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THE WHITE HOUSE

WASHINGTON

June 29, 1977

MEMORANDUM FOR: THE PRESIDENT

FROM: STU EIZENSTAT

SUBJECT: Labor Law Reform

BACKGROUND

The AFL-CIO, the U.A.W. and other union groups have declared labor law reform to be this year's top legislative priority. The unions feel that the 1974 Taft-Hartley Act, and particularly its rules governing union organizing efforts, unfairly favors management.

A bill, H.R. 77, embodying some of the union-backed reforms was introduced by Congressman Thompson in January. During the spring the AFL-CIO drafted a much more extensive bill. After several rounds for consultation with the Labor Department and with us (without committing you), the AFL-CIO agreed to a much more modest set of reforms outlined below. Three highly controversial proposals were deleted during this round of consultations - repeal of 14B, a provision that would have allowed certification of a union as a bargaining agent without an election in some cases, and a provision that would have required employers taking over a business to honor the old union contract. The AFL-CIO accepted these major compromises, along with a number of lesser ones, because they very much want Administration backing for their bill. Without our active support it is doubtful that any labor law reform bill can pass Congress. Even if the unions do not receive our support, however, they expect to introduce and push this package of reforms very soon. They have asked for your decision on these reforms by July 7.

ANALYSIS

The effect of this set of proposals is generally to streamline the labor laws and to make it easier for unions to organize. Under current law, companies can often use procedural delays to weaken union organizing efforts. The law's remedies are so weak that in some cases outright flaunting of the law is less costly than collective bargaining and the subsequent wage settlements. The package focuses on procedural changes and speed-ups, strengthened sanctions against employers guilty of unfair labor practices, and coverage expansions.

The business community argues that the changes will tip the current balance in labor-management relations too much toward labor. I disagree. I have met on three occasions with leaders from the Business Roundtable - Chamber of Commerce - National Association of Manufacturers to specifically discuss labor law reform. While, of course, they would prefer to see no change in the labor laws, many of their specific criticisms have been dealt with in our revisions.

A coalition of business groups intends not only to lobby against these proposals, but to introduce their own amendments to the labor laws, presumably ones intended to favor employers. It is likely that this issue will develop into a tough battle in Congress, with final passage delayed until next year, if at all.

Because labor law reform is such a high priority with organized labor, we have cooperated closely with the unions in the development of this package. At the same time we have tried to limit the proposals to measures that remedy actual inequities in the law, as opposed to simply shifting its balance toward labor.

Prior to submitting these proposals to you I have circulated them to the Departments of Commerce, Justice and Treasury, and to CEA, OMB and the Vice President. Their comments are attached, and the analysis below reflects their concerns.

OPTIONS

I believe that there are three possible strategies:

1) Neutrality We could take a hands off attitude on the grounds that it is not worth investing our political capital in this potentially bloody battle. The unions would consider this tantamount to opposition.

2) A Labor Law Reform Message As in our airline message, we could endorse the concepts and principles of labor law reform without detailing them or preparing legislative language.

3) An Administration Bill The Vice President, Ray Marshall and I support this course. If we adopt this course we can undoubtedly extract a much greater measure of cooperation from the AFL-CIO over the course of the next year.

It is unlikely that the AFL-CIO will accept a severely pared down Administration bill, since they have conceded so much already. Therefore, if you cannot support most of this package, the message or neutrality strategy is probably preferable, If you agree with most of these reforms, however, then an Administration bill is the option with the most political benefit.

It is difficult to overestimate the importance of this matter in terms of our future relationship with organized labor. Because of budget contraints and fiscal considerations, we will be unable to satisfy their desires in many areas requiring expenditure of government funds. This is an issue without adverse budget considerations, which the unions very much want. I think it can help cement our relations for a good while.

PROPOSED REFORMS*

I. Expedited Procedures

A. Board Membership

The number of board members would be increased from five to seven (budget costs $2 million). This should enable the board to better handle its growing back log of cases along with substantial additional powers the we have proposed in these reforms. Since the Board divides its work among small panels of its members, more members would allow more panels to operate. The American Bar Association has recommended an increase to 9 members.

OMB opposes this increase on the grounds that the Board may be able to increase its productivity with better utilization of existing resources.

Commerce and CEA do not oppose this change. DOL supports it.

I believe that the Board should be increased to 7 members.

B. Summary Affirmance of Administrative Law Judge Decisions

The decrees of the Administrative Law Judges (ALJs) could be affirmed in simpler cases by 2-member panels of the Board, rather than by the current three-member panels. Currently, the 94 ALJs across the country make all initial decisions regarding complaints of unfair labor practices. These decisions are in the form of recommendations to the Board in Washington, and do not become final until the Board acts on them. The Board takes an average of 120 days to review these decisions, resolving about 25% in less than 109 days, but taking more than 221 days to decide on the most complex 25%. About 2/5 of all ALJ decisions are totally or partially reversed by the Board. By allowing the Board to delegate its decision making authority to a greater degree, this reform aims at speeding up the review process. This procedure is consistent with those of the Courts of Appeal.

*Not all agencies commented on each of the reforms. All specific comments of the agencies surveyed are reflected. The Vice President, the Secretary of the Treasury and the Attorney General expressed non-specific approval of the whole package.

OMB does not support this change on the grounds that it would have little substantial impact. They prefer the procedure of allowing the ALJ's ruling to become final unless the Board grants review. This procedure was embodied in the H.R. 77 but was modified in the current plan because of the high rate of reversals of ALJ decisions by the Board. The business community strongly objected to delegating so much authority to the ALJs as OMB proposes.

CEA and Commerce have no objection to the 2-member panel affirmation. DOL supports this change.

I support the two-member panel approach.

C. Elections

1) Time Limits

In cases in which a majority of employees in an appropriate unit have signed authorization cards, an election would be required within 15 days of the filing of a petition with the Board (25 days for units larger than 250 employees.) All other elections would be required within 45 days, except for those of "exceptional novelty or complexity" which would have to be held within 75 days. In complex cases in which the Board could not resolve the issues by the time of the election, the election would be held anyway. If the subsequent decision changed the unit or eligibility rules under which the election was held a new election would be called for.

Currently the median time for holding an uncontested election is 57 days, while the median for contested elections in which the issues are resolved at the regional level is 75 days. These two kinds of cases comprise 99% of all elections. For the 1% of cases in which the issues must be resolved by the Board, the median time before an election is 275 days.

The Labor Department argues that delay almost always works in favor of an employer resisting unionization. They believe that under current law employers can unfairly delay elections by contesting such things as the appropriateness of the unit or the eligibility of certain employees to vote in the election. Time limits would eliminate the incentive to frivolously contest elections.

The Chairman of the NLRB has indicated that the proposed time limits are feasible.

CEA, OMB and Commerce all feel that the time limits may be too inflexible. They propose targets rather than limits.

I recommend that the time limits be adopted. To satisfy concerns that the limits are too restrictive we could consider a modest lengthening of the periods. But the principle that an election should be held after a fixed time is very important.

2) Unit Determination by Rule-Making

The legislation would instruct the Board to promulgate rules governing appropriate units for collective bargaining and for eligibility to vote in union elections.

Currently the Board resolves most of these issues on a case-by-case basis. Greater codification of the rule could cut down on delay and reduce the uncertainties in the law. This would be consistent with the changes we have encouraged other agencies to adopt, moving from time-consuming, case-by-case decision-making to more clearly defined and speedier rule-making.

OMB does not support this change because they believe that everything that could be covered by a rule in this area is already covered by an NLRB precedent. The Department of Labor feels, however, that NLRB precedents are inconsistently applied, and that rules would insure fairer and faster application of Board policies. Commerce supports rulemaking, but believes that it should not be tied to time limits for elections (Commerce's concern has been dealt with in the most recent draft).

I support this rulemaking procedure.

3) Equal Opportunity to Address Employees

The Board would be instructed to issue regulations requiring that employers and employees have "equal assured opportunity"to address all employees during a union's organizing efforts. Depending on how the Board wrote these regulations, this could grant unions, in some cases, rights to go on company property to make their case.

Currently, unions seeking to address employees are generally limited to calling or visiting them in their homes, or to distributing literature outside plant gates. Employers have much greater access to employees, since they can make their case on company time and company property.

The AFL-CIO had proposed that the legislation itself grant equal rights of access to unions. Our procedure will give the Board the power to define the appropriate rules to govern union rights.

OMB supports this change in principle, but warns of definitional and enforcement problems with an "equal" standard. Schultze agrees and suggests "full opportunity" rather than "equal". It should be noted that in cases in which an employer chooses not to make any case to his employees prior to a union election, a "full" standard would entail broader union rights than "equal".

Commerce supports this change in principle, but believes that it is very important to maintain private property rights. They urge that any legislative instruction to the Board specifically mention these property rights. The Department of Labor feels that the issue is not one of property rights versus union rights. They point out that under an "equal opportunity" standard that an employer could not be required to grant access to unions unless he used company time or property to argue against unionization. The controlling factor would be a decision by the employer.

This will be one of the most controversial aspects of this package. Unions should have a fair chance to make their case, but employers have a right to reasonable control over their operations and to control over access to their facilities. Therefore we recommend that the Board be instructed to promulgate rules granting unions "equal assured opportunity to address employees prior to an election consistent with the unimpeded operation of the business."

II. Strengthened Remedies Against Unfair Employer Labor Practices

A. Participation in Federal Contracts

Employers guilty of willfully violating a Board order enforced by a court decree would be debarred from participating in new federal contracts for three years. The Secretary of Labor could exempt a company from this penalty if he found it was in the national interest,

or if the company was the sole source of a needed product. This remedy would apply only to cases involving coercion of employees or discrimination based on union membership. Currently there is no such provision in the law.

OMB supports this provision but argues that similar sanctions (i.e., large fines) should also apply to firms without federal contracts and to unions guilty of unfair labor practices. The Department of Labor argues that fines for other violators are inconsistent with the intent of this provision, which is simply to insure that federal dollars do not go to those who willfully violate the nations laws. They point out that this sanction is used to enforce ~~labor and discriminate~~ other laws (such as Davis-Bacon, Service Contracts, OFCC, etc.).

Commerce finds an automatic 3 year debarment objectionable. They would prefer to see all firms subject to penalties, and they believe that debarment should be lifted when a firm comes into compliance.

The Department of Labor argues that lifting the sanctions when a firm comes into compliance would allow a firm to circumvent the law. For example, a firm could fire workers for union activities and then later, when the NLRB threatened to cut off federal contracts, it could simply rehire them. The damage would already have been done however.

I agree with the Department of Labor that a 3 year debarment should be written into the law. If this period (which is standard in other debarment laws) is considered to long we might later ~~have~~ agree to compromise on a shorter period.

B. Double Back Pay

Employees unlawfully discharged for union activity during the initial organizing period would be entitled to reinstatement and double back pay.

Currently the Board has the authority to require reinstatement and back pay awards, but this award is based on back pay less the interim earnings ~~which the employee earned or should have earned~~. The result is

interim earnings

lengthy proceedings to determine the amount of damages and ~~offsets~~ and an incentive for companies to contest and minimize these awards. Typically these back pay awards are quite small and are often delayed for years.

Double back pay computed without offsetting factors would greatly simplify and streamline this procedure.

OMB does not object to this change, if analysis supports this estimate of damages to the employee.

Commerce has no comment.

I support this change.

C. Remedies for Refusal to Bargain for First Conract

In other words, if first contract settlements had averaged 8% in the year of delay, then the employer could be required to pay his employees 8% of their previous pay.

The NLRA would be amended to authorize the Board to require companies found guilty of refusing to bargain in good faith for a first contract to recompense employees for the presumed loss of benefits during the unfair delay. This compensation would be the difference between the wages and fringes received by the employees during the delay and these benefits multiplied by the average percentage increase in all labor contract settlements signed during the delay, as measured by a standard BLS index.

Currently employers in some cases simply refuse to bargain after the union wins an election, and then litigate the subsequent "order to bargain" issued by the Board. They prefer the legal costs to the higher settlements that might result from a collective bargaining agreement. This provision takes away this incentive to delay by litigation.

OMB has no objection in principle but wants to further analyse the choice of index and how it would be used. Commerce believes that the remedy gives the Board too much authority to determine wage rates. In practice the distinction between a rigid but legal bargaining stance and an illegal pattern of refusing to bargain is based partly on the Board's judgment. Commerce questions whether the government should be so deeply involved in these issues, and urges further study.

CEA has no objection.

I support this remedy.
The Board would have to find a company guilty of refusing to bargain before imposing any penalties. Since this finding is based on a gross showing of a pattern of bad faith, I believe that there are sufficient safeguards to protect companies. DOL points out that the strength of this remedy will tend to make the Board very judicious in its use.

D. Preliminary Injunctions

The Board would be required to seek preliminary injunctions (prior to the issuance of a formal complaint) against companies accused of refusing to bargain after expedited first elections, and against companies accused of illegally discharging an employee. This injunction would only be issued after a local investigation by NLRB officials revealed probable cause to suspect these violations had occurred.

Currently the Board is only required to seek injunctions prior to issuance of a complaint in cases of secondary boycotts, unlawful picketing, "hot-cargo" agreements, and coercion to join or bargain with a union. It has discretionary power to seek preliminary injunctions after a complaint is issued in other cases of labor law violatio It has used this discretionary power sparingly.

According to DOL the intent of preliminary injunctions was to protect businesses against practices which had a particularly deleterious impact on their operations. This new authority would recognize that certain unfair employer practices can have an equally deleterious effect on workers and unions.

OMB has no objection to this proposal. Commerce opposes on the grounds that the NLRB already has sufficient power to seek injunctive relief. Commerce believes that it is undesirable to make it mandatory for the Board to seek preliminary injunctions in cases in which an employer is accused of refusing to bargain after an expedited election.

Some members of the current Board are concerned that this change would ~~substantially~~ increase the workload of the Board and the local District Courts who issue there injunctions.

requirement + the

I believe the Board should be required to seek injunctive relief in cases of refusal to bargain and unlawful discharge. The ~~request~~ that local Board make "probable cause" and "irreparable damage" findings insures ~~provides sufficient protection~~ that this provision would not be abused.

D. Expedited Enforcement of Board Orders

The Board would be required to file its orders with the Appeals Court within 30 days of a decision, if neither party appeals within this time limit. Upon receipt of the Board order by the Court the order would become final.

Presently there is no time limit for the Board to file its orders with the Court. In the past this had lead to some delay. Since this delay has now been largely cleared up through administrative action, this proposal will have little impact.

No agencies object.

I support.

III. Other Amendments

A. Foreign Flag Ships

American owned foreign flag ships would be brought under the NLRA jurisdiction, if the ships have more substantial contacts with American ports than with those of the nation of registry.

A 1962 Supreme Court ruling held that the NLRA did not cover workers on foreign flag ships, in the absence of a specific expression of Congressional intent. This proposal would overturn that ruling by providing a specific expression of Congressional intent.

OMB opposes this change citing concerns about international agreements, and enforcement problems. Commerce is sympathetic to the goals of the change, but suggests study of the costs. State is (unofficially) opposed. Charlie Schultze suggests limiting its impact to ships whose home ports and base of operation is the U.S. This would exclude the flags of convenience ships but would catch, for example, the foreign flag fishing fleets based on San Diego. In practice such a distinction would be difficult to enforce and would invite subterfuges

to avoid the law. It could also encourage some transfer of ships out of the country.

Applying the NLRA to foreign flag ships ~~This proposal~~ is primarily aimed at the flag of convenience shippers, particularly the oil companies who escape American labor costs by hiring foreign crews to work on their foreign registered vessels. The business community warns that this change may have the impact of forcing multinational companies to divest themselves of their foreign flag ships, rather than rereigstering them.

I believe that foreign flag ships should be brought under the NLRA. The danger of transfer outside the United States is small because on modern ~~efficient~~ ships labor costs are a small fraction of shipping costs, ~~and foreign labor costs have risen more rapidly in recent years.~~ This change will ~~also~~ tend to encourage the repatriation of American shipping to our flag, consistent with our other policies in the maritime area.

B. Greater Protection for Guards

The proposal would repeal current restrictions on the organization and representation of guards.

Currently guards cannot be represented by a union that includes non-guards, and a guard union cannot be affiliated with an organization that admits employees other than guards. The practical effect of this is to require separate unions solely for guards and to prohibit these unions from affiliating with the AFL-CIO.

The Congressional intent of this provision was to insure that employers would have loyal employers to protect people and property in the event of a strike or labor unrest. Separate unions were thought to protect against a conflict of interest.

Our proposal retains the prohibition against a single unit being the bargaining agent for both guards and non-guards at one location. But it would allow guards to join unions which have non-guard members, and would allow guard unions to affiliate with non-guard unions.

OMB and CEA object to this change on the grounds that there is no demonstration of harm to guards under the current system. In the absence of such a demonstration they feel that the original justification of the restriction is still valid.

Commerce has no objection.

I support this change. Our proposal provides adequate safeguards against conflict of interest or disloyalty by guards. It corrects a long-standing inequity which limits the freedom of guards to join unions of their own choosing.

D. Replacements for Economic Strikers

This proposal would give workers involved in a strike over economic issues ~~in the initial collective bargaining agreement~~ to displace the strike breakers hired to replace them during the strike. This right would apply only to workers striking over an initial collective bargaining agreement. Currently striking workers have the right to replace strike breakers only if the strike was called or prolonged because of an employers unfair labor practices. In strikes which are purely over economic issues the employer has the right to hire permanent replacements. This change would remove the danger of job loss for workers who go out on strike to obtain their initial contract.

OMB opposes this change on the grounds that an employer should have the right to choose his workforce prior to reaching a union contract. Commerce calls it a fundamental shift in labor law and asks for more information to analyse the issue.

I support this change. In negotiations for a first contract the union is usually very weak, with little allegiance from its members. It can seldom risk a strike if its members are aware they could lose their jobs. This right to reinstatement would not, of course involve any back pay.

June 29, 1977

TO: PRESIDENT CARTER

FROM: HAMILTON JORDAN H.J.

I hope you will adopt Stu's recommendation, and send an Administration labor law reform bill to Congress.

My reasons are as follows:

1. The compromise proposals developed by Stu and Ray all focus on removing inequities in the administration of the labor laws. This is a consistent position for the Carter Administration to take.

2. Most of the labor issues we have faced to date have been narrow special interest issues (international trade, situs picketing, cargo preference, etc.) which the AFL-CIO

supported because the issues were very important to a few unions within the federation.

In the case of labor law reform, however, there is strong broad support, particularly from the "progressive" unions - the UAW, the Machinists, CWA, etc. These unions represent our real base of support in labor - it is important that we honor their priorities.

3. The labor law reform negotiations with labor (Ray and Stu on one side, Tom Donahue and Steve Schlossberg of the UAW on the other) have been constructive and reasonable. In this case, labor has lowered its expectations ahead of time, rather than setting unreasonable objectives and then publicly blaming us for not meeting them.

By supporting labor on this issue, we can encourage a reasonable approach on future issues.

4. I believe your decision on this issue will have a significant bearing on the UAW's decision to reaffiliate with the AFL-CIO. Reaffiliation is in our best interest, because it will bring fresh, progressive and reasonable ideas into an organization (the AFL-CIO) which is now stale and obstreperous.

As you know, Doug Fraser is having trouble convincing his membership that reaffiliation is a good idea. One persistent member argument against the idea is that the UAW has more influence with the Administration than does the AFL-CIO.

A unified labor law reform effort - with the AFL-CIO, UAW, and the Administration working together - would improve the climate for reaffiliation.

In short, a labor law reform bill as proposed by Stu and Ray is consistent with our own approach to government, and also holds the promise of improving substantially our relations with labor on terms which we can accept.

P.S. Bert Lance told me that he supports the concept and this particular bill.