Secretariat
of Labor
and Social Welfare

National Administrative Office of Mexico for the North American Agreement on Labor Cooperation

Report on Review of Public Submission 9501 / NAO MEX

Mexico, Federal District, May 31, 1995

(NAO STAFF TRANSLATION)

INDEX

INTRODUCTION

On February 9 of this year, the National Administrative Office (NAO) of Mexico received a public submission presented by the Telephone Workers Union of the Republic of Mexico (STRM), on matters related to labor legislation that arose in the territory of the United States of America.

The NAO of Mexico, in accordance with Article 16(3) of the North American Agreement on Labor Cooperation (NAALC), proceeded to review the contents of Public Submission 9501/NAOMEX.

The review focused on U.S. legislation which protects and promotes the principle of freedom of association and the right to organize. Principally, the procedures that guarantee access to union representation and collective bargaining were studied.

In this context, various means were used to obtain and analyze public information on the relevant labor law. This procedure enabled us to better understand the scope, application, and functioning of U.S. law, one of the intended objectives of the Parties to the NAALC.

This document establishes, in the first part, the major legal issues contained in Public Submission 9501/NAOMEX that arose in the territory of the United States and how they are regulated in the applicable legislation.

The second part of the document has the objective of defining the causal relationship between said labor legal issues and the obligations established by the NAALC for each of the Parties. The actions by the NAO of Mexico to arrive at its conclusions are explained briefly.

Finally, the NAO of Mexico reports on its conclusions and issues its recommendations.

I. MATTERS RELATED TO LABOR LEGISLATION THAT AROSE IN THE TERRITORY OF THE UNITED STATES OF AMERICA, CONTAINED IN PUBLIC SUBMISSION 9501/NAOMEX.

The Constitution of the United States of American does not explicitly provide for a Labor Law, but instead, by establishing principles of individual freedom, provides the fundamental basis for the development of workers' rights in that country.

U.S. labor law is only in exceptional cases statutory.[1] As a general rule, federal legislation excludes from local jurisdiction those aspects which affect interstate commerce. Within the aspects regulated by federal legislation are the judicial framework for the rights to organize, bargain collectively and strike, and for the functioning of unions, among others. Said legislation is administered exclusively by the federal authorities and is found, principally, in Title 29 of the Code of that country.[2]

The public information obtained by the NAO of Mexico, regarding the principle of Freedom of Association and the Right to Organize, focused on such aspects as the formation of unions, union representation and the procedures to determine union representation, the authorities responsible for the application of the appropriate legislation, the concept of unfair labor practices, compensation for damages to the worker, and related matters.

1) UNIONS. FORMATION, MEMBERSHIP, LIMITATIONS, AND LEGAL STATUS.

The law recognizes the right of workers to organize, constitute, affiliate with, and assist workers' organizations, as well as to bargain collectively on their conditions of work through their representatives.[3] However, there is no specific legal procedure to organize a union.

The requirements to conduct a union representation election are that there be a determination that there exists an appropriate " bargaining unit" and that there exists substantial support of the

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[1]In general terms, United states law, whose nature and evolution is eminently based on case law (it derives from English Common Law), creates standards based on previous judicial decisions (precedents). An important difference between case law and statutory law (legislation)legal systems, is that the latter forces the judicial authorities to confine themselves to the written law, with limited room for interpretation. A judge may not freely review a statute, ignore it, or supplant it. In contrast, case law is much more flexible

[2]Legislation applicable in matters of union organization is principally the National Labor Relations Act (NLRA in its English acronym). United States Code, Title 29, Sections 151 et seq.

[3]Section 7, "Rights of Workers", NLRA.

workers in said unit to hold an election.[4]

The "bargaining unit" cannot include: agricultural workers; domestic workers; independent contractors; supervisors; workers subject to the Railway Labor Act; persons employed by their spouses or parents; and government workers. There are no restrictions on foreigners being members or officers of a union.

The appropriateness of the "bargaining unit" is dependant on a number of factors related to the common interests of the workers involved, among them the wishes of the workers, their level of organization, as well as geographical and occupational considerations. The "bargaining unit" can be the whole enterprise of an employer, a specific establishment, or a subdivision of the same.

The union which seeks to be recognized as the exclusive representative of a "bargaining unit", must obtain the support of a majority of the members of the unit. This would grant the union the right to negotiate with management on conditions of work which will govern the labor relations of the membership. The competent authorities recognize the existence and legal status of the unions in accordance with the law.[5]

2) NATIONAL LABOR RELATIONS BOARD (NLRB) - COMPOSITION, FUNCTIONS, SCOPE, AND AUTHORITY.

The NLRB is an agency of the Federal Government of the United States, composed of five members designated by the President and ratified by the Senate of that country. There are also a General Counsel and regional offices. Its duties are administrative and procedural in labor matters.[6] The NLRB does not have the authority to enforce its decisions.[7]

The two main functions of the NLRB are : to conduct representation elections to determine union representation in a "bargaining unit"; and to investigate and prosecute unfair labor practice charges. In

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[4]The determination of whether an appropriate "collective bargaining unit" exists is made by the National Labor Relations Board (NLRB in its English acronym), which is an agency of the federal government responsible for administering the NLRA. More information on this body can be found in Part I, section 2, page 4, of this report.

[5]For example, the Labor-Management Reporting and Disclosure Act of 1959, as amended, establishes the requirements for information which management as well as labor organizations must submit to the Department of Labor of the United States.

[6]Sections 3,4,5, and 6, NLRA.

[7]Section 10, Paragraph e, "Petition to the Court for the Enforcement of an Order, Procedures, Revision of Criteria," NLRA.

both cases, the Board becomes involved only at the request of one of the parties.[8]

The Board acts on all matters of unfair labor practices which are brought forward by the General Counsel and has full authority on questions of union representation. The General Counsel has exclusive authority to investigate and prosecute within the NLRB.

Should an employer or workers refuse to abide by a decision of the NLRB following a finding of unfair labor practices, the Board may petition the U.S. Court of Appeals of the corresponding judicial circuit for a court decree to enforce its order.[9]

3) UNION REPRESENTATION. ELECTION PROCEDURES, INVOLVEMENT OF WORKERS AND MANAGEMENT, COMPETENT AUTHORITIES.

The majority required by the NLRA for a union to become the exclusive representative of a group of workers can be determined, failing agreement between workers and management, through elections organized by the NLRB. The question of representation of different unions within a "bargaining unit" can be determined in the same manner.

The procedure for the election of representatives can be initiated by the petition of a worker or workers interested in being represented, by a union organization, or by the employer himself. Actions of the NLRB follow the following guidelines:

- After receiving a petition, the Board must conduct an investigation to determine if there is "reasonable cause to believe" that there are doubts on union representation which affect commerce. If there are doubts, a hearing must be held.[10]

- Following the hearing, if there continue to be questions about

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[8]Information received from the U.S. NAO, page 7.

[9]The United States is divided into 13 judicial circuits, including the circuit of the District of Columbia and the Federal District. Normally, appeals are heard by a panel of three judges, although on some occasions all of the judges which make up the circuit court may meet in plenary. The Courts of Appeals have jurisdiction over the majority of questions resulting from decisions of the District Courts of the United States and of federal agencies, such as the NLRB. Its decisions are final, except when they are accepted for review by the Supreme Court.

[10]Questions on the matter of union representation may deal with the following issues:
a) whether there exists or does not exist a desire by the majority of the workers to be represented;
b) whether the union previously recognized as the representative of the workers continues to be supported by the majority of workers; and
c) disputes on representation between two or more unions.

the degree of support for union representation, the Board must organize a secret ballot election and certify the result.

Prior to an election, workers can demonstrate to the employer their support for the union . Subject to certain rules, the employer may express his opinion about the union. Notwithstanding the above, the law in no way permits the use of threats or the promise of benefits to influence the results of an election, as any such conduct will be considered an unfair labor practice directed at influencing the right to organize of the workers. [11]

The purpose of the election is to determine whether or not a labor organization becomes the exclusive representative of the workers of a bargaining unit. The results of the election are valid for one year, during which time no new election may be held within the "bargaining unit" or in any subdivision.[12]

4) UNFAIR LABOR PRACTICES. ADMINISTRATIVE RULES, PROCEDURES (AUTHORITY, COMPETENCE, AND FINDINGS).

Unfair labor practices are acts by employers or by union organizations which interfere with, restrict, or coerce workers in the exercise of freedom of association and the right to organize.[13]

Following are examples of unfair labor practices by the employer:
- threats of loss of employment or benefits in order to influence union activities;
- physical or mental violence against workers in order to influence the outcome of an election;
- threats to close the establishment if a union is organized;
- spying on union meetings; and
- Illegal interrogation of workers.

Further, the employer cannot attempt to control or influence the organization of a union by such means as financial assistance, or otherwise favoring one union over the other in the election process.

The characteristics of U.S. law have permitted the courts to broaden the application of the concept of unfair labor practices to include other activities by the employer and union organizations. Examples of this are the following interpretations by U.S. courts:
- Questioning workers regarding their union sympathies, in such a

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[11]Section 8, "Unfair Labor Practices", NLRA.

[12]Section 9, "Representation and Elections", paragraph c(3), NLRA.

[13]Section 2 of the NLRA in relation to Sections 7 and 8.

way as to influence their votes. [14]
- Spy on workers, either directly or through supervisors, the workers themselves, or people removed from the labor relationship. [15]
- On matters of dismissal, if the sole real reason for the employer to terminate the employment relationship with the worker was the latter's union activities, the conduct of the employer constitutes an unfair labor practice. It is not a violation of the NLRA if the anti-union feeling of the employer did not contribute to the termination for reasons imputable to the worker.[16]

Actions against unfair labor practices can be initiated by a worker, an employer, a labor organization, or any person.

The authorities responsible for implementing the legal procedure are: the NLRB through its different venues, the Federal Courts of Appeal, and in some cases, the Supreme Court of the United States of America.

The actions of the NLRB can be described as those of a person acting as both judge and party. A regional office of the NLRB receives the allegation of an unfair labor practice, and, after evaluating the particulars, decides whether or not to issue a formal complaint to begin proceedings.[17] Once the proceedings are initiated, the case comes before an Administrative Law Judge (ALJ in its English acronym). The ALJ is an official assigned to a federal agency who is considered semi-independent in the exercise of his functions, and acts in accordance with U.S. administrative law. [18]

The ALJ conducts a hearing in accordance with the procedural rules for the District Courts of the United States. Once this procedural

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[14]NLRB v. West Coast Casket Co., 205 F 2d. 902 (9th Cir. 1953). Information received from the U.S. NAO.

[15]Consolidated Edison Co. v. NLRB, 305 U.S. (1938). Information received from the U.S. NAO.

[16]NLRB v. Transportation Management Corp., 1983, 103 S.Ct., 2469.

[17]If a Regional Office refuses to issue a complaint, an appeal may be made to the Office of Appeals of the General Counsel of the NLRB. This office can reverse or uphold the decision of the Regional Office. This decision is not appealable within the administrative process.

[18]The information on the question of the autonomy of Administrative Law Judges was received from the information submitted by the U.S. NAO, as well as the opinions of experts present at the Conference on Freedom of Association and the Right to Organize held in Washington, D.C. this past March.

step is completed, the ALJ issues a recommendation to the NLRB. This recommendation may be reviewed by the NLRB if so requested by one of the parties. Otherwise, the recommendation is considered final.

When there is a finding of an unfair labor practice, the Board can issue a resolution ordering that the party desist in such conduct or directing a remedy suitable to compensate the plaintiff, or both.

Final decisions of the NLRB can be appealed to the Federal Courts. [19] Decisions of the Federal Courts can be appealed, in some cases, to the Supreme Court.

5) COMPENSATION FOR DAMAGES TO THE WORKER - INDEMNIZATION, REINSTATEMENT, AND OTHERS.

The NLRA authorizes the NLRB to issue cease and desist orders regarding behavior determined to be an unfair labor practice. Furthermore, the Board can order that affirmative action be taken to compensate for damages caused by an unfair labor practice, including the reinstatement of workers, with or without back pay.[20]

In pursuing the objectives of the NLRA, the NLRB has, on some occasions, taken actions such as requiring an employer to negotiate collectively with a union, and, therefore, to recognize it as the exclusive representative of its workers; disbanding an employer dominated union (white union); or simply seeking a judicial order restricting the activities of the employer where deemed necessary. An order of the NLRB to engage in collective bargaining can be issued, in limited cases, even without previously holding an election.[21]

6) TEMPORARY MEASURES (INJUNCTION).

U.S. law contemplates the possibility that the NLRB petition a District Court, concurrent with the initiation of an unfair labor practice charge, for a temporary order (injunction) that would prevent irreparable harm from occurring due to the presumed illicit

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[19]The Court of Appeals has full jurisdiction on decisions of the NLRB. It has the authority to open appeals proceedings to new evidence when it finds it necessary, so long as such evidence was not submitted during the original NLRB hearing for a valid reason. At the conclusion of its review, the Court of Appeals issues a decision confirming, modifying, or revoking the NLRB decision.

[20]Section 10, "Prevention of Unfair Labor Practices", paragraph (c), NLRA.

[21]Information received from the U.S. NAO, page 4.

conduct.[22]

A District Court Judge can order that the practice in question cease or can even order temporary remedial action such as the reinstatement of dismissed workers.

Procedures initiated before a Federal Court are independent of the investigation by the NLRB. Their intent is to prevent damages or harm which may befall the parties due to the time period necessary to reach a final decision.

The NLRA does not establish exact criteria to be used by the District Judge to determine the legal basis and nature of an injunction.

7) CLOSURE OF A FIRM FOR ECONOMIC REASONS - PROCEDURES AND OBLIGATIONS OF THE FIRM TO ITS WORKERS.

There can be no more extreme expression of the termination of collective labor relations than the total closure of the workplace. If this action is taken with the sole and exclusive object of evading the exercise of the right of freedom of association and the right to organize of the workers it will be classified as an unfair labor practice under the NLRA.

In the case of the closure of a workplace, the workers who are terminated generally obtain compensation from monies paid by the employer, for a period of 26 weeks, as well as severance pay, seniority considerations, and other payments which may have been negotiated in the collective bargaining agreement. Unemployment compensation is calculated based on a formula and requires that the worker comply with certain requirements in order to be eligible.[23]

On the other hand, the Worker Adjustment and Retraining Notification Act (WARN in its English acronym)[24] requires that the employer refrain from ordering the closure of a plant or a mass dismissal, until 60 days have passed after giving written notification to the affected workers.

The concept "plant closure" is adequately defined in the WARN act as a permanent or temporary closure of a workplace, or one or more establishments or units of operation of a workplace or firm. The law covers those closures which result in a loss of employment of 50 or more full-time employees during the 30 days following the

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[22]Section 10, paragraph j, NLRA.

[23]Information received from the U.S. NAO, page 15.

[24]United States Code, Title 29, Section 2101 et. seq.

closure.[25]

In the case of the closure of a firm in violation of provisions of the WARN act which is the subsidiary of another company that continues operations, the parent company may be held responsible. This occurs in limited cases where the relation between the two firms is so close as to constitute a single enterprise.[26] A parent company which does not grant autonomy to a subsidiary can prevent the latter from complying with its obligations under the NLRA in matters of freedom of association and the right to organize of workers.

II. RELATIONSHIP BETWEEN THE MATTERS OF LABOR LEGISLATION CONTAINED IN PUBLIC SUBMISSION 9501/NAOMEX AND THE OBLIGATIONS OF THE PARTIES UNDER THE NAALC.

The matters related to the law of the United States submitted to the NAO of Mexico in Public Submission 9501/NAOMEX, concerning the freedom of association and protection of the right to organize, are included in the labor principles in Article 1 of the NAALC and in Annex 1 of the same. It is the obligation of each of the parties to promote said principles and to guarantee the adequate enforcement of the legislation directed toward this objective.[27]

Consequently, and in conformity with the procedures of the NAO of Mexico, Public Submission 9501/NAOMEX was accepted for review.[28] The NAO of Mexico took the following steps to obtain public information on the submission:

a. The NAO of Mexico requested consultations with the NAO of the United States on laws and regulations, policies, and practices, in

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[25]Section 1, paragraph a(2), of the WARN Act.

[26]Information received from the U.S. NAO, page 15.

[27] Annex 1 of the NAALC, titled "Labor Principles", defines the principle of Freedom of Association and Protection of the Right to Organize as "the right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests." The specific legislation that regulates this principle in U.S. law, as established earlier in this report, is the National Labor Relations Act administered by a federal agency called the National Labor Relations Board (NLRB).

[28]REGULATIONS OF THE NATIONAL ADMINISTRATIVE OFFICE (NAO) OF MEXICO ON PUBLIC SUBMISSIONS REFERRED TO IN ARTICLE 16 (3) OF THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC), were issued during February of this year and published in the Official Daily of the Federation on April 28. Rule 1 of said regulation establishes the requirements for the acceptance for review of a Public Submission.

accordance with Article 21 of the NAALC.[29]

b. The NAO of Canada and the Secretariat of the Commission for Labor Cooperation, were notified of the aforementioned petition, in accordance with the Agreement;

c. The NAO of Mexico conducted an internal study of U.S. labor legislation.

d. Meetings were held with the heads of the General Directorate of Legal Affairs and the Directorate of International Labor Affairs of the Secretariat of Labor and Social Welfare, with the purpose of evaluating the information related to the review;

e. Officials of the NAO of Mexico attended the Trinational Government to Government Conference on Freedom of Association and the Right to Organize, held in Washington, D.C., on March 27 and 28 ;[30]

f. Officials of the NAO met with the lawyers of the firm identified as the protagonist in the labor matters which arose in the territory of the United States; [31]

g. Officials of the NAO of Mexico participated in a meeting with the National Consultative Committee, where the content of Public Submission 9501/NAOMEX and the information obtained were analyzed;

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[29]The consultation with the U.S. NAO of March 22 of this year concerned the following aspects related to freedom of association and the right to organize in U.S. labor law:
a. Unions - formation, composition, limitations, legal status.
b. Union representation - election procedures, participation of workers and employers, competent authorities;
c. National Labor Relations Board - composition, functions, scope, and authority;
d. Unfair labor practices - the National Labor Relations Act, decisions and administrative rules, federal legislation and related state legislation, (authority, scope, and decisions); procedures (authorities, competence, resolutions).
e. Compensation for damages to the worker - indemnization and reinstatement; and
f. Closure of a firm for economic reasons - procedures and obligations of the firm to its workers.
The U.S. NAO responded to the consultation on April 26.

[30]The topics of the Conference were as follows:
- Organization of Workers and Elections to Determine Union Representation.
- Protection Against Anti-Union Discrimination.
- Procedural Actions and Guarantees.
- Union Democracy.

[31]The meeting took place on March 29 in Washington, D.C.

and[32]

h. The NAO evaluated information submitted by the lawyers of the company identified as the protagonist in the labor matters contained in the Public Submission.[33]

The analysis of the information and the points of view obtained, as indicated, permitted the NAO of Mexico to arrive at the conclusions which are expressed herein.

III. CONCLUSIONS

The review conducted by the NAO of Mexico consisted in obtaining and analyzing information on U.S. labor legislation and its application. The description of the laws, regulations, policies, and practices of the authorities charged with the application of the law, principles, and rights, furthered the understanding of the functioning of the U.S. labor system, consistent with the objectives of the NAALC.

After studying matters related to U.S. labor legislation related to Public Submission 9501/NAOMEX, particularly under the rubric of freedom of association and the right of workers to organize, the NAO of Mexico is concerned about the effectiveness of certain measures intended to guarantee these fundamental labor principles.

During the analysis it became clear that legislators, and U.S. federal authorities responsible for the application of legislation, give great importance to these principles, and rights. The law that governs freedom of association and the right to organize, is based on the premise that it is necessary to guarantee these fundamental rights of workers so as not to affect trade. [34]

The interrelation which exists between open trade and its direct influence on the life of workers, has been expressly recognized.[35] Consequently, there should be further study on the impact that actions motivated by commercial realities have on labor matters and vice-versa.

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[32]The National Consultative Committee of Mexico for the NAALC was constituted during 1994 with members from labor and business, in accordance with Article 17 of the Agreement. The meeting was held on April 27 of the present year.

[33]The information was treated as confidential.

[34]Section 1, "Purpose of the Act", NLRA.

[35]The signatory countries to the North American Free Trade Agreement recognize this relationship in the preamble of the NAALC.

In view of the above, the NAO of Mexico emphasized in its analysis the possible problems in the effective application of U.S. law, which could arise when an employer refuses to negotiate collectively with a union elected as the exclusive representative of the workers in the bargaining unit, or where the employer refuses to permit that an election take place. Specifically, the NAO, in light of the information obtained, was unable to assess with complete certitude the effects on the rights of workers when an employer, suddenly, closes the place of work.

The dynamism that characterizes present economic realities demands consistency between the ideal of the law and its form and timing of implementation. Only in this way can the objectives of the law be attained in real terms.

lV. RECOMMENDATIONS.

Reaffirming full respect for each country's Constitution and internal laws, the NAO of Mexico considers it necessary to further study the effects on the principles of freedom of association and the right to organize of workers of the sudden closure of a place of work . For this reason, it is recommended that a consultation take place at the ministerial level, in accordance with Article 22 of the NAALC.

Mexico, Federal District, May 31, 1995

(signed)

Miguel Angel Orozco
Secretary, NAO of Mexico