XI. The Limits of NLRB Certification and Its Alternatives

The Employee Free Choice Act: A Reality Check

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The AFL-CIO, as well as its allies such as American Rights at Work, has invested a great deal of time, energy, and money in promoting passage of the Employee Free Choice Act (EFCA). Those of us who believe in collective representation hope that this initiative will fulfill the hopes of its promoters and produce a major advance in the number of workers covered by collective agreements. However, with continuing control of Congress and the White House by Republicans, the odds against passage of the Act would seem to be high. Even if it should surmount the odds and pass, there are reasons to expect that the results will, unfortunately, fall short of expectations.

Among the key elements of the Free Choice Act that are intended to spark new organizing are card-check certification, first-contract arbitration, and stiffer penalties for employers who offend the law. Since the commission by employers of unfair labor practices during certification election campaigns and stonewalling during the negotiation of first contracts are common practices, it seems obvious to American unionists that the establishment of procedures designed to counter those practices will significantly improve the labor movement's organizing prospects. Maybe, but that is not what the Canadian experience indicates. In the private sector, where industrial relations are regulated by a legal framework similar to the one in effect in the United States, union density and bargaining coverage are falling even in provinces such as Saskatchewan and Quebec that have card-check and first-contract arbitration clauses in effect (Adams 2006a). In the past several decades, union density in the Canadian private sector has fallen from about

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30 percent to less than 18 percent (Godard 2003; Adams 2006a). Despite devoting significant new resources to union organizing in the 1990s, Canadian unions have been unable to recruit enough new members to make up for attrition due to industrial change (Jackson and Schetagne 2004). Moreover, the entry into Canada of aggressively anti-union employers such as Wal-Mart may have emboldened employers to take stronger positions on union avoidance. Despite a well-funded and strongly focused campaign and the Canadian legislative advantages, the United Food and Commercial Workers Union was unable to achieve a collective agreement with any Wal-Mart outlet through 2005. When issues in dispute at one certified store in Quebec were submitted to first contract arbitration, the company shut down the store (Adams 2005).

Research in the United States indicates that nearly 60 million currently unorganized American workers would like to have collective representation via government-certified agents. There can be little doubt that overt employer opposition is a major cause of this unfulfilled demand. The Employee Free Choice Act is designed to make it costly for employers to thwart unionization by disobeying the law as they now do frequently with impunity. The theory is that fear of costly penalties will result in less law breaking, and less law breaking will result in more successful organizing. The theory may be true, but, even if it is, how much of a difference will it make?

The Canadian experience indicates that the net benefit will be minimal. Employer opposition is effective even when employers refrain from illegal activities. Most unorganized Canadian employers make it known that they do not want to deal with a union and that any effort at unionization will be regarded as an unfriendly challenge to managerial competence and good will (Bentham 2002). Although illegality is not as prevalent in Canada as it is in the United States, most employers take the union avoidance steps that are legally available to them when the union organizer comes to call. In doing so they create a union-demonizing atmosphere. Combined with the availability of legal union avoidance, the existence of such an anti-union climate is enough to stop most people from organizing. Publicly expressed or even implied employer opposition to certification plants in the mind of the unorganized worker the seed that to organize is to upset the apple car,to make the employer angry, and to identify oneself as a troublemaker. A good example of this effect in practice is the Stelco and Subsidiaries Salary Employees Association (SASSEA; see www.sassea.ca).

When the Steel Company of Canada put itself into a state of bankruptcy protection in 2004, unorganized salaried employees formed an association to represent their interests. Although the company had dealt with certified shop-floor unions for decades, the leaders of the new association felt compelled to

make it clear that the initiative was intended to be a representation mechanism only during the bankruptcy proceedings. They explicitly stated that SASSEA was not a full-fledged trade union and there was no intention of developing it into one. They promised that the identity of those who joined the association would not be divulged to management. In short, even in a situation where collective bargaining is well established, the climate is such that yet-unorganized employees, although clearly desirous of relevant collective representation, are reticent to exercise their basic right to organize in order to participate over the long run in the governance of their employment relations.

Employer opposition is especially effective when coupled with the majoritarian dynamics of the Wagner Act–model legal framework that is in effect in both Canada and the United States. Even if the EFCA goes through, those employees who want representation still will not be able to get a certified bargaining agent unless they are able to convince more than 50 percent of their colleagues to sign up for it. In an atmosphere where employer opposition to unionism continues to be regarded as legitimate, reaching this level of support will be very difficult. Organizing may be marginally easier, but, if the Canadian experience is indicative, it will not make a major difference in the overall outcome.

Over and above these technical reasons for skepticism about the EFCA, the fundamental logic of the Act is flawed. Opponents of collective representation have developed and refined a theory of the union-free workplace that is pervasive in the media, among the general public, and, in my experience, even in the minds of many labor friendly academics and practitioners (Adams 2006b). The Free Choice Act plays right into the hands of the theory's proselytizers. The fundamental tenets of union-free theory are the following:

1. Individual bargaining is the natural alternative to collective bargaining.
2. Unions are "outside organizations" to whom employees turn when they are unhappy with the outcome of their individual efforts.
3. If employees are satisfied with the individual employment relationship they have no need for a union.
4. If unorganized enterprises institute policies and practices that are acceptable, the employees will be satisfied, and being satisfied will have no need for a union.
5. Thus, unionization is a bad thing—the outcome of management failure.
6. The absence of unionization is an explicit indicator of good management.

7. Thus, it is a duty of managers of unorganized enterprises to demonstrate good practice by avoiding unionization.
8. To become unionized is to fail, to be disgraced.
9. The proper role of government is to act as a neutral referee in the contest between unions and unorganized employers for the loyalty and support of the employees. This role lends support to the propositions that unions are "outside organizations," that individual employment relations are the natural norm, and that unionization is the outcome of a failed attempt by management to create social harmony in the workplace.

By implying that the choice between individual bargaining and collective bargaining is legitimate, the Employee Free Choice Act gives credence to this philosophy since each of its tenets follow from the initial statement.

Although many human resource and labor relations professionals are willing to grant the legitimacy of individual bargaining, it is clearly not an effective alternative to collective representation. Every day there are reports in the press about companies announcing major layoffs, changes to their pension plans, the imposition of two-tier wage systems, and movement from full-timers to more part-timers and contract workers. Individuals cannot bargain about such aspects of employment. To have any influence over them they need a collective representative. That is a major reason why the right of all employees to collectively negotiate their terms and conditions of work has been heralded internationally as a fundamental human right. In 1998 the United States joined with nearly all of the nations of the world in affirming the human rights nature of collective bargaining (Bellace 2001).

The agency that is recognized globally as the authoritative source regarding labor norms and principles is the International Labor Organization (ILO). That organization, of which the United States is a prominent member, promotes a labor relations vision that is the polar opposite of union-free philosophy. Its principle concept is that of social partnership, and the main tenets of the paradigm it promotes for all of the world's nations are the following (Adams 2006b):

1. Collective bargaining is an inherently good thing and the preferred process for making democracy effective in the economic sphere of society.
2. Thus, it should be freely accepted as the norm by employees, employers, and society as a whole.
3. It is no disgrace to becoming unionized; indeed, the absence of unionization is an indicator of a potentially problematic, antisocial situation.

4. The proper role of government is encouragement of collective bargaining, not neutrality.
5. While majoritarian certification is an acceptable policy, employees in any uncertified unit have a right to organize themselves and seek recognition in order to negotiate issues such as layoffs, pension change, and work organization change, and employers have a responsibility to recognize and negotiate in good faith with them even if the employee organization is composed of only a minority of the relevant employees and has not been state certified.[1]

The United States, as a member of the ILO, has endorsed its basic philosophy and principles. ILO membership may be interpreted as acceptance of a responsibility to put into place a labor relations system that is consistent with that organization's basic ethos. Should that be accomplished and the tenets of social partnership theory be accepted as the norm in the United States, industrial relations would change dramatically. Employer opposition to unionization would be no more legitimate than opposition to diversity or condoning child labor. The only valid employee choice would be between certified representation by an exclusive agent and representation by less formal means. Although individual employment relations might still be appropriate for employees in very small enterprises, or for high-level managers, the absence of collective representation would automatically be suspect and in need of explanation. In short, the main obstacle to union advancement in the United States is not the law but rather the prevalence of an ideology that demonizes collective representation as a social, economic, and administrative negative.

The promoters of the Employee Free Choice Act would seem to believe that the current legislative framework in the United States is sound but in need of certain revisions in order to become fully effective. Canadian experience does not support that theory. The principle obstacle to the advancement of collective bargaining in North America is the existence of a paradigm that accepts the choice of subservience to management control as legitimate. So long as that paradigm continues to dominate, the decline of the American labor movement is likely to continue. Unfortunately, the Employee Free Choice Act affirms rather than denies the paradigm's legitimacy, thus enhancing its credibility and power to shape behavior.

Note

1. This right exists in the United States but, because of the dominance of the certification process on both thought and practice, is little used. See, for example, Morris 2005.

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