CHAPTER 12

Labor Relations

LEARNING OBJECTIVES

- Understand the provisions of the National Labor Relations Act (NLRA), which apply to all employers, regardless of whether their workforce is unionized
- Explain the reasons why employees form and join unions
- Describe the restrictions the NLRA places on union organizers and employer behaviors during organizing campaigns
- Gain an appreciation of the reasons for decline in union membership and the challenges organized labor faces in a global information-based economy
- Understand the process of collective bargaining and the various types of bargaining items
- Appreciate the role of alternative dispute resolution when collective bargaining has been unsuccessful

Labor Unrest at the New York MTA

On the morning of December 20, 2005, New Yorkers who relied on public transit to get to their places of employment or around town to complete their holiday shopping woke up to find that the subway and public bus systems had been shut down by a strike of the 34,000 workers who were members of the Transport Workers Union Local 100 of the Metropolitan Transportation Authority (MTA). Negotiations for a new contract had broken down because of a failure to agree on retirement or pension provisions and wage increases. The strike was seen as a particular hardship for lower-income residents of the outer boroughs of New York City.

While the strike itself lasted only 60 hours, it took another day to get the transit system fully up and running. Nonetheless, the strike had a significant impact on New York. Public schools were affected and had to operate on a delayed schedule, while many private schools were forced to close completely. Public safety was impacted detrimentally because of the increased congestion on streets and sidewalks. The financial impact of the strike was significant, as the city estimated that it lost more than $300 million per day and other revenues.

The strike was illegal under the New York State Public Employees Fair Employment Act, more commonly known as the Taylor Law, which prohibits municipal workers from striking and provides alternative means for resolution of labor-related disputes. This law, which had been enacted in response to a previous transit strike, which took place in 1966, also provides for criminal penalties, including imprisonment for union officials and fines to be levied against both the union and striking employees. Local 100 did not have the support of its parent union—the International Transport Workers Union—for the strike, with the parent union ordering Local 100 workers to return to work as soon as it became aware of what had transpired. As a result of the strike, Local 100 president Roger Toussaint was sentenced to ten days in jail and the union was fined $2.5 million. $300,000 in strike-related penalties were levied against union members and deducted from the paychecks of striking workers.[1] The aftermath of the strike involved a tremendous amount of published analysis of the political behavior of the union as well as local elected officials, particularly Mayor Michael Bloomberg, illustrating the politically charged realities in which organized labor operates.

Labor relations is a key strategic issue for organizations because the nature of the relationship between the employer and employees can have a significant impact on morale, motivation, and productivity. Workers who feel that the terms and conditions of their employment are less than advantageous will not be as committed to perform and to remain with an employer. Consequently, how organizations manage the day-to-day aspects of the employment relationship can be a key variable affecting their ability to achieve strategic objectives.

Workers who have unionized create special challenges for human resource (HR) management. When workers form unions, the employment relationship becomes more formal through a union contract and is subject to special provisions of the National Labor Relations Act. This Act allows unions to be formed and exist as employee organizations that have the legal right to bargain with management over various terms and conditions of employment. Unions provide membership solely for employees; managers are prohibited by law from joining employee unions or from forming their own unions.

Organized labor in the United States has had a cyclical history, generally consisting of short periods of sharp growth in union membership and activity followed by extended periods of decline.[2] In the early part of the twentieth century, employee-centered management practices were eroding interest in unionization. The Great Depression then ignited strong interest in unions with the resultant creation by John Lewis of the Congress of Industrial Organizations (CIO). At that time, both the CIO and the American Federation of Labor (AFL) were able to unionize large segments of the workforce. These organizing efforts were largely focused on second-generation immigrants, particularly Catholics, Italians, and Jews, as unions attempted to provide these individuals with the full benefits of working in the WASP-dominated economy.

Unions continued to enjoy increased membership until World War II. Interest in unions declined post-War until the mid-1960s, when unions began to reach out to African Americans during the drive for civil rights and subsequently enjoyed a renewed popularity. Also at that time, Cesar Chavez founded the National Farm Workers Association, drawing attention to the plight of Latino and Filipino farm workers who had been forced to endure deplorable working conditions and substandard wages. Chavez's efforts led to a grape boycott that was observed by more than 17 million Americans and, more generally, resulted in widespread awareness and distrust of exploitation of workers by employers. These successes also led to a flurry of union organization among public sector employees that continued until the early 1980s.

August 3, 1981, is considered to be a significant day in the history of American labor. On that date, more than 12,000 employees of the Federal Aviation Administration (FAA) who were members of the Professional Air Traffic Controllers (PATCO) union walked off of their jobs. When President Reagan ordered them back to work within 48 hours, 11,325 of them refused and were fired immediately, as the FAA commenced hiring permanent replacements. Since the unsuccessful PATCO strike, strikes have nearly disappeared in the United States. During the 1950s, organized labor successfully orchestrated an average of 344 work stoppages annually.[3] However, post-PATCO, that number had continuously been in decline and by 2008 had dipped to just 15, with 9 of these 15 lasting for 10 days or less.[4] The PATCO strike greatly influenced public perceptions against organized labor stoppages and affirmed the right for employers to hire permanent replacements for striking workers. This shift has turned the strike into a present-day near-suicide tactic for unions.

Union membership in the United States has been steadily declining for a number of years. In 1970, approximately 30 percent of the private workforce was unionized, in addition to a majority of public sector employees. By 1999, the U.S. Department of Labor reported that only 13.9 percent of the workforce was unionized. By 2013 union membership had dropped further to 11.3 percent of the workforce. Public sector employees were more than five times more likely to be union members than private sector employees (36 percent versus 6.6 percent), and more than 50 percent of union members lived in seven states (California, New York, Illinois, Pennsylvania, Michigan, New Jersey, and Ohio).[5] These numbers represented declines in overall union membership as well as in both the public and private sector union density.[6]

The decline in union membership can be attributed to a number of factors. First, many workers have become disenfranchised from their unions. Allegations of union corruption and

misuse of funds—combined with the fact that workers sometimes feel that the costs of union membership outweigh the benefits—have eroded union membership. Second, many organizations have moved their manufacturing and assembly operations outside the United States. Unions have traditionally had their strongest bases of support among these blue-collar workers, and the movement of those jobs overseas has hurt unions. Third, changes in the nature of work and technology have eliminated many of the traditional manual labor jobs in which union members were employed. Finally, many unions have refused to be flexible enough to allow organizations to grow and adapt in relation to the changes taking place in their industries, markets, and the technological, economic, and sociocultural environments. The traditional model of American labor unions, which guard employee rights by attempting to maintain the status quo, no longer benefits employers or employees. Unions of the future will have to be based on a different model and have different relationships with the organizations whose workers they represent—if they continue to exist.

Although overall union membership is declining, it is important to understand organized labor relations for at least three reasons. First, in many industries, unionization is the norm. Many public sector workplaces are unionized. In the private sector, industries such as transportation, construction, hospitality, publishing, education, and healthcare are usually highly unionized. In fact, the transportation industry has the highest level of private sector union membership, at 25.5 percent.[7] Managers and business owners in these industries have no choice but to be well versed on the laws that regulate the relationship with union employees. Second, competitors may be unionized, and settlements in those organizations may impact HR practices, programs, and policies needed to remain competitive in recruiting and retaining productive employees. Arguably, the most important reason for employers to have a sense of the labor relations landscape is that the National Labor Relations Act provides all employees—rather than just those who have unionized—with specific rights. Consequently, many employers who operate in nonunion environments may be unfamiliar with some of the terms and conditions of employment outlined in the Act. Section 7 of the Act grants all employees, including those who are not members of unions, the right to engage in activities that support their "mutual aid or protection." There are six notable provisions under this section that employers must know to avoid violations of the Act.[8]

First is the right of employees to discuss employment terms. In order for employees to consider whether they wish to organize, they must be able to discuss the terms and conditions of employment, including compensation, harassment, and discrimination. This right, however, does not extend to the disclosure of confidential information, such as salaries, to which an employee might have access as part of his or her job. Second, employees reserve the right to complain to third parties, such as customers, clients, and the media, about their treatment by the employer. Again, however, the employer retains the right to prohibit disclosure of any confidential or proprietary information. Third, employees have the right to engage in a work stoppage or collective walkout to protest working conditions without fear of retaliation. Any employee who is disciplined or discharged for engaging in such behavior has a valid claim against the employer under the National Labor Relations Act. Fourth, employees have the right to honor picket lines without fear of retaliation. This is considered protected activity regardless of whether the employee is a member of the picketing union or merely sympathetic to the cause and plight of the workers on the picket line. Fifth, employees have the conditional right to solicit and distribute union literature. Such behavior can be restricted but not fully prohibited, as will be discussed shortly. Finally, employers cannot unilaterally ban employees' access to the worksite while off duty. Restrictions may be imposed that limit access to the interior of the facility if applied consistently to all employees for all purposes, but employees still retain the right to be present on company property, such as the employee parking lot, after working hours to engage in behaviors protected under the Act.

It cannot be emphasized enough that nonunion employees enjoy significant protection against arbitrary, capricious, or harassing conduct by employers. This standard was established by the Supreme Court in the 1962 case of *NLRB v. Washington Aluminum Co.*,[9] where the Court found that employee activity that was concerted for mutual aid or protection (in this case, walking off the job in protest of poor working conditions) was lawful. As long as the employee's or group of

employees' actions are beyond that of a personal complaint pursued in self-interest, such behavior is protected without the presence of a formally recognized union. These rights have consistently been reinforced in numerous court cases since the initial ruling in *Washington Aluminum*.

Just because an organization is not unionized today does not mean that it may not be in the future. Managers in such organizations need to know why workers form or join unions, how the law requires the employer to behave during any union-organizing campaign and after a union has been voted in, how the collective-bargaining process is conducted, and how impasses may be settled. Some management advisors who work with organizations on labor relations have even gone as far to encourage employers to have their supervisors talk openly with employees about possible union representation in a proactive manner before any possible organizing efforts begin.[10] Critical to such a strategy, however, is training of managers on what they are allowed to say to employees (facts, opinions, and examples) and what they are not allowed to say or do (threats, interrogation, promises, and surveillance).[11]

The word "union" means that workers have agreed to work together in dealing with and negotiating the terms and conditions of their employment with management. The Latin root *uni* means *one*, in the sense of a union; it means that a plurality of workers has united to speak with "one voice."

Organized labor presents a number of key strategic challenges for management. First, when workers unionize, the power based within the organization is redistributed. Employers can find that their ability to manage workers at their discretion to achieve the organization's strategic objectives has been severely curtailed. Second, the process of unionization involves bringing in outside players: union representatives, who then become an additional constituency whose support must be gained for any new or ongoing management initiatives. Finally, a unionized work setting can greatly impact the organization's cost structure, particularly payroll expenses and work processes that may contribute to or retard efficiency in operations.

Why Employees Unionize

Employees usually form or join unions because of the perceived benefits that unionization might provide them. These benefits can be economic, social, and/or political. Economic benefits can result from a union's ability to negotiate higher wages, better or expanded benefits, greater job or employment security, and improved working hours and conditions. Social benefits can be derived from the affiliation and sense of community that workers share when they are unionized. Their personal issues and needs relating to their jobs and lifestyles can often be integrated within the union agenda, with corresponding support gained from coworkers. Unions also often sponsor social events for their members and their families. Is it not surprising that many unions have the word "brotherhood" in their name; this attempts to signify the family or community atmosphere the union tries to create for its members.

Political benefits can be gained through the sense of power in numbers. In negotiating with management over terms and conditions of employment, individual employees are relatively powerless. They often need the organization (to earn a living) far more than the organization needs them (individual workers can be easily replaced). When workers unionize and speak with one voice, they leverage their individual power against management and equalize the balance of power within the organization. Management may be able to do without individual employees, but they cannot do without their entire workforce. Unions can allow workers far greater say and involvement in negotiating and setting critical terms and conditions of employment and in ensuring fair treatment from the organization. Unions can often provide additional political benefits in a literal sense in that the power and strength of their united membership can be used to support and influence political races and legislation passed at the local, state, and federal levels.

No benefits come without some cost, and union membership is no exception. Union members pay at least two significant costs for their benefits. First are the economic costs of the fees or dues that unions charge their members to support the initiatives the union undertakes on behalf of

its employees. Second are the political costs employees assume when they relinquish their individual freedom to deal with their employer and be represented by the union. Individual employees may not agree with the terms and conditions negotiated for them or the tactics and strategies the union uses in negotiating. Although individual employees do vote on the decision to strike, an employee who does not wish or cannot afford to go out on strike is basically stuck in accepting the majority position and then assumes any risk associated with deviating from the union majority.

The National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act (NLRA), also called the Wagner Act, which gave employees the right to unionize and to regulate union and management relations. This Act has been amended several times, most notably in 1947, with amendments known as the Taft-Hartley Act, and in 1959, with amendments known as the Landrum-Griffith Act.

The NLRA created the National Labor Relations Board (NLRB) to oversee the provisions of the Act. Among other duties, the NLRB is responsible for overseeing union elections, certifying a particular union as the official bargaining representative of a group of employees, and hearing allegations of violations of the Act from employers, unions, and employee groups.

As a first step in establishing a union, a group of employees petitions the NLRB, often through the assistance of a union representative, to conduct an election. As a prerequisite for an election, the NLRB requires at least 30 percent of the employees to have signed authorization cards, which indicate an expressed interest in having union representation from a specific union. Most petitions to the NLRB involve the presentation of authorization cards from a far greater number of employees than 30 percent. These authorization cards are not a vote for the union; they are merely the means for establishing the level of employee interest to conduct an election. Some employees who are not in favor of union representation often sign authorization cards under peer pressure or to facilitate the election process. Union-organizing campaigns often create very stressful working conditions, and some employees who are against unionization may sign authorization cards to ensure that the election be held as soon as possible.

Once the NLRB has received the authorization cards and determined that there is sufficient interest to conduct an election, it will attempt to determine the appropriate bargaining unit. A bargaining unit is a group of employees who have similar wages, skill levels, working conditions, and/or levels of professionalism. The NLRB will determine whether the organization should have one bargaining unit that covers all employees or separate bargaining units for different groups of employees, given the differences in their jobs.

For example, airlines have separate bargaining units for flight attendants, pilots, and ramp workers, given the differences in job responsibilities, training, hours, and working conditions. Newspapers have separate unions for writers, printers, and press people because of similar differences. A restaurant, on the other hand, might have one bargaining unit that includes wait staff, cooks, hosts, bartenders, and bus staff. When a unionized organization has more than one bargaining unit, each bargaining unit negotiates a contract with management separately; however, the individual units are often impacted by what the other units negotiate, and each unit often lends support to the others during periods of labor unrest.

When the NLRB conducts an election, the option that receives the majority of the votes (50 percent plus one) wins the election. There may, however, be more than two options (union or no union) on the ballot. Given that the NLRB requires authorization cards from only 30 percent of employees, it is mathematically possible for more than one union to be part of an election. This has been the case when there has been public knowledge of dissatisfied employees and thus more than one union attempted to organize workers simultaneously. If there were three options on the ballot (no union, Union A, Union B) and none of them received more than 50 percent of the initial vote, then the option receiving the least support would be dropped and a second ballot would be issued. Eventually, one option will have the support of more than 50 percent of the employees in the prospective bargaining unit.

Behavior During Organizing Campaigns

Union-organizing campaigns often present difficult working conditions for employees, who are often continuously subjected to opposing information from management, union representatives, and prounion coworkers in support of their respective positions. In passing the NLRA, Congress determined that it should regulate the behavior of management and union representatives in union-organizing campaigns to ensure that one does not have an unfair advantage over the other in communicating positions to employees.

The NLRA outlines specific provisions pertaining to employer conduct during union-organizing campaigns in its discussion of unfair labor practices. Section 8(c) of the Act provides that "the expression of views, arguments or opinions, or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit." Therefore, employers have free rein to communicate their position concerning unionization to employees during working hours, which is only appropriate because the employers are paying employees for that time. However, employers are forbidden from making any threat or promise pending the outcome of the election. The reason for this directive is that allowing employers to do so would give employers an unfair advantage in the election. The union does not have the power to make any such promises, and so to ensure a level playing field, the NLRB also prohibits employers from doing so. Employers need to treat employees more favorably *before* the NLRB has stepped in and established employee interest in conducting an election.

The Act also allows prounion employees the full right to approach their coworkers at work and express their support of the union, as long as such contact takes place during nonworking periods in nonworking areas (such as the employee cafeteria during lunch breaks, the parking lot after leaving work, or in a restroom during a scheduled break). This is consistent with the constitutional guarantee of freedom of speech. Employers can prohibit employees who support the union from communicating this support to coworkers at any other time.

A more difficult question concerns the extent to which employers can prevent employee solicitation by union representatives at the worksite. The U.S. Supreme Court has issued several rulings in this area that continue to redefine the relative positions of unions and management. Generally, an employer can restrict nonemployee access to employees if two conditions have been met: (1) The nonemployee—in this case, a union organizer—must have some reasonable means to access and communicate with employees outside the workplace, such as electronic or print media, and (2) the employer must have a general ban on all nonemployee solicitation. The latter condition is not limited to union solicitation; it might also include charitable appeals, blood drives, or employer-sponsored outings for which employees have to pay. If these two conditions are met, then the employer can restrict union organizers' access to employees.

Historically, this issue of access to employees has involved somewhat of a "chess game" between employers and union organizers. Subsequent to the Supreme Court rulings described above that restrict union organizer access to employees, unions have turned to a strategy called "salting" the workplace. Salting involves a paid union organizer applying for employment with an employer whose employees are the target of an organizing drive. The Supreme Court has held that under the NLRA, an employer cannot discriminate against a person solely on the basis of his or her status as a salt and intention to organize the workplace. Employers have since countered salting efforts through the use of restricted hiring criteria that have the effect of eliminating salts from employment consideration. The portrayal of union organizing efforts and management responses as a chess game relates to the fact that each side is attempting to develop a response to counter the other side's most recent "move" or court victory. Reading 12.1, "A Big Chill on a 'Big Hurt': Genuine Interest in Employment of Salts in Assessing Protection Under the National Labor Relations Act," illustrates the tensions that exist between unions and employers in organizing campaigns.

Employees who are dissatisfied with their union representative may elect to decertify the union. The process for decertification happens in exactly the same manner as certification—utilizing authorization cards and requiring a 50 percent plus one majority employee vote. The NLRA does, however, require employees to wait at least one year from certification until a decertification election can be held. This is to ensure that the union has had appropriate time to work on behalf of the employees and to ensure that employees do not drain the time and resources of the NLRB by continually calling for certification and decertification elections. Similarly, if a union loses an organizing campaign, the NLRA prohibits another organizing campaign and election for at least one year.

Collective Bargaining

When a union is elected to represent employees, the union representative and employer are jointly responsible for negotiating a collective-bargaining agreement that covers various terms and conditions of employment. There are no set requirements as to the term or content of any collective-bargaining agreement, but the NLRA classifies bargaining items as mandatory, permissive, or prohibited. Mandatory items must be negotiated in good faith if one party chooses to introduce them to the negotiations. They consist of many of the economic terms of employment, such as wages, hours, benefits, working conditions, job-posting procedures, or job security provisions. Mandatory items also include management rights clauses and union security clauses. The two parties are not required to come to an agreement on these items, but they are legally required to discuss them and bargain in good faith if requested by the other party. "Mandatory" simply means that one party cannot refuse to discuss one of these items if the other party requests to do so.

Permissive items can be discussed if both parties agree to do so. Neither party can legally force the other party to negotiate over a permissive item nor can either party pursue a permissive item to the point of impasse. Permissive items include things such as changes in benefits for retired employees, supervisory compensation and discipline, and union input in pricing of company products and services. Prohibited items are things neither party can negotiate because these items are illegal. They include featherbedding (requiring the employer to pay for work not done or not requested), discrimination in hiring, or any other violation of the law or illegal union security clauses. A listing of some of the items that fall under each classification is presented in Exhibit 12.1.

Unions often attempt to negotiate security clauses into the collective-bargaining agreement. These clauses are a mandatory bargaining item and an attempt to ensure that the union enjoys some security in its representation of employees and that the cost of the union's efforts on behalf of employees is covered. The two types of union security clauses are union shop agreements and agency shop agreements. Union shop agreements require all newly hired employees who are not union members to join the union within a specified time period after beginning employment. Agency shop agreements do not require employees to join the union but require all nonunion members who are part of the bargaining unit to pay the union a representation fee, usually equivalent to the amount of dues paid by union members. The rationale for collecting such fees is that although individual employees can maintain the freedom of being nonunion, as bargaining unit members, they reap the advantages of what the union negotiates. Therefore, it is only fair that they should share equally in the cost of obtaining what the union is able to achieve for the bargaining unit. Although union security clauses are a mandatory bargaining item, the NLRA allows individual states to pass right-to-work laws that prohibit union and agency shop arrangements. To date, nearly half the 50 states have passed such laws. When Michigan, the birthplace of the United Auto Workers and the U.S. labor movement, became the 24th right-to-work state in December 2012, the move was seen by many as a crushing blow to the future of organized labor in the United States.[12]

A third type of union security agreement that was originally allowed under the NLRA has since been outlawed. Closed-shop agreements required the employer to hire only applicants who

EXHIBIT 12.1 Types of Bargaining Items

Mandatory	Permissive	Illegal
Base wages	Union representation on board of directors	Closed-shop agreements
Incentive pay	Benefits for retirees	Featherbedding
Benefits	Wage concessions	Discrimination in hiring
Overtime	Employee ownership	
Paid time off	Union input into company pricing policy	
Layoff procedures		
Promotion criteria		
Union security clauses		
Management rights clauses		
Grievance procedures		
Safety and health issues		

were already union members. Congress found such arrangements to be detrimental to labor because individuals without income were forced to pay union dues without the benefit of any employment. There was no guarantee that an applicant who belonged to a union subsequently would be hired, and so closed-shop agreements were eventually outlawed.

Failure to Reach Agreement

When the union and the employer are unable to agree on the terms of the collective-bargaining agreement, workers have the right—under the NLRA—to strike. Whether employers are obligated to rehire striking employees at the conclusion of the strike depends on the kind of strike.

An economic strike is one in which the parties have negotiated in good faith but have been unable to settle on a contract or collective-bargaining agreement. The organization has the right to continue to operate during such a strike and often does so by utilizing management employees, hiring temporary workers, and/or hiring permanent replacements. The discretion of how to proceed rests with the organization. Economic strikers cannot be terminated simply for engaging in collective strike activity. At the conclusion of the strike, they must be reinstated if two conditions are met: (1) Their individual jobs still exist and (2) permanent replacements have not been hired. Economic strikers run the risk that the employer may eliminate their jobs or hire replacements; both activities are protected under the NLRA.

An unfair labor practice strike is one in which employees strike in response to some action of management that the NLRA identifies as an unfair labor practice. These behaviors are outlined within the statute, and workers who go out on such a strike have a guaranteed legal right to reinstatement by the employer even if the employer has hired permanent replacements in the interim.

A wildcat strike is one in which workers decide not to honor the terms of the collective-bargaining agreement and walk out in violation of their obligation to the employer under the agreement. Because wildcat strikers have breached their contractual obligations to the employer, they have no right to reinstatement in their jobs. Wildcat strikes can be caused by perceived unfair treatment of an employee by management or a worksite may be perceived as hazardous or dangerous, such as those found in the mining and construction industries. In certain industries, management will attempt to resolve the issue if the claims are deemed to have merit in lieu of fighting the

union in court. In addition, federal workers are prohibited by law from striking for any reason, including an economic strike. Any strike by federal employees is not protected under the NLRA, and striking employees have no legal rights to return to their jobs. Such was the case in the early 1980s when the PATCO union struck, and President Reagan immediately fired and replaced the striking workers.

The incidence of labor strikes in the United States is decreasing as both employees and employers realize that everyone loses during a strike. The company gets hurt financially and in the public domain; workers get hurt financially and emotionally; customers may be hurt operationally and financially, particularly if there are no substitute providers. Organizations can prevent strike activity in two principal ways: through the use of a formal grievance procedure or through the alternate dispute resolution (ADR) processes of mediation or arbitration.

Grievance procedures are a permissive bargaining item under the National Labor Relations Act, as indicated in Exhibit 12.1. Grievance procedures outline how conflicts or disagreements between workers and management over the terms of the collective-bargaining agreement are handled. Grievance procedures are often the catalyst to resolving problems before the conflict escalates to a strike. They are also useful in helping union leaders and management identify weaknesses or oversights in the collective-bargaining agreement that can be addressed during the negotiations over subsequent collective-bargaining agreements. Grievance procedures are also useful as a means of communicating to management firsthand work-related sources of employee dissatisfaction that can hamper morale and productivity.

An increasing number of collective-bargaining agreements are calling for mediation or arbitration of labor disputes as a means of avoiding strikes. Mediation involves an outside third party who has no binding decision-making authority assisting both sides in reaching a settlement. This individual assists the two sides in finding some middle ground on which they can agree and in facilitating dialogue and concessions. Arbitration works in a similar manner: It involves an outside, unbiased third party who listens to the arguments presented by both sides. However, the arbitrator renders a ruling or decision that binds both parties. Both sides agree to abide by the decision of the arbitrator prior to entering the arbitration hearing. Mediation is frequently used in public sector organizations where strike activity is outlawed at the federal level and often greatly restricted at the state and local levels. Arbitration is used quite frequently in professional sports in resolving salary disputes between union players and the owners of their teams.

Arbitration has been controversial in that it has been perceived as depriving employees of their rights to pursue claims in courts of law and have their cases heard by a jury and replacing this process with an employer-controlled system that is less likely to result in a favorable decision for the employee. However, history has shown that this is not the case. Employment-related cases heard in federal district courts historically have resulted in a 12 percent rate of success for employees, while general employment arbitration has favored employees in 33 percent of cases decided, and labor arbitration—heard under a collective-bargaining agreement—has favored employees in 52 percent of cases.[13]

Unions Today

One way in which unions are attempting to maintain their viability in light of declining membership is to recruit in organizations and industries with which they have no previous affiliation. With the demise of their traditional manufacturing base, many domestic unions have expanded their missions, as efforts to recruit new members have become a top priority. Such recruiting efforts are seen as so central to the ongoing livelihood of unions that the AFL-CIO now earmarks one-third of its operating budget for organizing, compared to just 5 percent 10 years ago.[14] Consider the diversity now present in some of the leading labor unions: the United Steelworkers of America, established in 1936 to represent steelworkers, now includes employees from Good Humor/Breyers, the Baltimore Zoo, and Louisville Slugger; the United Auto Workers, established in 1935 to represent auto workers, now includes employees from Miller Beer, Planter's nuts, Kohler bathroom fixtures, Yamaha musical instruments, and Folger's Coffee; the International

Brotherhood of Teamsters, established in 1903 to represent drivers in the freight-moving industry, now includes flight attendants, public defenders, and nursing home employees. There is no consensus regarding the value of such diversification by unions. Some argue that it provides more power to unions and their members by strengthening their numbers and preventing their dependence on one particular industry. On the other hand, critics argue that this prevents unions from being very influential in setting wages and policy in a particular industry, given the need to spread time and resources across multiple industries. However, given the demise of traditional manufacturing jobs from which unions originated and relied on for their support and power, unions have little choice but to reach out to new industries. The critical issue is whether this diversification is really strategic for the union or merely opportunistic.

Another new development in how unions operate is their reliance on technology. Unions have been using the Internet effectively to recruit new members, particularly those in technology-based industries, and to gain support from others in their organizing efforts. The South Bay Central Labor Council, based in California's Silicon Valley, consists of 110 affiliated unions that represent more than 100,000 employees in the area. The Council is using the Internet to communicate with and, it is hoped, organize contingent workers.[15] Similarly, the Service Employees International Union undertook a campaign to organize janitorial workers in the Silicon Valley. The union successfully used the Internet to publicize its case against Apple Computer, Oracle, and Hewlett-Packard worldwide via electronic bulletin boards that informed engineers and programmers about the wages and working conditions of those who cleaned their offices at night.[16] Finally, the Oakland-based Local 2850 of the Hotel Employees & Restaurant Employees International Union used the Internet in a campaign against software giant PeopleSoft. In attempting to organize workers from a hotel used extensively by PeopleSoft and its corporate partners and unable to gain the support of PeopleSoft, the union launched an Internet campaign that caused PeopleSoft's stock value to decline by more than $63 million, according to the company's own estimates.[17]

The NLRB has also considered the role of technology as it relates to worker rights under the NLRA. Given its charge to ensure that employees are able to communicate freely with each other about wages and all other conditions and terms of employment, the NLRB has endorsed e-mail communication between employees as a means of safeguarding those rights. Only when an employee's behavior is disruptive does NLRA protection cease. As a result, employer policies that ban all nonbusiness and/or personal use of e-mail may interfere with the right to self-organize and therefore constitute a violation of the NLRA. A key issue here is the extent to which employees normally use the employer's computer system for their regular work and communication with coworkers. Employees who normally use a computer system in carrying out their regular job responsibilities are considered differently from employees who generally do not use computers or e-mail to carry out their regular job responsibilities. In addition, the more e-mail is normally used in the workplace, the less restrictive a policy an employer can implement that regulates communication that might be considered protected concerted activity under the NLRA.[18]

In recent years, the proliferation of social media has greatly altered the means by which employees communicate with each other, both inside and outside of the workplace. The National Labor Relations Board has provided protection to some employees who have had adverse action taken against them by their employers due to their social media communications and postings. Reading 12.2, "Social Media, Employee Privacy and Concerted Activity: Brave New World or Big Brother?," discusses issues surrounding employee privacy and how social media posting by employees may fall with NLRA protection.

Broader employer policies regarding employee electronic communications have also been targeted by the National Labor Relations Board. Warehouse retailer Costco had a policy which prohibited employees from making defamatory statement deemed unlawful by the NLRB. Specifically, the policy stated, "Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation or violate policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment." The NLRB found the prohibition to be too broad and designed to squelch employee concerted communications with each other.[19] As part of the same decision, the NLRB also struck down Costco rules that