VII. ALTERNATIVE FORMS OF EMPLOYEE REPRESENTATION OR INVOLVEMENT

Returning Members-Only Collective Bargaining to the American Workplace

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Abstract

This paper challenges the conventional wisdom that a union majority is required for collective bargaining under the NLRA. The paper demonstrates that in workplaces where no majority representative has been designated, an employer has a duty to bargain with a minority union for members only. Statutory language and legislative history support the paper's thesis, and existing case law points in that direction. Both before and immediately following passage of the Wagner Act, members-only bargaining was a common phenomenon. In fact, most early Steel Worker and UAW contracts were members-only agreements. The author urges the labor movement to return to its roots by organizing and bargaining on a members-only basis.

Conventional Wisdom and Historical Wisdom

According to latter-day conventional wisdom, under the National Labor Relations Act (NLRA or Act),[1] a labor union does not have a right to engage in collective bargaining unless it represents a majority of the employees in an appropriate bargaining unit. But as Sportin' Life in *Porgy and Bess* reminded us about conventional wisdom, "It ain't necessarily so" (Gershwin 1934).

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During the early years following passage of the Act, it was conventional wisdom that in workplaces where employees had not yet chosen a majority representative, majority status was not essential to the collective bargaining process. That early wisdom represented an accurate reading of the statute. It is an ironic twist of history that the perception that majority representation is the sine qua non of collective bargaining ever developed, for neither the National Labor Relations Board (NLRB or Board) nor the courts have ever held that an employer has no duty to bargain with a minority union for its members only when that union does not claim to be the exclusive representative of all the employees in the unit (Morris forthcoming: chap. 9). On the contrary, all of the decisions relevant to this issue point in the direction of such a qualified duty to bargain.[2]

For many years, it has been fashionable to denigrate the Wagner Act, to view it as an outmoded Depression-era antique that cannot meet the needs of the modern-day economy. Although it is late, it is not too late to reverse that shortsighted view of the Act and to begin providing the means to reclaim the basic right of association under the Act for the American workplace. Notwithstanding that the Act was weakened at the edges by the Taft-Hartley and Landrum-Griffin Acts and by several key Supreme Court decisions, its core provisions remain intact. And, despite much wishful thinking to the contrary, "encouraging the practice and procedure of collective bargaining"[3] continues to be the official national labor policy.

Despite the apparent ineffectiveness of the basic provisions of the Act (Compa 2000:18; Morris 1998:317) those provisions are nevertheless alive and well. There is nothing outmoded about the 14–word phrase in section 7 that guarantees that "employees shall have the right to . . . bargain collectively through representatives of their own choosing." When accurately construed, section 7 can credibly reinforce what the international community recognizes to be fundamental human rights.[4] Those rights first became enforceable in the United States as a matter of general federal law with the enactment of section 7(a) of the National Industrial Recovery Act (NIRA)[5] in 1933. That provision, however, was seriously flawed because of its lack of adequate enforcement procedures—the symbolic Blue Eagle was almost its only medium of enforcement (Garrison 1936:138). Therefore, to correct that deficiency, Senator Wagner conceived and guided to passage his 1935 bill, which contained the same substantive features and practices that had prevailed under section 7(a), but with the addition of the new NLRB[6] that was expected to provide effective administration and enforcement. The Wagner Act was thus not intended to make new law, and for the most part it did not (NLRB 1949:1312 and 1611).

Union Membership and Union Bargaining

Organized labor in the early Wagner Act years understood and appreciated, as was demonstrated under the NIRA and earlier, that collective bargaining was intertwined with the concept of union membership. In those days, unions normally negotiated only on behalf of their members, and majority status was irrelevant to the bargaining process except to the extent that the size of a union's membership was related to its economic power—power that was commonly measured by its ability to strike. Even the unions' penchant for closed-shop agreements fitted this connection between membership and collective bargaining. But when a union was not strong enough to obtain a closed shop, or even full recognition, it frequently settled for a members-only collective agreement (Carlson 1992:779; Morris forthcoming: chap. 1), for this was considered a logical step in an organizational process that would eventually lead to full recognition.

Members-only collective agreements were fairly common both before and after passage of the NIRA. A report by the National Industrial Conference Board at the end of 1933 reveals that employee-members of independent trade unions who were represented through members-only bargaining often worked side by side with other employees who were either nonunion and unrepresented or were represented by company unions. Members-only collective bargaining was a common practice in many establishments. In fact, the Conference Board data indicate that 45 percent of all manufacturing and mining companies that engaged in collective bargaining with independent trade unions in 1933 bargained with minority unions on a members-only basis; the other 55 percent bargained on an exclusive basis. Approximately 21 percent of all the independent trade union members who were employed in those industries were represented by minority unions (Conference Board 1933:16). Such statistics dramatically portray the eclectic nature of union representation in manufacturing and mining during the section 7(a) period, and they confirm that members-only bargaining with independent minority unions was a common phenomenon in those industries. Manufacturing and mining were certainly not unique in this regard, for the same practices prevailed elsewhere (Carlson 1992:804).

Following passage of the Wagner Act, members-only bargaining not only continued to flourish, but its usage also actually increased because the practice proved pragmatically useful to both labor and management. The industrial relations community was thus putting into effect what scholarly comment on the Act had already concluded. In 1936, E. G. Latham, a fellow of the Social Science Research Council, wrote as part of his analysis of the new Act that "it

appears to be a reasonable construction [that] the employer may be bound to bargain with minority groups until . . . '*proper majorities*' have been selected" (453, emphasis in original). He concluded that "*it is reasonable to suppose that where there is no majority organization at all . . . minority rights are . . . reserved*" (Latham 1936:456, n. 65, emphasis added).

As reported by the Bureau of National Affairs in 1938, of newly signed collective-bargaining contracts, members-only agreements were at least as common as exclusive recognition agreements,[7] and their coverage was perhaps even more extensive. For example, by 1939, of the 445 contracts signed by the CIO's Steel Workers Organizing Committee, 85 percent provided for members-only recognition; in fact, those contracts covered 98 percent of all workers under Steel Worker agreements[8] (see also Brooks 1940:166). Not surprisingly, these agreements were eventually replaced by exclusive recognition agreements (Brooks 1940:166; however, in 1940 the U.S. Steel contracts were still "for members only" [Brooks 1940:248]).

What occurred in steel was also occurring in many other industries (Millis 1942:24). General Motors was a part of that pattern, though reluctantly, after the sit-down strikes; and Chrysler followed suit (Fine 1969: 266–312 and 328). The members-only agreement thus emerged as a critical United Automobile Workers (UAW) organizational device. By 1938, of all UAW contracts, 64 percent were members-only agreements.[9] And by 1942, nearly all the plants where the UAW had first achieved recognition on a members-only basis were now locked in for "sole bargaining rights" (McPherson 1942:595). Members-only agreements had proven to be useful stepping stones to majority membership and exclusive-representation bargaining.

By the early forties, however, these members-only agreements had become increasingly rare. Unions were now bypassing that early bargaining stage, seeking instead—and in most cases achieving—exclusive majority-bargaining rights directly through NLRB representation procedures. The union success rate through this route was phenomenal. Unions won recognition in more than 85 percent of their representation cases during the Board's first decade.[10] Consequently, out of sheer convenience, Board elections became the favored organizational device of most unions, and in a relatively short period of time that approach became habit-forming. Therefore, after World War II, the labor movement made no visible effort to resume organizing through members-only bargaining. And employers, needless to say, had no reason to question dependence on the election process, for elections provided them with an ideal forum in which to mount offensive campaigns against union representation. In time, NLRB elections became the centerpiece of the statute and eventually the established norm. Consequently, it is not surprising that during the following years, when unions were busily distracted by massive amounts of liti-

gation engendered by the Taft-Hartley Act, members-only bargaining was effectively forgotten. Although such institutional forgetfulness may be understandable, it is nonetheless regrettable, for the premature abandonment of minority-union bargaining undoubtedly contributed to the steady decline in union organizing.

Legislative History and Statutory Text

It is now time for unions to revive their institutional memory and return to their organizational roots. When they do so, they will find both history and the law on the side of members-only bargaining. Despite the passage of time and the wide acceptance of the current version of conventional wisdom, in workplaces where there is no section 9(a) majority representative the Act still mandates that an employer has a duty to bargain with a less-than-majority union for its employee-members only. This perhaps startling legal conclusion is supported by compelling statutory text, remarkable legislative history, and constitutional considerations that are firmly based on the First Amendment's protection of the right of association.

The history of Senator Wagner's first legislative attempt, his 1934 Labor Disputes bill and that of his ultimately successful 1935 National Labor Relations bill (Morris forthcoming: chaps. 2 and 3), demonstrates that the bargaining provisions in both bills were consciously intended to protect minority-union bargaining, notwithstanding that the ultimate goal of the 1935 bill was to encourage majority-rule bargaining. The history of the enactment of the 1935 bill, which became the Wagner Act, positively shows that minority-union bargaining preliminary to mature majority-based exclusive bargaining was intended to be fully protected by the text of the Act. Although many aspects of that history support this conclusion (Morris forthcoming: chap. 3), space and time permit mention of only a few, including one especially revealing feature that has not been previously noticed.

It should first be noted that the original bill Senator Wagner introduced in 1935 (NLRB 1949:1295) did not contain a separate section 8(5),[11] the duty-to-bargain unfair-labor-practice provision. Wagner and Leon Keyserling, his legislative assistant and primary author of both bills, were of the opinion that such a specific provision was unnecessary because the employer's duty to bargain was adequately covered by the broad bargaining duty in section 7 under which an employer's refusal to bargain would represent an *interference* with the employees' right to bargain collectively, and hence would be enforceable under section 8(1)[12] (NLRB 1949:1419 and 2102).

Section 9(a), with its requirement of exclusivity *when and if* employees choose a majority representative, was the bill's only limitation on the duty to bargain. By its very terms it is a conditional clause.[13] The bargaining require-

ment itself, however, was originally contained only in sections 7 and 8(1), with the latter providing the correlated enforcement mechanism. The original duty to bargain was thus based only on the simple, but elegantly worded, previously noted 14–word vintage phrase in section 7. I characterize that phrase as "vintage" because of its long-established clear meaning, the evolution of which can be traced in a direct line of succession through identical text, first from a proclamation by President Wilson in World War I (Rubinow 1936:11), then to the preamble of the Norris-LaGuardia Act,[14] then to the corresponding phrase in section 7(a) of the NIRA,[15] and finally to its inclusion in section 7 of the Wagner Act, where it remains today. When Congress passed the Wagner Act, it was reenacting without change the substantive bargaining requirements that had prevailed under section 7(a) (indeed had prevailed earlier as a matter of general policy), including codification of the 1934 *Houde*[16] decision. That case had established the doctrine of bargaining exclusivity following the election of a majority representative, but significantly left standing an employer's duty to bargain with minority unions prior to such majority designation[17] (Lippman 1949:2252; Sargent 1934:278–80; Smethurst 1935:145; Wickersham 1935:971 and 973).

The bill's belated inclusion of a separate duty-to-bargain unfair-labor-practice provision was an afterthought, though it did not change the substantive bargaining requirements of sections 7 and 8(1). In response to the urging of Francis Biddle (e.g, NLRB 1949:1455 and 2649) chairman of the old NLRB, section 8(5) was added two and a half months after introduction of the original bill (NLRB 1949:2285). Although Wagner finally agreed to its inclusion, he and the Senate committee, and later the House committee, made it abundantly clear that all four separate unfair-labor-practice provisions following section 8(1)—including this new section 8(5)—were included only to amplify and spell out specifically the most troubling unfair labor practices, but they would "not . . . impose any limitations or restrictions on the general guarantees" of sections 7 and 8(1) (Senate Report, NLRB 1949:2309; see also NLRB 1949:2333 and 2971).

The language of section 8(5) (which Biddle had drafted) and related congressional commentary in the legislative history make it abundantly clear that this provision was never intended to exclude the requirement of a duty to bargain with a minority union where there was not yet an exclusive section 9(a) majority representative. That conclusion is reinforced by a feature in that history that has not heretofore been recognized. After the 1935 bill was introduced and referred to the Senate Committee on Education and Labor, Biddle presented to that committee for its consideration two alternative versions of section 8(5). Here, verbatim, is the text of those versions as they were appended to the printed bill of S. 1958 (Casebeer 1989:130):[18]

> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> or, (5) To refuse to bargain collectively with employees through their representatives, chosen as provided in section 9(a).

The committee, which was dominated by Wagner and Keyserling (Bernstein 1969:340; Casebeer 1987:295, 302–303, 341–43 and 361; Casebeer 1989:76; Keyserling 1960:215), adopted the first version, which is the text contained in the present Act. By selecting that version, Congress gave assurance that the duty to bargain with a majority union would not exclude the duty to bargain with a minority union prior to the establishment of majority representation. Had the drafters intended to exclude such minority bargaining they would have selected the second version, for it would have specifically limited the bargaining duty under section 8(5) to majority unions "chosen as provided in section 9(a)." Here is the legislative "smoking gun" that proves that the duty to bargain under the Act was not intended to be confined only to unions that meet the majority requirement of section 9(a). Absent such a majority, the duty to bargain contained in sections 7 and 8(5) remains fully binding until some union activates the majority condition in an appropriate unit, thereby triggering the application of section 9(a).

Minority-union bargaining prior to the designation of majority representation was not even an issue during the congressional debates, for it was not viewed as controversial. There was, however, considerable controversy about the ultimate configuration of mature majority-based bargaining. Proponents of the bill believed that "majority-rule" bargaining—the bill's solution to the problem of dual unionism—would mean more effective bargaining, hence this was the type of mature bargaining that Wagner and his supporters sought (NLRB 1949:1419; Summers 1990:539). On the other side of that debate, the employer lobby advocated plurality bargaining, regardless of majority representation, and opposed majority rule as a denial of the rights of minorities (Bernstein 1950:109; Lorwin and Wubnig 1935:191–92, n.44; Sargent 1934:279; Wickersham 1935:971 and 973). In that context, employers vigorously defended the right of minority-unions to engage in collective bargaining.

Attention during the congressional debates was concentrated on the anticipated presence of multiple unions and on whether a minority union should have bargaining rights *after* a majority union had been chosen. There was no discussion about minority-union bargaining *prior* to the establishment of majority representation, and numerous statements by the proponents of the bill showed full recognition that the majority-rule provided by section 9(a) would apply to bargaining only *after* the employees had exercised their selec-

tion of a majority representative (e.g., NLRB 1949:2336 and 2974). There was never a question voiced about the nonapplicability of that restriction *prior* to majority selection.

We are dealing with a fundamental right of constitutional proportions. The Supreme Court, in its initial review of the Act in *NLRB* v. *Jones & Laughlin Steel Corp.*,[19] affirmed that "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . is a *fundamental right*"[20] (see Adams 2001:521; Gross 2002). That right is of the same nature—and is indeed protected—as freedom of association under the First Amendment to the U.S. Constitution. Judicial confirmation of the minority-union bargaining thesis outlined herein would be consistent with constitutional requirements[21] (Morris forthcoming: chap. 6).

Conclusion: An Organizing Union Needs to Act Like a Union

It is now time for unions to resume organizing by recruiting dues-paying union members,[22] not card-signers and potential voters. By doing so, they will be complying with the national labor policy expressed in the Act. And even if employers refuse to bargain with these minority unions—which is likely, at least until the bargaining requirement is legally confirmed—membership-based organizing makes infinitely more sense than the alternative. Even without the advantage of formal collective bargaining, an actively organizing members-only union can make its mark in the workplace simply by acting like a union. It can assist employees in many different ways, especially concerning their engagement in section 7 concerted action for "mutual aid or protection" (Morris forthcoming: chap. 11), for example, by offering a union steward to serve as the fellow-employee available to assist any employee who is confronted with a disciplinary interview under the *Weingarten*[23] and *Epilepsy Foundation*[24] requirements. It can also provide employees with a variety of social and economic services that are not dependent upon a collective bargaining relationship (Hyde et al 1993:663–64; Hecksher 2001:66–69), such as providing advice and assistance concerning a wide variety of worker-related services, for example, health and safety issues under state and federal law, workers' compensation, unemployment compensation, minimum wage and overtime requirements, disability requirements and benefits, social security and welfare benefits, vocational rehabilitation, state and federal antidiscrimination laws, and 401(k)[25] and other financial issues. This fledgling union can thus become a clearinghouse for information and action, even serving as an organizational link to an assortment of community (Osterman et al. 2001:12) and political activities. Most of these activities, some of which fall within the rubric of "mutual aid or protection" and some of which do not, are ideally suited to the role of a new union that is seeking to prove its worth and expand its membership.[26] Even-

tually, however, the primary function of this new union will be to bargain collectively for its members; ultimately, when it reaches majority status, it will bargain in the familiar fashion for every employee in the bargaining unit.

Acknowledgment

I am indebted to Clyde Summers for having reidentified the foregoing qualified duty to bargain in his 1990 Kenneth Piper lecture, *Unions Without Majority: A Black Hole*.

Notes

1. 49 Stat. 449 (1935), as amended, §§ 1–19, 29 U.S.C. §§ 151–69.

2. See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938); *International Ladies Garment Workers* v. *NLRB* (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 736, 741–43 (1961); *Retail Clerks* v. *Lion Dry Goods, Inc*., 369 U.S. 17, 29 (1962); *The Solvay Process Co.*, 5 NLRB 330 (1938); *The Hoover Co.*, 90 NLRB 1614 (1950); *Consolidated Builders, Inc.*, 99 NLRB 972 (1952); *NLRB* v. *Lundy Mfg. Corp*., 316 F.2d 921 (2d Cir. 1963), cert. denied, 375 U.S. 895 (1963), enforcing 136 NLRB 1230 (1962).

3. § 1.

4. See Convention No. 87, International Labour Organization, *Concerning Freedom of Association and Protection of the Right to Organize*, July 9, 1948, 68 U.N.T.S. 17, and Convention 98, International Labour Organization, No. 98, *Concerning Right to Organize and Collective Bargaining*, July 1, 1949, 96 U.N.T.S. 257; ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conf., 86th Sess. (June 1998).

5. Chap. 90, § 7(a), 48 Stat. 195 (1933).

6. The prior (old) National Labor Relations Board had been created by Exec. Order No. 6073, June 29, 1934, pursuant to Joint Resolution No. 44, 73rd Cong., H.J. Res. 375, 48 Stat. 1183 (1934).

7. *Union Recognition as Shown in Contracts*, 1–A L.R.R.M. (BNA) 781 (1938). Of the 23 "typical" contracts reported, 13 (57 percent) were members-only agreements, whereas only 8 (35 percent) were exclusive agreements (2 were ambiguous as to coverage).

8. *Collective Bargaining Contracts and Industrial Practices: Bargaining in the Steel Industry*, 3 L.R.R.M. (BNA) 553 (1939). See also Brooks (1940).

9. Three hundred forty-three of 537 contracts. *Bargaining in the Automobile Industry*, 2 L.R.R.M. (BNA) 952–53 (1938).

10. 2 NLRB Ann. Rep. 25–26 (1937); 3 NLRB Ann. Rep. 39, 49 (1939); 4 NLRB Ann. Rep. 43, 53 (1940); 5 NLRB Ann. Rep. 17–18, n. 6, 29 (1941); 6 NLRB Ann. Rep. 37, Table 19 (1942); 7 NLRB Ann. Rep. 90, Table 18 (1943); 8 NLRB Ann. Rep. 37, 38, 90, Table 18 (1944); 9 NLRB Ann. Rep. 88, Table 13 (1944); 10 NLRB Ann. Rep. 4 (1946).

11. The present § 8(a)(5).

12. The present § 8(a)(1).

13. The statutory text: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpos-

es, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

14. 29 U.S.C. §§ 102.

15. Chap. 90, §7(a), 48 Stat. 195 (1933).

16. Houde Engineering Corp., 1 NLRB (old) 35 (1934).

17. 1 NLRB (old) at 44.

18. This draft is a revision superimposed on the officially printed version of the bill as originally introduced on February 21, 1935. All changes on the document are either in handwriting or in typed copy on inserted flaps. As indicated by the committee's ultimate adoption of most—but not all—of the proposed changes, this was a preliminary mark-up copy. The original of this draft is in the collection of the Leon Keyserling papers in the Lauinger Library of Georgetown University, which graciously provided me with a photocopy.

19. 301 U.S. 1 (1937)

20. Id. at 33. Emphasis added.

21. See *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979), and *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Id. at 575).

22. Members should "put their money where their mouth is" and thereby have a financial stake in the process, but the amount of dues might be nominal at the organizational stage.

23. *NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251 (1975).

24. Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92, aff'd in pertinent part, 268 F.3d 1095 (D.C. Cir. 2001).

25. 26 U.S.C. §401(k).

26. These nonbargaining activities fit well into the current pattern of social unionism that is gaining support in the American labor movement (Bacharach et al. 2001; Turner 2001).

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