The NLRA After Seventy Years: What Next?

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Abstract

This paper asks whether the National Labor Relations Act (NLRA) can remain relevant in a competitive economy where non-union employer discretion is the low-cost workplace governance form. We explore changes that would enhance worker participation and individual and collective voice in the non-union (and possibly union) private sector. Examined are changing the labor law default to some form of a non-union works council and narrowing the NLRA's restrictions against company-sponsored worker groups. The impact of either change would be modest. Neither is politically likely. Such legal innovations, however, might produce workplace outcomes preferable to those likely to evolve under the current legal framework.

Introduction

The National Labor Relations Act (NLRA) of 1935 provided the legal framework that ushered in union organizing, collective bargaining, and a sharp rise in private sector unionism in the United States during the early and mid-twentieth century. Since that time, the role and relevance of the NLRA has narrowed as union density has eroded in the private sector. In today's competitive environment, the dominant form of employee governance is one in which management has unilateral, albeit constrained, discretion with respect to most aspects of the workplace. Reforms in the NLRA will not resuscitate traditional unions. Designed for a different era and type of workplace, the bargaining relationship envisioned in the 1930s has limited

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relevance today. Left unmet is a desire by many nonunion workers for a cooperative exercise of individual and collective voice but in a form different from that seen in union establishments. This paper explores changes in labor law and public policy that might promote value-added worker voice.

Private Sector Unionism in Decline

The decline in private sector unionism is widely recognized. Private sector union density was at about one-in-three private sector workers the late 1950s and one-in-four by the early 1970s. Although private sector wage and salary employment climbed from 66.1 to 103.6 million between 1977 and 2004, union membership declined from 14.3 to 8.2 million.[1] Union membership coverage (density) fell from 21.7 percent (23.3 percent) in 1977 to only 7.9 percent (8.6 percent) in 2004. Particularly sharp declines are seen in sectors that were highly organized in the past. Between 1977 and 2004, membership density fell from 35.5 percent to 12.9 percent in manufacturing and from 35.9 percent to 14.7 percent in construction. It is difficult to identify any large industry in which private sector union density has not declined. In contrast to the private sector, public sector union density rose during the 1960s and 1970s and has held relatively steady since the early 1980s.

Nor has private sector unionization ended its decline. Union density is affected by "flows" in and out of "stocks" of union and non-union employment. For density to remain constant, union organizing of non-union jobs (existing and new) plus employment change in already-covered establishments must exceed the number of union jobs lost. Organizing since the early 1980s has fallen short of that necessary to maintain union density, the steady state of private sector density being below the current 8 percent.

The reasons for union decline are many and well known. Important but hardly sufficient are structural changes that have reallocated jobs toward industries, occupations, and locations that are typically less unionized. Significant in this respect is technological change that is labor saving for production jobs and for occupations that can be routinized (for example, reservation agents). Rapid productivity growth has been most evident in manufacturing, with increasing output accompanied by lower employment. The NLRA organizing process has proven costly and difficult for unions, due primarily to sometimes fierce management opposition. Such resistance in part reflects an increasingly competitive domestic and international economy, coupled with relatively large union wage premiums (by international standards) that have shown surprisingly modest decline.

Unenthusiastic worker, public, and, of course, employer sentiment for unions in what is a highly competitive world is the ultimate constraint, limit-

ing not only the ability to organize but also adoption of union-friendly public policy and workplace norms. Sentiment for unions may well have been dampened by government mandates and regulations that affect all workplaces; such legislation may well be more a substitute than a complement for collective bargaining. Absent a sharp and unlikely shift by workers and voters from individualistic and toward collectivist attitudes or, more broadly, of U.S. economic policy from a competitive to a corporatist orientation, we are unlikely to see a resurgence in traditional private sector unionism. Demand by at least some employees for greater workplace voice and cooperation will not be satisfied by NLRA-style collective bargaining.

Is the NLRA Relevant in Today's Workplace, and if Not, What Is?

How relevant is the NLRA for workers in the current U.S. labor market? Apart from its role in governing the union organizational and electoral process, the Act's role in non-union workplaces is modest. Even for organizable workplaces, the NLRA's relevance has waned; today's workplace no longer matches the work environment envisioned by the law's architects. Implicit in the NLRA is a view that workplaces have top-down control moving from managers to workers, the latter having minimal discretion and need for decision making. This characterization may have been defensible during the NLRA's formative years, but not today. In contemporary workplaces, job hierarchies are not so clear-cut, while worker decision making is essential at most levels.

In the private sector the dominant governance structure has not been traditional unionization but employer-fiat personnel systems, whose outcomes are determined by some combination of employer norms, governmental regulations, and mandates, and the incentives and constraints produced by market forces, in particular the need to attract and retain qualified employees. Subject to economic constraints, plus governmental constraints with respect to discrimination, minimum pay, hours of work, safety, and the like, non-union employers are free to dictate pay and governance methods.

Wachter (2004) identifies several critical factors in any labor-contracting relationship. He argues that the predominance of non-union enterprises is primarily the result of low transaction costs, coupled with their ability to effectively deal with match-specific investments, asymmetric information, and risk—problems handled in union firms through contract. A problem associated with match-specific investments is the possibility of holdup; once investments are made the other party can behave opportunistically and capture ex post quasi-rents. One solution is for workers and firms to jointly invest in firm-specific skills, creating self-enforcing agreements by which both parties have an interest in a continuing relationship. Opportunistic

behavior by non-union employers is constrained as well by reputation. Not so easily solved is the holdup problem faced by union firms with respect to fixed capital investment (Hirsch 2004).

Asymmetric information involves different information among workers and employers, creating a risk that the advantaged party will behave opportunistically. For example, firms possess information on product demand superior to that of workers. Thus, a non-union norm by which firms rarely adjust wages downward, but are relatively free to adjust employment, is self-enforcing. If employers could freely decrease wages they would have incentive to understate the true level of demand, but they do not have incentive to cut employment if demand is strong. A similar but more formal arrangement holds in the union sector—most union contracts allow employment but not wage adjustments (absent negotiation).

Because most worker income is tied to their job, workers are in a poor position to bear company-specific earnings risk. Investors can readily diversify investments and bear such risk. Thus, we expect workplaces to have relatively fixed wage rates, in union companies because it is contractually required and in non-union companies because the implicit contract or norm of fixed wages is largely self-enforcing.

The principal advantage of non-union over union pay and governance determination is not likely to arise from the above factors but, rather, from lower transaction costs. New information is constantly coming to a firm and its workers. It is prohibitively costly to have explicit contract terms for every possible contingency. Although many collective bargaining agreements have broad management rights clauses, a formalized contractual governance structure of a union company limits flexibility and use of discretion by management and workers. Revising contractual terms is costly, all the more so in today's rapidly changing and highly competitive economic environment.

Ultimately, choice of a union (formal) or non-union (less formal) governance structure depends on two questions: (a) Which do you trust—management discretion or governance through union contract? and (b) How competitive and dynamic are product and resource markets? Readers can provide their own answers to (a) and (b). We contend that sectoral and technological change, coupled with increasing competition in the U.S. and world economies, increasingly tilt labor-contracting outcomes toward non-union governance. In today's economy union governance has proven to be an expensive minority model. This disadvantage is most apparent in the evidence on firm profitability (where union wage premiums fail to be offset by productivity improvements), investment, and growth (Hirsch 2004). As long as there is a gap in performance, the dominant form of workplace governance will remain one of management norms.

Approaches to Workplace Voice and Cooperation in Nonunion Workplaces

Below we identify alternative paths (none politically likely) that could lead to workplace gains in a world where private sector unionism remains limited. We start by asking what it is that workers want. The Worker Representation and Participation Survey was administered in the United States in the early 1990s. The results of the survey, along with similar surveys in other countries, are discussed in Freeman and Rogers's *What Workers Want* (1999) and in subsequent literature. Relevant findings that emerge from the survey are the following. First, many workers want greater voice and participation in workplace decision making, but the voice they seek is as much individual voice as the collective voice associated with traditional unions. Second, workers want a more cooperative and less adversarial worker-management relationship, coupled with management support for worker participatory organizations. Third, workers want not just to express themselves but also to have their views affect workplace outcomes in meaningful ways. And fourth, workers see management resistance as the primary obstacle to worker participation and cooperation. Despite some differences, the expressed wants and concerns of workers are similar in union and non-union workplaces.

The inferences we draw from these results are as follows. First, the current system often leads to an underproduction of worker voice/participation and worker-management cooperation in union and non-union workplaces. Second, the adversarial relationship envisioned and reinforced by the NLRA does not appeal to workers. And third, greater voice and cooperation will not evolve from today's status quo.

Ideally, a given policy proposal or path should satisfy four criteria, although this may not be possible given inherent tradeoffs among some of the criteria (for example, greater worker voice versus limited rent seeking). First, proposals should be value enhancing for the parties and the economy. Second, reforms should facilitate enhanced voice (including some freedom to choose whether and how to exercise that voice), cooperation, and the flow of information within non-union workplaces. Third, any arrangement should constrain rent seeking and opportunistic behavior by workers and employers. And fourth, reforms should allow for variation across heterogeneous workplaces and be flexible within workplaces over time.

We outline two paths that might encourage value-enhancing workplace governance. We focus on non-union workplaces, although what happens in the non-union sector will affect outcomes in the union sector. Due to space constraints, discussion is brief.[2] This is not to deny that the details are important.

Reform of Sections 8(a)(2) and 2(5)

NLRA provisions that affect worker participation within non-union firms include Sections 8(a)(2) and 2(5). The former prohibits employer domination or support for any labor organization. The latter defines a labor organization as one in which employees participate and that has the purpose, in whole or in part, to deal with employers over grievances, disputes, wages, rates of pay, hours of employment, or conditions of work. The legitimate goals of the provisions are to prevent employer-dominated worker groups that would effectively stop workers from choosing an independent (traditional) union and to restrain employer interference with a traditional union that is recognized as workers' exclusive representative.[3] Such provisions may also restrict development of non-union vehicles for employer-employee cooperation and productivity-enhancing worker voice. Although unions are concerned that such worker groups might become a substitute for traditional unions, it is also possible that the process of electing worker representatives and the exercise of voice in non-union companies would complement the organization of traditional unions (Estlund 2002). Other developed countries, most notably Canada, bar company-dominated unions but do not foreclose employer-initiated or -supported worker groups that might engage in discussion over compensation and working conditions. Employer-supported non-union employee groups are permitted and not uncommon in Canada, while traditional unions and collective bargaining operate at levels higher than in the United States.

We support modification of NLRA restrictions on employer-sponsored work organizations. A change that would best reflect our four reform criteria would maintain restrictions preventing company domination of traditional unions while permitting the development in non-union companies of worker-selected representatives. These non-union groups would not participate in formal collective bargaining but could communicate with management and participate in workplace discussions, including those regarding pay, grievances, and working conditions. Our recommendation is to change Section 2(5)'s definition of labor organization to include only those entities that have been certified by the Board, or recognized by an employer, as an exclusive collective bargaining representative under Section 9.

This modification, similar to a proposal by Estreicher (1994) and to a House-passed Taft-Hartley Bill in 1947, would permit employers to create or maintain employee groups that discuss terms and conditions of employment, so long as those groups are not labor organizations as defined by a revised Section 2(5). This permits employers virtually unfettered opportunity to promote the sharing of information without the specter of a Section 8(a)(2) violation, while maintaining the major policy aims of that provision. Section

8(a)(2)'s goal of preventing employers from coercing or misleading employees into thinking that they have independent representation will be maintained. Unlike other proposals, such as the TEAM Act, which do not alter the definition of "labor organization," the proposed modification ensures that all non–Section 9 entities lack the protections that independent labor organizations enjoy under the NLRA. Thus, employers and employees are able to engage in information sharing without fear of violating the NLRA, yet those employees who want representation by an independent union may pursue that goal without any interference by the employer-sponsored work group. This heightens employee choice and encourages union and employer competition in responding to employee demands.

Employers are currently able to interfere with the employees' decision of whether or not to pursue traditional unionism with little cost. Accordingly, modification of Section 2(5) should be accompanied by changes to the NLRA that strengthen the Board's ability to eliminate employer interference. In this same vein, Estreicher (1994) has identified the need to proscribe work groups created in response to an organizing campaign, to strengthen protections against retaliatory discharges, to increase union access to employees, and to decrease the incentive to delay the representational process through litigation.

Current 8(a)(2) law makes worse off employees who do not want traditional union representation but would like more input in a less formal system. The proposed changes expand opportunities for worker input. Employees preferring an independent union can still pursue that path. For employees who want enhanced voice but do not want a union or are employed at a firm where a union is not politically possible, the proposed loosening of Section 8(a)(2) restrictions create an opportunity for voice.

Although likely to be welfare enhancing, changes in 8(a)(2) and/or 2(5) are not likely to bring about large-scale change. Despite management protestations, current law (weakly enforced) does not provide an overwhelming barrier to non-union worker participation programs, the use of which may be limited chiefly by management reluctance to increase worker participation. Relaxation of 8(a)(2) and 2(5) restrictions would be a change in the right direction, encouraging and publicly sanctioning participation and employee-employer cooperation in non-union companies. It is difficult to see such a move greatly damaging traditional unionism. Substitution does not appear widespread in other countries, although labor relations environments in other countries differ from that in the United States. Nor should our goal be to bolster traditional unionism per se. Both competition and complementarity between union and non-union vehicles of worker democracy and participation are likely to pull traditional unions in a direction

aimed more at value creation and less at rent appropriation. The highly competitive environment in which U.S. firms operate will provide both an incentive to develop value-enhancing innovations in workplace governance while at the same time constraining developments that transfer rents but do not add value. If value-enhancing innovations develop, adoption could be widespread; if not, we will see little change.

Change the Labor Law Default

A broader reform is a change of the labor law default from its current *not union* setting to an alternative setting that invokes a governance structure with independent worker voice (but not collective bargaining), perhaps along the lines of German workers' councils. The default structure could be waived or replaced following the approval of workers *and* management. Although the default can be waived (just as with today's non-union default), many or most workplaces will not do so. Economic agents exhibit behavioral inertia, often sticking with an existing rule or environment as long as it does not differ too much from the preferred choice. More important, the default signals a norm that the state (or employer, etc.) has deemed appropriate. The default is not a mandate, however, but a starting point (or bargaining "threat point") from which the parties are free to move.

We see virtue in a default that establishes some form of independent worker association, although not one with full collective bargaining rights. Workers would retain their current right to form independent unions (without management approval). The default mechanism would specify standard procedures by which workers and management might discuss, negotiate, and approve mutually beneficial changes. We cannot predict precisely how any given system might evolve and operate, and the default will not function well in all workplaces. We suspect that in many (or most) workplaces, workers would not invoke their right to engage in collective voice. In other workplaces, the employer and workers (in the form of unions or worker associations) will have incentive to move away from the default and develop proposals for participatory value-enhancing governance structures. Over time, experience with such a system will lead to administrative and legislated changes in the default.

The inability to identify in advance all outcomes of a given reform is not a fatal flaw. The same can be said of any change (for example, the NLRA in 1935). Moreover, laws and regulations evolve in response to changing benefits and costs. Adoption of a new workplace default would set off no small amount of activity among management, workers, and workers' agents to communicate, negotiate, and arrive at alternatives that make the parties better off. Such a major change in employment law obviously requires thorough analysis and careful design. The actual working of such a system, however,

will be determined in no small part by the way it evolves in the workplace, courts, and regulatory agencies.

The Internet

The Internet has sharply lowered communication costs and is changing the way in which unions, companies, worker groups, policy advocates, and the public at large interact. With or without labor law reform, the Internet will play an important role. For example, a long-standing labor law issue has been the question of permitted access by union representatives (both employees and organizers) on company property. Existing law (for example, *Lechmere*) significantly restricts such activity. The Internet provides a virtual location or web site(s) where employees can obtain and exchange information with union organizers, their incumbent union, their employer, or any other number of workplace groups or associations. Freeman (2005) suggests that the Internet may also make possible the evolution of other forms of worker associations (from "Webbs to the Web"), organized not so much around collective bargaining with a particular employer but around political or workplace issues, be they national (for example, trade legislation or changes in Federal Labor Standards Act hours regulations) or "local" (for example, changes in IBM pension calculations). Whatever the evolution (or revolution) in future non-union and union employee participation, electronic communication will play an important if not critical role. We cannot say with any degree of confidence what that specific role will be or what that future will look like.

Conclusion

The NLRA has played an important role in the development of private sector unionization. On its seventieth anniversary, we choose to look forward rather than backward. We have suggested labor and employment law reforms that might facilitate the development of greater voice and cooperation in the non-union private sector while providing the impetus for unions to create joint value in an increasingly competitive world. Even with the adoption of such reforms, the economic, social, and political environment will do more to determine labor outcomes than will labor law. Although we prefer the path of reform, the more likely scenario is one with no major labor law innovations, with workplace governance evolving in reaction to shifting opportunities and constraints.

Notes

1. All figures in the text on union membership since 1973, compiled from the Current Population Survey (CPS), are from www.unionstats.com, described in Hirsch and Macpherson (2003).

2. Our working paper discusses other reforms and provides greater detail (Hirsch and Hirsch n.d.). We include a discussion of "conditional deregulation" (Levine 1995) whereby employers and freely elected worker groups can jointly agree to exempt their workplace from selected labor regulations and the weakening of federal preemption on state innovations in labor law (see Freeman's paper in this symposium).

3. An excellent volume edited by Kaufman and Taras (2000) includes not only a paper by Estreicher but several papers examining company-supported worker groups in the United States (pre- and post-NLRA) and in Canada.

References

Estlund, Cynthia. 2002. "The Ossification of American Labor Law." *Columbia Law Review,* Vol. 102, no. 6 (October), pp. 1527–612.

Estreicher, Samuel. 1994. "Employee Involvement and the 'Company Union' Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA." *New York University Law Review,* Vol. 69, no. 1 (April), pp. 125–61.

Freeman, Richard B. 2005. "From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes." NBER Working Paper No. 11298, May.

Freeman, Richard B., and Joel Rogers. 1999. *What Workers Want.* Ithaca, NY: Cornell University Press.

Hirsch, Barry T. 2004. "What Do Unions Do For Economic Performance?" *Journal of Labor Research,* Vol. 25, no. 3 (Summer), pp. 415–55.

Hirsch, Barry T., and David A. Macpherson. 2003. "Union Membership and Coverage Database from the Current Population Survey: Note." *Industrial and Labor Relations Review,* Vol. 56, no. 2 (January), pp. 349–54, and accompanying database at *www.unionstats.com.*

Hirsch, Barry T., and Jeffrey M. Hirsch. n.d. "Which Should You Trust? Management Discretion or Contractual Governance?" Unpublished paper, Trinity University and University of Tennessee.

Kaufman, Bruce E., and Daphne Gottlieb Taras, eds. 2000. *Nonunion Employee Representation: History, Contemporary Practice, and Policy.* Armonk, NY: M. E. Sharpe.

Levine, David I. 1995. *Reinventing the Workplace: How Business and Employees Can Both Win.* Washington, DC: Brookings Institution.

Wachter, Michael L. 2004. "Theories of the Employment Relationship: Choosing between Norms and Contracts." In Bruce E. Kaufman, ed., *Theoretical Perspectives on Work and the Employment Relationship.* Champaign, IL: Industrial Relations Research Association, pp. 163–93.