UNION BUSTERS AND THE LAW: CONSULTANT AND EMPLOYER NON-COMPLIANCE WITH REPORTING REQUIREMENTS OF THE LANDRUM-GRIFFIN ACT IN CALIFORNIA

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UNION BUSTERS AND THE LAW: CONSULTANT AND EMPLOYER NON-COMPLIANCE WITH REPORTING REQUIREMENTS OF THE LANDRUM-GRIFFIN ACT IN CALIFORNIA*

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The growing use of professional consultants and attorneys to prevent unions from organizing and to break those that already exist is perceived as a significant problem by the American labor movement. In 1979, staff members of the AFL-CIO's Department of Organization and Field Services reported in the *American Federationist* that the last half of the 1970's had witnessed a growing "climate of hostility towards unions" characterized by "singularly callous actions against workers' rights." These actions, they argued, were largely the work of a new breed of "union busters" — attorneys and consultants hired by employers for the express purpose of getting rid of unions.[1]**

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* Many people generously helped us in the preparation of this article. We especially wish to thank Charles McDonald and Ed Collins for encouraging the original research on which this article is based. Rome Aloise brought to our attention numerous specific cases of consultant activity which he encountered as a union organizer. Giles Gibson, Gerald McKay, Kathleen King, Sandra Hughes, Alexander Greenfeld, and the editorial boards of the *New Labor Review* and the *Labor Center Reporter* thoughtfully read and commented on a previous draft of this article. Of course, we are solely responsible for the data and interpretations presented here.

** "Union busting" itself, of course, is not new; for decades some employers have sought to prevent or weaken unionization — and have enlisted the aid of others in doing so. Typically, such attacks on unions' rights to organize have come during periods when labor as a whole is weakened by economic recession or a conservative political climate. [For a review of previous periods of employers' offensives in the 1890's, 1920's, and late 1940's in the United States, see Sean Flaherty, "A History of Employers' Offensives Against Unionism," *Labor Center Reporter*, No. 25, December, 1980. | What appears to be distinctive about today's union busters, in contrast to those of an earlier generation, is their certification as professionals and their organization into specialized legal or consulting firms.

Of course, not all activities of management consultants and their employers can properly be included under labor's "union busting" label. Many consultants respect workers' rights to organize and bargain collectively, and restrict their activities to giving strict legal or other professional advice. By the term "union buster," we refer in this article exclusively to management attorneys or consultants who professionally advise employers on how to prevent union organization or eliminate or weaken unions which have bargaining rights. They accomplish these ends — or train employers to do so — through a wide range of techniques, which may include preparing and distributing persuasive anti-union speeches, literature, and films; interrogating or spying on workers to determine their union sympathies or activities; isolating, harassing, or firing union supporters; delaying elections, union recognition, or negotiations to demoralize an organizing campaign; or bargaining in bad faith to provoke a strike or extract concessions. Union busting need not be illegal, but almost always these consultants evade the spirit — and sometimes the letter — of federal labor laws which protect workers' rights to organize, choose their own representatives, and bargain collectively.[2]

By most measures, the number of active anti-union consultants is expanding. In 1980, the AFL-CIO's Department of Organizing and Field Services calculated, based on reports from organizers in the field, that there were 1000 firms and 1500 individuals engaged full time in union busting activities. The Federation estimated that employers spend in excess of $500 million annually and use outside consultants in two-thirds of all organizing campaigns.[3] These figures have not been updated, but AFL-CIO staff representatives report that they "add at least ten more [names of union busting consultants] to the files each week."[4] Although the AFL-CIO has not disaggregated its data by state, other evidence shows a similar pattern for California. Since 1970, the number of full time attorneys on the staff of Littler, Mendelson, Fastiff, and Tichy — believed by many labor leaders to be one of the leading anti-union law firms in California — has grown from eight to sixty-two, and the firm has expanded from two offices to seven.[5] The other major California-based firm with a reputation as a union buster, the West Coast Industrial Relations Association, in 1980 had between 1250 and 1500 regular client-members, according to testimony by one of its partners before a congressional hearing.[6] In the past few years, several leading

national anti-union consulting firms, including Pechner, Dorfman, Wolffe, Rouncik and Cabot; Modern Management, Inc.; and Jackson, Lewis, Schnitzler and Krupman have opened California offices.

The growing involvement of anti-union professionals seems to be weakening labor's ability to organize successfully. In 1980, unions won only 46% of all representational elections, down from over 60% in the mid-1960's. The number of decertification elections, in which workers vote whether or not to retain the union as their bargaining agent, has risen almost four-fold from 239 in 1968 to 902 in 1980; unions are now losing 73% of these elections, up from 65% a decade ago.[7] Of course, there are many reasons for the decline in union wins in representational elections, including labor's own strategic and organizational weaknesses. But organizers cite many cases where the involvement of professional union busters proved decisive.[8] The AFL-CIO Industrial Union Department estimated in 1981 that consultants were involved in over 90% of the representational elections lost by its member unions.[9]

This paper examines one aspect of the activities of anti-union consultants and employers in California: their non-compliance with the reporting and disclosure provisions of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA, also known as the Landrum Griffin Act, requires employers and labor relations consultants to file detailed reports concerning their activities in organizing drives and other labor disputes under certain circumstances. These reports include information that could be very helpful to unions in developing campaigns to defeat the union busters' efforts. Unfortunately, compliance by consultants and employers with the provisions of this federal law is woefully inadequate. In this paper, we first review the provisions of the LMRDA dealing with employer and consultant reporting; and then estimate the extent of non-compliance with these provisions in California, based on an examination of testimony given at unfair labor practice hearings in the state. Several specific cases are discussed in detail, to convey the range of activity which is currently eluding Department of Labor investigators. We conclude with a review of recent enforcement efforts and make several policy recommendations aimed at improving compliance with LMRDA provisions applying to consultants and employers. Although our research is based

solely on California data, we believe it reveals a pattern and suggests solutions which are of national relevance.

LMRDA Reporting Requirements for Consultants and Employers

Under the terms of the LMRDA, both labor relations consultants and employers are required to file reports with the Department of Labor concerning certain of their activities in representational elections and other labor disputes. Much of the behavior of today's professional union busters is covered under these reporting requirements.

A labor relations consultant must file if he is hired by an employer to "persuade employees about exercising their rights to organize and bargain collectively" or to "obtain information about the activities of employees or a union in connection with a labor dispute." Consultants must file two separate types of reports. An "agreements and activities report," known as a form LM-20, must be filed each time the consultant arranges with an employer to undertake reportable activity, and must be filed within thirty days of the agreement. The LM-20 report, in addition to the name and address of both the consultant and the employer, must include a complete listing of the terms of the agreement, the specific activities to be performed, the names and addresses of persons who will be involved in carrying them out, and the employees or labor organizations which are the object of the activities.

Any consultant who files an activities report must at the end of that fiscal year file a "receipts and disbursements reports," or LM-21, which lists all payments he received or made in the course of carrying out the agreement with an employer. In addition, once a consultant performs reportable activity during a year, he must include in that year's LM-21 *all* payments received from *any* employer during the same fiscal year, whether or not his other activities were also reportable. All persons who agree or arrange with an employer to carry out reportable activity must report, whether or not they define themselves as labor relations consultants.

The Department of Labor is quite explicit about what

kinds of activities are and are not reportable. For example, consultants must report if they:

—make a speech to a group of workers to agrue that they should not join or should quit a union;

—persuade union members to vote against a strike;

—organize an anti-union rally;

—persuade workers to set up a "vote no" committee or join a company union;

—conduct espionage — for example, by following union activists to monitor their activity or by providing spies who pretend to be regular employees;

—conduct a questionnaire survey of employees regarding their own or others' union sympathies.

On the other hand, consultants are not required to file if they are hired exclusively to engage in collective bargaining for the employer; give legal advice or represent the employer before a court, administrative agency, or arbitrator; or give advice about wage administration, job evaluations, or similar matters. A consultant is also not required to report if he meets with non-bargaining unit employees, such as supervisors, to inform them about legal methods for convincing workers not to join a union. However, if the consultant uses the supervisors to solicit information — for example, instructs them to report back to him on the number of workers in their units who support an organizing drive — a report is probably necessary.

In one area, the definition of reportable activity is ambiguous. The LMRDA states that consultants must file with the Labor Department if their activities either directly *or indirectly* aim to persuade employees or supply information about them to the employer. Despite the inclusion of the word "indirectly" in the language of the statute, since 1962 the Labor Department has tended to exempt from the reporting requirements consultants who prepare materials, such as anti-union leaflets or speeches,

which are delivered to workers by the employer. This loophole, sometimes known as the "advice exemption," has allowed many consultants to slip through the enforcement net.*

Employers, too, must file under some conditions. In addition to reporting any payments to consultants for covered activities, the employer must file on any payments to employees to persuade others about exercising their rights to organize and bargain collectively; payments to obtain information about workers or union members in connection with a labor dispute; or any; other expenditures which aim to interfere with, restrain, or coerce employees in their rights. Employers must also report payments to any union or union officer other than regular wages and benefits — for example, those made in an attempt to maintain "labor peace" or to obtain a favorable resolution of a grievance. The employer's form, which is called an LM-10, must list the date, amount of payment, person paid, and the nature of the agreement with the employee or consultant, and must be filed at the end of the fiscal year.

The Labor Department is also quite explicit about what kinds of employer activities are reportable. In addition to reporting payments made to a consultant for any of the activities listed above, employers must report if they:

> —secretly give money to an employee to persuade others about their rights to organize or bargain collectively, or on the condition that they not join a union;
>
> —make payments to "vote no" or decertification committees, unless they are disclosed to all the workers;

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* The "advice exemption" has been the object of strenuous criticism by a number of labor relations professionals. William Hopgood, Assistant Secretary of Labor for Labor Management Relations under the Carter Administration, told a New York University conference in 1980 that "this interpretation [the advice exemption] troubles me . . . because when stretched to its extreme it permits a consultant to prepare and orchestrate an entire package of persuader material while sidestepping the reporting requirement merely by using the employer's name and letterhead or avoiding direct contact with employees."[10] The exemption has also been criticized by the AFL-CIO and by union attorney Jules Bernstein[11].

—pay to print and distribute literature which threatens workers with a loss of wages, benefits, or job security if they organize — for example, a letter that threatens to close the plant if the workers vote for a union;

—pay someone to obtain information about union activities during a labor dispute unless the information is to be used solely to prepare for a trial or administrative proceeding.

There are also some areas of ambiguity in the employer reporting requirements. The law requires employers to report when they pay regular wages to a managerial employee to have him threaten other workers against organizing or joining a union or otherwise interfere with, restrain, or coerce workers in their rights. However, the employer is exempted if the payment is to an employee whose "established duties include acting openly . . . in matters of labor relations or personnel administration." This provision has caused considerable controversy, since employers generally maintain that persuader activity is a regular element of the supervisorial role. In practice, the Labor Department has tended to exempt managerial employees, such as labor relations directors, who peform persuader activity in the "regular and ordinary course of their employment" but not other workers who would not routinely perform such duties.

The statute is co-extensive. This means that if an employer is obliged to file a report, a consultant party to the same activity must also file.[12]

In spite of the various loopholes and ambiguities in the reporting requirements, the LMRDA covers a wide range of employer and consultant behavior. Many of the activities which are part of the regular bag of tricks of today's professional union buster — persuasive speeches to workers, employee surveys, "ventilation meetings," slick anti-union films, in-plant and out-of-plant spying, intensive sessions in which supervisors report back to the consultant on the day to day progress of a management campaign — all fall clearly under the Department of Labor's reporting requirements. So do many of the tactics used by zealous employers who seek to remain, or become, "union free."

Consultant and Employer Non-Compliance with the LMRDA

Despite the apparently growing use of tactics by consultants and employers which fall under these guidelines, few union busters report their activities to the Department of Labor as required by law. In the fiscal year ending September 30, 1981, only 37 labor consultants filed annual financial reports and only 124 filed individual agreements and activities reports in the entire United States. Only 141 employers filed. These figures have remained relatively constant (and extremely low) throughout the past decade, during a period when other evidence suggests commission of reportable activity greatly increased (see Table One). In the only direct study of this issue to date, Charles Craver, a Professor of Law at the University of California at Davis, in 1978 surveyed several hundred management attorneys serving on various committees of the Labor Relations Law Section of the American Bar Association. Craver found that only two percent of the respondents had filed an LM-20 or LM-21 report with the Department of Labor, although fully 65% admitted to engaging in reportable activity. A substantial majority of the respondents — 59% — believed that fewer than 10% of all management attorneys complied fully with the law. Craver concluded the obvious: that his study revealed "pervasive noncompliance with the consultant reporting requirements."[13]

In this study, we attempt to gauge the extent of noncompliance with the LMRDA by both consultants and employers in California by comparing reports on file with the Labor Department with evidence of apparently reportable activity revealed in testimony given at unfair labor practice (ULP) hearings before NLRB administrative law judges in California during the years 1975 to 1981.

In the absence of direct evidence of reportable activity by employers and consultants, we reasoned that unfair labor practice charges filed by unions would provide an excellent clue to its presence. Unfair labor practice charges are often filed by unions or individual workers in the wake of contested representational elections and decertification drives in which consultants are heavily involved. Naturally, not all reportable activity by consultants and employers during such campaigns results in the filing of ULP charges; and not all alleged unfair labor practices are accom-

TABLE ONE
LMRDA Reports Received By The Department of Labor From Consultants And Employers, 1974-1981

Type of Report	For the Fiscal Year Ending September 30: 1974	1975	1976	1977	1978	1979	1980	1981
LM-20 (consultant activities report)	106	70	102	163	159	159	206	124
LM-21 (consultant financial report)	32	30	14	22	19	35	32	37
LM-10 (employer report)	20	37	124	41	40	206	145	141

Sources: See footnote 14

panied by reportable acts by employers or their hired agents. But there is often a coincidence of reportable activity and ULP's, as when an employer attempts to coerce employees — and enlists the aid of a consultant to help him do so.

To arrive at a rough estimate of LMRDA non-compliance in recent years, we read through summaries of transcripts of all unfair labor practice hearings held before NLRB administrative law judges in the Board's Regions 20 (Northern California), 32 (Central California and Northern Nevada), 31 (Southern California and Southern Nevada), and 21 (Southern California) from 1975 to 1981.* We counted the instances of reportable activity by employers and consultants in California whch appeared in the testimony, noting the name of the employer, consultant, and consulting firm in each case. **

* Since there is typically a lag of nine to twelve months between commission of an alleged ULP and the resulting administrative law judge decision, we correlated NLRB decisions dated 1975-1981 with reports filed with the Department of Labor between 1974 and 1980.

** We wish to emphasize that our classification of individual instances of consultant and employer activity as reportable or non-reportable is based on our own judgement. Department of Labor officials we consulted declined to verify our classifications on a case by case basis. However, we also wish to emphasize that in classifying instances as reportable, we followed a cautious course and counted only those cases where the activity unambiguously fell under the Department of Labor's own guidelines. For examples, instances of indirect persuasion by a consultant — such as where he prepared persuasive materials for distribution by the employer — were not counted as reportable consultant activity, although some observers of the law maintain such activity should be reported. Similarly, legal advice to employers was excluded even in instances where it appeared to

To determine which of these had filed the required reports, we then compared this list to registers of reporting employers and consultants compiled by the Office of Labor Management Services Enforcement of the Department of Labor. These registers list all individuals and firms which filed a LM-10, LM-20, or LM-21 report with the Department since 1959, as well as the most recent year in which they filed; these data are aggregated by state.[15] Finally, we checked the actual reports filed by these consultans and employers, released to us under the Freedom of Information Act, to determine if they filed for the specific acts of reportable activity we identified in the NLRB testimony.* By comparing the evidence of reportable activity with the actual filings, we were able to arrive at an estimate of the extent of LMRDA compliance.

Our results clearly show extensive non-compliance with the reporting and disclosure provisions of the LMRDA among consultants and employers in California. During the seven year period of 1975 to 1981, 1027 unfair labor practice charges involving California employers were heard before NLRB administrative law judges in the state. In this lot, we counted 107 instances of reportable activity by employers, and 35 by consultants. Because there were some repeaters in this group, the actual number of employers and consultants committing reportable activity was somewhat lower — 106 and 28, respectively. Shockingly, only four of the 28 consultants we identified and only one of the 106 employers had filed *any* report with the Department of Labor during the years 1974-1980. Only one of the consultants, and

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shade over into behind the scenes stage-managing of an anti-union campaign. Thus, we feel that our estimates of the extent of reportable activity appearing in the NLRB transcripts are conservative.

* The research was conducted at the offices of the Department of Labor in Washington, D.C. Under Department guidelines, LM-10, 20, and 21 reports must be filed in Washington; copies are then forwarded to the area offices. In practice, however, this system has completely broken down. We learned, when examining the records filed in the San Francisco area office, that copies are rarely forwarded, and records at the area level are partial and inadequate. For this reason we found that only in Washington were we able to obtain complete records of the filings of California consultants and employers. All filings are open to the public and may be obtained by filing a Freedom of Information request with the Department of Labor.

TABLE TWO

Employer and Consultant Commission of LMRDA Reportable Activity in California, As Revealed in NLRB Unfair Labor Practice Hearing Testimony

Year of ALJ Decision	Total No. of Decisions	Instances of Reportable Activity by Employers	As % of Cases	Instances of Reportable Activity by Consultants	As % of Cases	Total Instances	%
1975	157	11	7.0%	3	1.9%	14	8.9%
1976	147	25	17.0%	6	4.1%	31	21.1%
1977	130	16	12.3%	5	3.8%	21	16.2%
1978	173	15	8.7%	6	3.5%	21	12.1%
1979	151	14	9.3%	4	2.6%	18	11.9%
1980	121	13	10.7%	6	5.0%	19	15.7%
1981	148	10	6.8%	5	3.4%	15	10.1%
Total	1027	107	10.4%	35	3.4%	142	13.8%

Note: We wish to stress that this table does not and is not intended to estimate the total *volume* of reportable activity by consultants and employers. Only a small proportion of reportable activity by consultants and employers (how small we can only speculate) results in the filing of unfair labor practice charges by unions. Once filed, only a small fraction of such charges are ultimately heard before an administrative law judge. In 1980, for instance, only 1273 administrative law judge decisions were issued nationally — less than 3% of the 44,063 ULP charges filed. Most cases are either found to be without merit or are settled informally prior to full hearing (45th Annual Report of the NLRB, pp. 8-14). Our best guess, then, is that *several hundred times* as many reportable acts are committed every year as appear in this table.

none of the employers, had filed a report for the specific instance of reportable activity we identified in the NLRB testimony. Of the 132 instances of reportable activity which appeared in these cases, 131 — more than 99% — had *never* been reported to the Department of Labor as required by law. These findings are summarized in Tables Two and Three.

Contrary to our expectations, these data show no clear trend towards an increase in the total volume of reportable activity by either consultants or employers during the period studied. Between 1975 and 1981, the incidents of reportable activity by consultants each year fluctuated in a narrow range from 3 to 6, at a time when the total number of Administrative Law Judge decisions per year remained fairly static. Similarly, the number of employer acts ranged from 10 to 25 per year, with no clear trend over the period examined. These data appear to contradict other, more impressionistic, evidence that union busting activity is on the rise.

There are several possible explanations for this discrepancy. Union busters may be growing increasingly sophisticated about the law, and may have become more careful to limit their activities to granting legal advice or preparing materials for distribution by the employer, thus taking advantage of exemptions in the reporting requirements. Since union busting is often carried out by attorneys, these cases may more often be settled prior to hearing to avoid damaging testimony against a member of the bar. The NLRB does not actively seek testimony on the identity of consultants, an issue which may be peripheral to the unfair labor practice charge, so evidence of their activity may not show up in the transcript even when present in the case. Finally, unions may be failing, for whatever reason, to file ULP's in cases where union busters are involved. The solution to this riddle will have to await further research.*

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* One promising angle would be to examine transcripts of all election challenges filed with the NLRB. Administrative law judges hear only election challenges that are linked with unfair labor practice charges. Election challenges that are not linked with ULP's are heard separately. It is possible that when these are added to the total, the trend data would better conform to other evidence indicating a rise in union busting activity during the past few years.

The "Union Busters" At Work: Case Examples

The actual cases themselves, as summarized in testimony before the NLRB Administrative Law Judges, suggest the range and character of the reportable activities currently being carried out by employers and consultants in California which are falling

TABLE THREE

Employer And Consultant Compliance With The Reporting And Disclosure Provisions Of The LMRDA In California, 1974-1980

	Employers	Consultants	Combined
Number who committed apparently reportable activity	106	28	134
Number that filed any report with the Dept. of Labor during this period	1 (1%)	4 (14%)	5 (4%)
Number that filed a report with the Dept. of Labor for the specific act identified in NLRB testimony	0 (0%)	1 (4%)	1 (1%)

through the Department of Labor's enforcement net. The following three cases, drawn from our counted instances of reportable activity, are illustrative.

—Workers at Neely's Car Clinic, an auto service shop in Vallejo, California, joined Local Lodge 1492 of the Machinists union and won their first contract in 1971. James Neely and James Deaver, joint owners and managers of the small business, evidently decided sometime in 1977 that they wanted to get out from under the union agreement. According to employee testimony, owners told workers in the shop that the union "cost too much" and that they were "tired of having the union trying to tell them how to run their business."

Over several months in the spring of 1978, the owners assisted in drawing up a decertification petition, attempted to solicit employee signatures for it, threatened to fire workers who did not sign, and promised hospitalization and other benefits to those who did. In addition, they singled out one worker they

judged to be sympathetic, paid his union fees on the condition that he "go along with the union thing," and paid him expense money to cover the costs of driving to San Francisco to deliver the petition to the Labor Board office.

The owners also retained the services of a consultant, David Comb of the Redwood Employers Association, who spoke by telephone to the employee who filed the petition, counseled him about his dealings with the Board, and instructed him to report back to Comb about the outcome. According to the employee's testimony, Comb initiated this telephone conversation by saying, "First of all, you and I are not having this conversation. I will deny it at every opportunity."

The NLRB administrative law judge ruled in support of the Machinists' unfair labor practice charges, and ordered the employers to "cease and desist" interfering with their workers' exercise of their rights and to reinstate with back pay two workers fired for refusing to support the decertification effort. His decision was later upheld by the full Board. Both the consultant, David Comb — who counseled a worker about the decertification petition and instructed him to report back — and the employers, James Neely and James Deaver, who in addition to hiring Comb made payments to an employee on the condition that he support the decertification drive and later persuade others to go along — clearly committed reportable activity under the LMRDA. Yet neither the consultant nor the employer ever filed a report with the Department of Labor (242 NLRB No. 69; JD SF 39-79; Earldean V.S. Robbins, Administrative Law Judge).*

—In 1973, Local 399 of the Service Employees International Union was certified by the NLRB to represent workers at the Westminster Community Hospital, near Long Beach, and negotiated their first contract. The following year, however, a number of employees filed a decertification petition, and the NLRB scheduled an election to decide the issue.

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* Case numbers cited are those given in *Decisions and Orders of the National Labor Relations Board* (Washington, D.C.: NLRB), volumes 216-253 (1975-80) and in published summaries of cases heard before administrative law judges at the regional level. This case was also discussed in the *Rub Sheet*, No. 30, December 1981-January 1982. According to sources in the agency, it is scheduled for investigation by the San Francisco Area Office of the Department of Labor.

To help present its viewpoint to the workers, the hospital administration hired Fred Long, then a consultant with Keil, Beard, Gummerson, and Long, a predecessor to the West Coast Industrial Relations Association (WCIRA). On August 21, Long scheduled a series of meetings with groups of employees, extending from morning to night. At the first meeting, Long told workers that if the union were retained as their representative, the employer would limit the amount of the wage increase in the upcoming contract to only 5.5% — well below what the union wanted. He also suggested, according to the testimony of workers who attended the meeting, that without a union they could possibly earn as much or more than workers at other non-union hospitals.

That afternoon, union stewards met to discuss the situation and decided to take on Long aggressively in the evening meetings. "The word is out that they are really going to let you have it this evening," the hospital's maintenance chief warned Long before he went into the 8:00 p.m. meeting. Long later testified that the audience was "very loaded" and that he had had to field some "very outspoken questions" from union supporters there. The ten o'clock meeting was apparently even more boisterous. One unionist told Long that "We're going to make sure we get a good contract and . . . we're going to shove it down your throat." At this, Long — according to his own testimony — "lost my cool and . . . blew my top" and told the worker that "I can negotiate just as lousy a contract as the union can negotiate a lousy contract against us, and we can shove it down your throat and up your ass."

The administrative law judge found that the employer had violated the workers' rights when, through the consultant, he threatened to limit their wage increases if they voted in favor of continued union representation, and ordered Westminster to "cease and desist" from such activity.

In threatening workers with wage restrictions should they vote in favor of the union, Fred Long committed clearly reportable activity — as did Westminster in employing him. Neither Keil, Beard, Gummerson, and Long nor Westminster Hospital filed reports for this incident, although WCIRA, the successor firm, filed for subsequent involvement at Westminster

Hospital in a later year (221 NLRB No. 26; JD SF 116-75; Administrative Law Judge William J. Pannier III.)

—La Mousse, Inc., annually manufactures and distributes about half a million dollars worth of deluxe pastry and bakery products in the Los Angeles area. In the summer of 1979, kitchen workers at La Mousse, virtually all of whom were Spanish-speaking and most of whom were illegal aliens, contacted Local 453 of the Bakery, Confectionery, and Tobacco Workers Union in an effort to organize. The owner of the business, Nadine Korman, who had started La Mousse only a few years before by baking desserts in her own home kitchen, was bitterly opposed to unionization. Shortly after she received a notice from the NLRB in July that an election was scheduled, she hired attorneys Ross Arbiter and Paul Gordon of the law firm of Gordon, Weinberg, and Gordon to represent her in the unionization campaign.

The law firm promptly went to work. The attorneys drafted a persuasive, anti-union speech, which Korman read to the workers in the kitchen and had translated into Spanish by a translator. In mid-August, Gordon, Weinberg, and Gordon retained the services of two Spanish-speaking consultants, Daniel Ramirez and Carmen Fierro of the firm of Borowski and Brushett, to deal directly with the workers. Over the next few weeks, Ramirez and Fierro interrogated workers about their union sympathies, solicited their grievances, promised them benefits in exchange for voting against the union, and inferred that they would seek wage increases for the workers.

But apparently the attorneys did not want to leave anything to chance. On August 29, only two days before the scheduled election, Arbiter — according to employee testimony — contacted the Immigration and Naturalization Service and suggested they make a sweep of the La Mousse kitchen. The next morning at 7:30 the INS arrived at the premises and found that ten of the fourteen workers present were undocumented. They were all immediately deported to their homes in Mexico and Guatamala. These ten workers, along with two others who had not shown up for work that morning, were promptly fired.

The administrative law judge found that the termination of these twleve workers clearly had been motivated by the em-

ployer's "desire to affect the results of the Board election" and ordered all twelve reinstated with back pay. Since a fair election was no longer possible under the circumstances, the Board certified Local 453 as bargaining agent and ordered La Mousse to commence good faith bargaining immediately.

By interrogating, threatening, and making promises to workers, consultants Ramirez and Fierro clearly committed reportable activity, as did Korman by hiring them. The activities of Arbiter and Gordon are somewhat more ambiguous. The preparation of a persuader speech, which was delivered by the employer, would probably be covered by the "advice exemption" and therefore would not be reportable. So far as could be learned from the testimony at the NLRB hearing, neither of the attorneys ever had any direct contact with the kitchen staff. However, contacting the INS to raid the kitchen seems to move beyond the mere giving of advice or legal counsel into the realm of coercive persuasion*. In any case, neither the employer, the law firm, nor the consulting firm reported their involvement in this case to the Department of Labor, although Borowski and Brushett have filed reports on their activity in other cases (259 NLRB No. 7; JD SF 48-81; James S. Jensen, Administrative Law Judge).

Enforcing the Law: Policy Implications

The main finding of our research is that the overwhelming majority — in our data, 99% — of reportable activities committed by employers and consultants in California in the past seven years has gone unreported to the Department of Labor as required by law. The NLRB testimony we reviewed revealed a wide array of reportable activity by consultants — everything from giving persuasive speeches to groups of workers during organizing campaigns to stage managing behind the scenes decertification drives. Yet the 142 incidents we unearthed in these transcripts represent only the "tip of the iceberg" — a small fraction of total reportable activity currently being carried out by California consultants and employers. Perhaps hundreds of

* Because of the ambiguous nature of this case, we did not include Arbiter's and Gordon's action among our counted instances of reportable activity by consultants.

times as many incidents never produce an unfair labor practice charge, or produce one which is settled prior to hearing before an administrative law judge. If this is true, then hundreds of incidents every year are falling through the Department of Labor's enforcement net in California alone.

Why is non-compliance with the LMRDA significant? Put simply, systematic enforcement of the reporting and disclosure provisions of the LMRDA would help the labor movement organize more effectively. Most importantly, it would make valuable information available to union organizers and members. LM-20s, 21s, and 10s reveal which consultant an employer hires, how much he is paid, what services he performs, and which unions or individuals are targeted. This information can be used to anticipate actions by the union busters or discredit the employer in the eyes of workers or the public. Second, meeting the requirements of the filing provisions — as many local unions which laboriously fill out LM-1, LM-2, and LM-3 forms every year well know — is time consuming and often costly. The need to fill out elaborate forms may be a disincentive to some employers and consultants. If some of the bigger union busting firms were required to file, they would owe thousands of "back" forms, a logistical nightmare. Strict enforcement might thus slow down the growth of the union busting profession.

Unfortunately, actual enforcement of employer and consultant reporting provisions has been very lax. In the more than twenty years since the passage of the Landrum-Griffin Act, the Secretary of Labor has filed suit against an employer or consultant only seventeen times. It has *never* imposed a penalty more severe than requiring the filing of back forms.[16] In fact, enforcement efforts could be much more vigorous. The LMRDA entrusts the Labor Department with considerable power to enforce the reporting provisions of the law. The Secretary of Labor may bring a civil court action in federal district court against any person who appears to have violated, or is about to violate, a provision of the Act. In order to determine if such a violation has occurred or may occur, the Secretary is further empowered to make a full investigation, including the conduct of searches and the subpeona of records. Case law suggests that the Department need not have "probable cause" to begin an investigation and is not bound by

specific time limits.[17]

Recognizing the possible benefits of — and potential for — effective enforcement, the Department of Organizing and Field Services at the AFL-CIO, under the Directorship of Alan Kistler, in 1979 initiated a campaign to improve reporting by consultants. The Department distributed a "checklist for organizers" designed to reveal the presence of reportable activity by consultants during organizing drives. Organizers who uncovered such activity were encouraged to forward information about the consultants to the Department of Labor and to the AFL-CIO, and to pressure the employer and consultant directly for disclosure. In its four years of operation, this campaign has collected hundreds of reports and has forwarded many of these cases to the Department of Labor for further investigation.[18]

There is some evidence that the Labor Department began to tighten up its enforcement operation in the final months of the Carter Administration, in response to this intensive pressure from the AFL-CIO. Between October 1979 and September 1980, the Department opened more than 330 new investigations of employers and consultants in Washington, and referred additional cases to the field offices — a ten fold increase over the previous fiscal year — according to William Hopgood, then Assistant Secretary of Labor for Labor management Services.[19] Unfortuntely, these cases appear to have been given low priority by the Reagan administration. In July 1982, according to the enforcement division of the Labor Management Services Administration, only five California cases were currently under investigation.[20] The AFL-CIO reported the same month that according to "very reliable" sources the percentage of time spent by Labor Department field investigators on violations of LMRDA reporting requirements by consultants had been halved, from 10% to 5%. The Federation concluded that "it is clear that the Department is only going to proceed on the most obvious and undisputed cases."[21]*

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* Since the passage of the LMRDA in 1959, its provisions have always been enforced much more vigorously against unions than against employers and their agents, no matter what administration was in power. Each year almost 55,000 unions file reports with the Department — compared with no more than a couple hundred consultants and employers in a typical year. Despite this apparent

Another area which saw temporary improvement under the Carter Administration was cooperation between the National Labor Relations Board and the Department of Labor in the enforcement of Landrum-Griffin. Our research clearly demonstrates that evidence of reportable activity regularly appears in testimony before NLRB judges hearing unfair labor practice charges. Enforcement efforts would be greatly strengthened by the routine referral of this information to the Labor Department. There is some evidence that such a program was initiated in 1979, when researchers at the NLRB began listing labor consultant activity in their index of cases. However, this listing only appeared in one index and was subsequently discontinued.[23]

The evidence suggests that pressure from unions can make a difference, although labor's effectiveness is clearly limited by the policies of the incumbent Administration in Washington. An organized campaign by the AFL-CIO in the last years of the Carter Administration resulted in improved enforcement efforts by the Labor Department and better cooperation among government agencies in seeking out violations of the law; and increased enforcement activity may have encouraged greater self-reporting among consultants themselves. These gains appear to have been lost under the Reagan Administration, however, which seems to have little interest in enforcing the provisions of Landrum Griffin against the consultants and employers, despite continued labor pressure to do so. An effective strategy to improve compliance with the reporting and disclosure provisions of the Landrum Griffin Act must both maintain grassroots labor pressure and seek a change in policy within the governmental agencies responsible for enforcement. A combination of grassroots pressure from below and a more committed approach in Washington could land some anti-union consultants and employers in jail, or fine them for their negligence. At the least, it might yield informa-

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evidence of much greater compliance by unions than by employers, the Department has concentrated most of its enforcement efforts on labor organizations. Between 1960 and 1978, the Department initiated 120 suits to enforce compliance with the LMRDA's reporting and disclosure requirements. Only 17 of these were directed against employers and consultants; the remaining 103 cases — 86% of those filed — were aimed at unions.[22]

tion unions can use in the fight against union busters in the shop and at the bargaining table.

Note: Unions that wish to report apparently reportable activity by consultants and employers in Northern California should write to: Mr. Anthony B. Cosola, Area Administrator, Labor Management Services Administration, Department of Labor, 211 Main Street, Room 317, San Francisco, CA 94105.

Copies of all correspondence should be forwarded to Mr. David Siefert, Supervisory Investigator, at the same address; and to: Labor Management Consultant Reporting Project, Department of Organization and Field Services, AFL-CIO, 815 16th Street N.W., Washington, D.C. 20006.

Footnotes

[1] Charles McDonald and Dick Wilson, "Peddling the Union Free Guarantee," AFL-CIO *Federationist*, April 1979.

[2] For general accounts of the contemporary union busting phenomenon, see: Jules Bernstein, "Union Busting: From Benign Neglect to Malignant Growth," University of California, Davis, *Law Review*, 1980, v. 14; *From Brass Knuckles to Briefcases: The Changing Art of Union Busting in America*, Center to Protect Workers' Rights, Washington DC: 1979; and Anne Lawrence, "Union Busters: The New Professionals," *Labor Center Reporter*, no. 28, January 1981.

[3] *Pressures in Today's Workplace: Oversight Hearings Before the House Subcommittee on Labor-Management Relations of the House Committee on Education and Labor*. 96th Congress, 1st session. Vol. 1, (1979). Statement of Robert A. Georgine, President, Building and Construction Trades Department, AFL-CIO, p. 410.

[4] Interview with Michael Bowen, Staff Representative, AFL-CIO Department of Organizing and Field Services, by Anne Lawrence, March 9, 1983.

[5] Martindale-Hubble *Law Dictionary* (Summit, New Jersey, R.R. Donnelly), v. 1, 1970-81.

[6] *Pressures in Today's Workplace, op. cit.*, v. 2. Statement of Fred Long, Chairman of the Board, West Coast Industrial Relations Association, p. 313.

[7] *45th Annual Report of the NLRB*, Washington D.C. 1980: 269-73.

[8] See, for example, Anne Lawrence, "Fighting the Union Busters: An Interview with Rome Aloise of Teamsters 853," *Labor Center Reporter*, No. 36, June 1981.

[9] *Industrial Union Department Viewpoint*, Spring 1981, p. 6.

[10] William P. Hobgood, "Management Consultants and Enforcement of the Landrum Griffin Act." Remarks presented to New York University's 33rd National Conference on Labor, June 11-13, 1980. Bureau of National Affairs *Daily Labor Reporter*, July 20, 1980, No. 121, p. D-2.

[11] Bernstein, "Union Busting," *op. cit.*, p. 23-27.

[12] *Labor Management Reporting and Disclosure Act of 1959, as Amended;* U.S. Dept. of Labor Bureau of Labor Management Reports, *Employer and Consultant Reporting*, no date but probably 1963; and U.S. Dept. of Labor, Labor Management Services Administration Office of Labor Management Standards Enforcement, *LMRDA Interpretive Manual*, 1981. Sections 253.201, 255.110, 266.100.

[13] Charles B. Craver, "The Application of the Labor Management Reporting and Disclosure Act 'Labor Consultant' Reporting Requirements to Management Attorneys: Benign Neglect Personified." Northwestern University *Law Review*, v. 73 No. 4, November 1978.

[14] U.S. Dept. of Labor, Labor Management Services Administration, *Compliance, Enforcement, and Reporting in 1978 Under the LMRDA*, Table 5, p. 29; and personal communication with James Santelli, Labor Management Services Administration, January 1982.

[15] U.S. Dept. of Labor, Office of Labor Management Standards Enforcement, *Register of Reporting Employers* and *Register of Reporting Consultants,* October 31, 1980; and first hand examination of reports filed by California consultants and employers since the publication of these registers.

[16] U.S. Dept. of Labor, Office of Labor Management Services Administration, "News Bulletin to Professionals," No. 80-2, February 1980, "Summary of Employer and Consultant Reporting Cases."

[17] Bernstein, *op. cit.,* pp. 37-8.

[18] "Consultant Checklist," *RUB Sheet,* No. 8, September 1979, pp. 1-2; and interview with Michael Bowen, *op. cit.*

[19] Bureau of National Affairs, *Daily Labor Reporter,* September 3, 1980, p. F-3, and August 26, 1980, pp. A-1-2.

[20] Interview with Brian O'Hanlon, Enforcement Division, Labor Management Services Administration, U.S. Department of Labor, by John Williams, July 12, 1982.

[21] *RUB Sheet,* No. 33, July 1982, p. 2.

[22] *Compliance Report, op. cit.,* p.3; "News Bulletin," *op. cit.* p. 4.

[23] Interview with Sharon Chabon, National Labor Relations Board Researcher, by John Williams, July 1982.

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