job tenure with a single employer, but they did have the opportunity to develop skills and experience in a variety of worksites. This unionism, then, in contrast to industrial unionism, never developed rigid seniority rules at individual worksites. Occupational unionism was committed to maintaining employee productivity, quality service and production, and to ensuring the viability of unionized firms.

Occupational unionism declined dramatically in the postwar era, in part because of shifts in union institutional practice, as I have detailed for the hotel and restaurant industry in *Dishing It Out: Waitresses and Their Unions in the Twentieth Century*. Legislative and legal deci-

sions also took their toll: the closed shop, picketing to gain employer recognition, secondary boycotts, the removal of members from the job for noncompliance with union bylaws and work rules, and union membership for supervisors all became illegal. Unions lost their ability to organize new shops, to maintain multi-employer bargaining structures, to set entrance requirements for the trade, to oversee job performance, and to punish recalcitrant members.

By the 1960s, occupational unionism was a shadow of its former robust self. Only the building and construction trades (which were exempted from some of the postwar restrictions on union activity) and certain specialized professional groups (such as the performing arts occupations) retained some degree of power. Yet by the 1960s other alternatives to mass production unionism were emerging. The professional and semiprofessional employee organizations built primarily by women, for example, initially focused less on extracting economic concessions from individual enterprises than on the well-being of their industry and on responding to the "professional" interests of their members. As state bargaining laws and other forces moved them toward more traditional "bargaining" relations with employers, they shed some of their occupational and associational orientation. Yet, as Charles Kerchner and Douglas Mitchell observe in *The Changing Idea of a Teachers' Union*, many teachers' unions are now moving toward a third stage of labor relations in which they are as concerned with the welfare of the overall educational system as with protecting their own interests. It is these alternative models of unionism that hold promise for the future.

Encouraging Postindustrial Union Alternatives

Of course, the industrial model should not be abandoned wholesale, but it is essential that we begin to think once more in terms of multiple and competing forms of unionism. A single model of labor relations cannot meet the needs of all workers. What transformations in public

policy would help make possible new unionisms for the postindustrial future?

Expanding the definition of "employee" under the Wagner Act is of primary importance. By my estimates, a third of the private sector work force (some thirty-two million workers) is now explicitly exempted from exercising collective bargaining rights. Domestic and agricultural workers, the self-employed, and others were originally excluded under the Wagner Act in 1935. Later legislation and legal rulings have rescinded the bargaining rights of supervisors, managers, professional employees deemed "managerial," and "confidential" employees (those with access to information considered confidential by the employer). The law must not discriminate against those such as domestic and agricultural workers whose work-sites are still linked to the household economy. Nor should categories of workers be excluded simply because they exercise certain "managerial" or "supervisory" responsibilities. In a post-Taylorist workplace, virtually every employee will participate in decisions once thought to be managerial prerogatives.

In addition, many workers are "effectively barred" from collective representation because they have nonstandard employment relations. Many part-timers, temporaries, and other casuals are exempted from participating in NLRB (National Labor Relations Board) elections because they lack a sufficient "community of interest" with "regular" employees.

If workplace democracy is to be retained as employers and employees move away from standard contractual arrangements, public policy should not penalize those who work off-site, on schedules other than full time, or whose tenure is undefined. As Virginia duRivage recommends in *New Policies for the Part-time and Contingent Workforce*, part-time, temporary, and short-term hires should be included in bargaining units based on "the content of their work rather than the classification of their employment."

The problem is not just one of eligibility and expanded coverage but of making it easier for employees to secure contracts with their employers. The most frequently mentioned recommendations include increased penalties

for employers who fire union activists, expedited election procedures, enhanced worksite access for union organizers, card-check recognition (which requires employers to bargain once a majority of workers have signed cards favoring unionization), and requiring arbitration when negotiations over a first contract break down—all of which would do much to "level the playing field." Yet more fundamental reforms are required.

If a mobile, decentralized service work force is to gain union representation, unions must once again have the ability to organize "top-down" and to exert many of the economic pressures on employers that were once legal. The millions of nonfactory workers—teamsters, longshoremen, waitresses, cooks, musicians, and others—who successfully organized between the 1930s and the 1950s relied on mass picketing, recognition picketing (prolonged picketing with the explicit goal of gaining union recognition), secondary boycotts (putting pressure on one employer to cease doing business with another), "hot cargo" agreements (assurances from one employer that "he" will not handle or use the products of another nonunion or substandard employer), and pre-hire agreements (contracts covering future as well as current employees)—all tactics now illegal under current labor law. Making them legal again would facilitate the organizing of workers from domestic cleaners to the millions of fast food workers toiling for minimum wages. McDonald's, for example, is unionized in Denmark, Finland, Mexico, Australia, and other countries in large part because of the legality of secondary boycotts and other kinds of economic pressures. Unionized employees at milkshake supply centers, truckers, and printers all helped bring McDonald's to the bargaining table by refusing to produce and deliver goods to the chain.

The law has long made exceptions for the construction trades and other sectors of the economy with high degrees of transience and subcontracting, allowing them to engage in certain kinds of "secondary" economic pressures and exempting them from the prehire or "closed shop" ban. These protections must not

only be preserved but extended to other occupations and industries.

Yet even when employer recognition is achieved, the small bargaining units typically decreed by the National Labor Relations Board make meaningful bargaining difficult. Decentralized, firm-based bargaining fuels employer resistance by heightening the economic burdens on the few unionized employers. It divides employees, thus weakening their bargaining strength. And it demands an inordinate degree of union staff and resources. The Hotel Employees and Restaurant Employees, for example, cannot negotiate individual contracts with the thousands of independent and family-owned eating establishments that exist in even one major metropolitan area.

Changes in the law would help remedy this situation. Market-wide, multi-employer bargaining could be encouraged by certifying multi-employer bargaining units, by penalizing employers who withdraw from voluntarily constituted multi-employer agreements, and by implementing "sectoral bargaining" legislation. Sectoral bargaining, as it exists and is being proposed in Canada, mandates that the minimum standards of an agreement be extended to other employers on an industry, occupational, or geographical basis. Broader-based bargaining would also be facilitated by removing the restrictions on the economic weapons allowed to labor. Increasing the power of unions has often meant that employers—especially small employers in highly competitive markets—voluntarily sought multi-employer bargaining.

For a unionism suited to the postindustrial work force to be born, our labor laws and institutions must move beyond an enterprise or worksite-based orientation. Let me give some further examples of how this might translate into concrete policy.

- First, most proposals for enhancing joint decision-making and employee participation recommend giving increased responsibilities for training, quality control, and other personnel matters to employee teams at individual worksites. More responsibility needs to be placed in the hands of

employee associations that operate across enterprises, representing members on a market, geographical, or occupational basis.

- Second, more attention could be paid to the promotion of statutes that raise wages and secure benefits for employees on a nonenterprise basis. To give one example, prevailing wage legislation (such as the Davis Bacon Act or the Service Contract Act) should be extended to additional sectors of the economy. Prevailing wage legislation—requiring that all employers pay wages and benefits equal to those prevailing in a given area—establishes a floor below which wages and benefits cannot fall. It discourages a reliance on wage cutting as the prime competitive strategy, and it provides institutional stability for unions by lowering employer resistance to unionization.

- Third, the historic commitment of the occupational unions to providing employment and income security rather than merely guaranteeing job security at an individual worksite should be revived. Occupational unions fostered employment and income security by taking responsibility for employee competence and productivity and by promoting the health and viability of unionized employers. These practices helped preserve high-wage, union jobs by creating employer incentives to unionize.

The occupational unions also pushed for broad-based bargaining structures and union-run hiring halls to protect the employment security of their members. The benefits of employee-run or state-run employment agencies were many. Operating among waitresses, agricultural workers, garment workers, performing artists, janitors, teamsters, longshoremen, and many other groups, they raised wages in the local labor market, offered portable, high-quality benefits that did not penalize work-force intermittence, and provided workers with control over their hours and work schedules without jeopardizing employment security. Increasingly workers desire mobility among employers and flexibility in their work lives. Nonprofit agencies could provide such variety and flexibility, and they could presumably offer higher wages than agencies run for profit.

Employee-run or state-run agencies would need to be subject to strict antidiscriminatory procedures that would guarantee the rights of

minorities. Groups of workers or so-called neutral agencies can discriminate in hiring just as employers do. It is important to recognize, however, that hiring halls have not been solely the creature of the building trades and other male-dominated occupations. Historically, they served the interests of women and minorities in a wide range of industries, including garment, agricultural, and food service.

Although some employers might rely on such agencies voluntarily, most would seek cheaper labor if it were available. Thus, in order for these mechanisms to flourish, the union must be able to exert control over the labor supply within a local labor market or to pressure employers through recognitional picketing, secondary and customer boycotts, and prehire or preferential hiring agreements.

Lastly, other deeply rooted industrial union traditions must be reconsidered if a postindustrial unionism is to be born. Survey data show that although the majority of workers want collective representation, they are not satisfied with the way most unions respond to their need for promotional opportunities and their desire for recognition of individual achievement. The union movement must reclaim the emphasis among occupational and associational unions on representing the individual as well as the collective interests of employees. In addition to offering training, occupational unions rewarded individual initiative through pay schedules that combined seniority-based scales with wages pegged to skill. The performing arts unions still negotiate a collective contract that sets mini-

mum standards while allowing individuals to bargain supplemental enhancements.

Collective bargaining practices must also be redesigned to enhance employee participation. The efforts of Harvard University and the Harvard Union of Technical and Clerical Workers (HUTCW) are instructive here. As John Hoerr recently reported in the *American Prospect*, their first labor-management agreement was primarily a statement of "value and principles, not an elaboration of rules and procedures." The interpretation of these principles was left in the hands of groups of employees. Rigid, detailed work rules became less important in an environment in which decision-making had been shifted downward and in which trust and good relationships were deemed of value. In addition, Harvard employees relied on large bargaining teams during contract negotiations and set up a system of joint problem-solving councils that have involved hundreds of workers. These new mechanisms for bargaining were effective in large part because the local union vigorously maintained ties with its own members and relied on well-organized and traditional economic pressures when necessary. HUTCW skillfully combined cooperative and adversarial strategies.

Work-force diversity is not new. Over its century and a half of existence, the American labor movement has accommodated that diversity, as the variable practices of organizing and representation among teachers, nurses, construction workers, waitresses, janitors, truck drivers, and others attest. The test of the labor movement in the twenty-first century service society will be whether it can recover and extend that tradition of multiple unionisms. □

On-Line with DISSENT

Upon the advice of several librarians, we have decided to stop printing a biennial index in the pages of *Dissent*. *Dissent* is now indexed in *Academic Abstracts*, the Infotrak Academic Index, *Magazine Article Summaries*, the *PAIS Bulletin*, University Microfilms, Inc. (UMI), the *Social Sciences Index*, and the *Social Science Source*. Readers and librarians who wish to receive a copy of the index for Volumes 39 and 40 of *Dissent* (Winter 1992 through Fall 1993) can write to *Dissent*, 521 Fifth Avenue, N.Y., N.Y. 10017. Please include 52¢ postage.