XIV. Learning from the New Deal

The Relevance of the Wagner Act for Resolving Today's Job-Security Crisis

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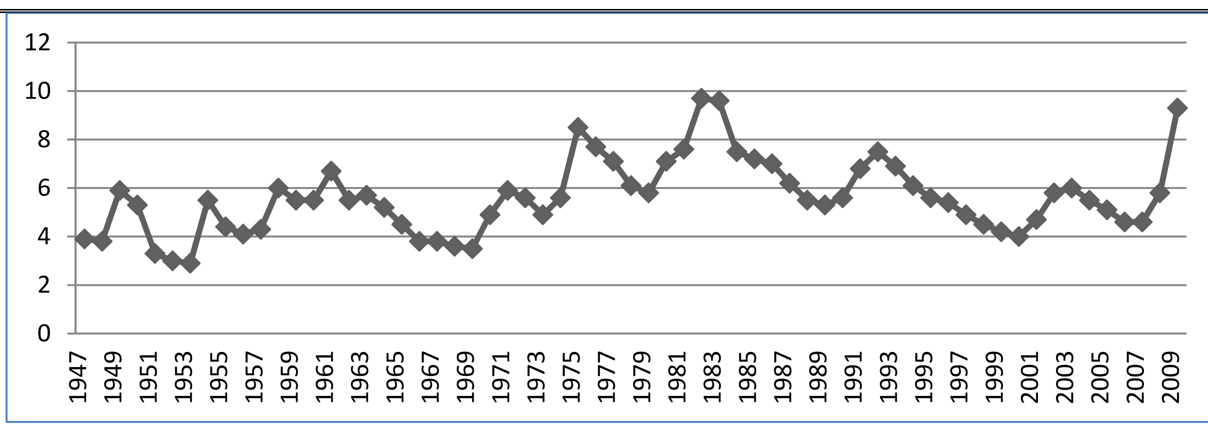
Abstract

In this paper I start with the simple observation that workers are more vulnerable in times of economic contraction than in times of economic growth. The purpose of my paper is two-fold. First is to unpack the underlying reasons for that phenomenon. Second is to propose a solution that makes workers less vulnerable during recession, and which employers can buy into. My solution—to compel bargaining over mass layoffs and plant closings regardless of whether the workers are unionized—is both economically efficient and values the autonomy and dignity of the worker.

Introduction

The world is currently in the midst of an economic contraction (Shin 2009, Homan 2009), which some have dubbed the Great Recession (Samuelson 2010). This recession has greatly impacted job security, as evidenced in part by the increasing unemployment rates. As of January 2010, the U.S. unemployment rate was at 9.7 percent, down only slightly from a high of 10.1 percent in October 2009 (U.S. Bureau of Labor Statistics 2010). The 2009 unemployment rates are also significantly higher than the post–World War II historic rates. During this time period, the annual labor force unemployment rate had never hit 10 percent, although it came close in 1982 (9.7 percent) and 1983 (9.6 percent; U.S. Bureau of Labor Statistics 2008).

FIGURE 1
Percent of Labor Force Unemployed



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During such times, it is natural for labor law and labor relations scholars to think deeply about the impact the economy has had and continues to have on job security. This reflection reveals that, although no one doubts the enormous impact of the economy on job security, the story is much more complicated than the hackneyed maxim—bad times mean job insecurity, and good times mean job security.

This paper does not attempt fully to describe the relationship between economic contraction and job security. Nor do I directly compare the Great Recession with the Great Depression. Insufficient time has passed to fully appreciate the similarities and differences between those two economic phenomena. Rather, I provide two pieces in the job-security puzzle that will ultimately describe the behavior of firms and workers during times of economic contraction and economic expansion. Those puzzle pieces come in part as lessons learned from our experience with the New Deal's labor legislation, the National Labor Relations Act (NLRA), or the Wagner Act, as it was popularly called.

To accomplish my limited goals, I start with the deceptively simple observation that workers are more vulnerable in times of economic recession than in times of economic growth. Given that observation, my twofold goals here are not merely limited but also preliminary. First, I wish to unpack the complex underlying reasons for that seemingly simple observation about worker vulnerability. Second, I describe my proposed solution—one that makes workers less vulnerable during economic recession, and that employers can buy into. My solution—to compel bargaining over mass layoffs and plant closings regardless of whether the workers are unionized—has been developed in another paper (Lofaso 2010) but is introduced here with greater attention paid to bargaining in the context of economic contraction. This article is intended to open a dialogue about the extent to which solutions along the line of collective bargaining value the autonomy and dignity of workers while remaining economically efficient.

The work introduced here is ultimately much more ambitious than the confines of this paper—to describe fully the relationship between firms and workers during time of both positive and negative economic growth. But that ambitious goal will await further work.

Observation: Workers and Firms Are Vulnerable When the Economy Contracts

Unpacking the Observation

Workers are more vulnerable in times of economic recession. There are many reasons for this phenomenon. First, even though firms are always under pressure to cut costs so that marginal revenue equates to marginal cost, during economic contraction, firms will be under more intense pressure to cut costs (Hovenkamp 2009). When faced with this intense pressure in the short run, it is easier to cut labor costs, which are not fixed, than to cut other costs. Firms prefer to decrease labor costs because labor can be easily replaced when economic conditions improve. The more a firm relies on firm-specific capital (e.g., specialized machines to manufacture Toyota parts only for Toyota cars), the harder it is for the firm to buy that capital (because it has to be specially manufactured) and to sell it (because no one else wants it), and therefore the harder it is for the firm to change its productive capacity by changing its stock of the firm-specific capital.

Of course, in the long run, most costs are variable, and firms can thus cut other costs by contracting both labor and capital—by closing plants, for example. But even long-run decisions to sell capital, such as the decision to close plants, often entail cuts in labor costs as well. After all, smaller firms need fewer workers to sustain themselves.

In the short run, though, firms are likely to cut labor costs directly because the gains can be more quickly realized and the cuts more easily reversed. Firms face two main options about how to proceed. First, firms could lay off workers. Second, firms could reduce wages, including benefits. Imagine you are the manager of a firm facing this decision. Your human resources director tells you that layoffs will negatively affect the morale of those workers who remain—because the remaining workers will fear that their jobs are next. But she also tells you that wage cuts also reduce morale because you will have continue to interact with those workers whose wages you just cut.

Given the choice of having to lay off workers or cut wages, managers tend to lay off workers. As one manager recently told me, "It is often easier to lay off the worker, even if you replace that worker with another one at a lower wage, than to deal with the fall-out from the worker whose wage you just reduced." Given the choice between terminating a worker (and possibly replacing that worker with another worker who is willing to work at a reduced rate) and reducing the wage of the original worker, managers will often terminate (and replace).

Truman F. Bewley studied this very same question, asking it this way:

> Why have money wages and salaries seldom declined during post–World War II recessions in the United States and abroad, despite high unemployment and intense competition for jobs? Instead, market pay rates continue to rise during downturns, albeit at a slower rate than during economic booms. Why don't labor markets behave like competitive commodity markets, where prices fall or even plunge when supply exceeds demand? *Why do few firms avoid layoffs by cutting pay and lowering product prices so as to increase sales*? How can the frequency of layoffs be reconciled with the movement within the business community to treat workers humanely? (Bewley 1999:1; emphasis added).

Economists call the "failure of pay rates to fall" wage stickiness, or downward wage rigidity (Bewley 1999:1).

Again, the picture is not so simple as to say that wages are sticky downwards. Trying to describe why is difficult precisely because we are dealing not with commodities but with people, who will have different reactions to managerial attempts to reduce the price of their labor. Recognizing this, consciously or subconsciously, managers faced with economic pressure to cut costs are very likely to initiate a wage cut in more invisible ways. They may, for example, initially refuse to grant the annual pay raise, decrease benefits packages (so as to contain costs), or increase employee contributions to their own benefits.

While these strategies may work in the extreme short run (especially if the economic downturn is temporary), they may not work where the economic pressure is more intense, as in the case of a prolonged recession. Thus, managers faced with prolonged pressure to cut payroll will have to make some even more difficult choices.

Significance of Examining the Question of Job Security

Many observations can be made about the similarities and differences between the world we live in today and past worlds. I focus on one similarity and one difference. In the post–World War II period, there have been cyclical fluctuations in unemployment rates. Accordingly, our high unemployment rate may not be as unprecedented as some sources wish to project[1]; in any event, fluctuations in the unemployment rate are not unprecedented. But what may be unprecedented since World War II is the context in which the current unemployment rate comes: a world of ever-increasing technological change, globalization, and interdependence (Stone 2004). Skills required for workers are changing so rapidly that we would expect higher job displacement rates, as workers move away from manual labor by investing in developing skills needed in today's more technologically advanced market. Some of those workers will be unemployed for a short period until they find another unskilled job; others will voluntarily leave the labor market to pursue educational opportunities, eventually returning to the labor market to find a skilled job; still others will never be able to make the transition from unskilled to skilled worker and will perhaps become part of the structurally unemployed.

In the midst of this change, presumably for humanity's betterment, unemployment rates continue to fluctuate. And so, it is important for us to remember, even when the unemployment rates subside to below 6 percent, as they probably will, that the question of job security remains important. Job security is important even if the most enlightened promises of technological advancement and globalization—a better world with a higher living standard for all—come true. This is so because with change will come displacement—displacement of workers whose skills are no longer needed in a more technologically advanced economy; displacement of workers because the freer movement of goods, services, capital, and labor that results in greater trade benefits for all also guarantees labor market mismatch; and displacement of workers as firms transform the real workplace into a virtual one, resulting in reconceived job duties and descriptions.

With these observations, I explore the following question: What is and should be the law's role in shaping job-security policies?

The Role of the Law

The default job-security rule in the United States is employment at will. That means that employers in most U.S. states may lawfully discharge employees for any reason, good or bad, or for no reason at all (Summers 2000, Roseman 2008, Lofaso 2010). Under this default rule, employers do not act unlawfully even when they act arbitrarily in firing a worker, so long as the employer does not violate some other law, such as federal or state antidiscrimination laws, by discharging the worker.

There are some limitations to the employment at-will doctrine. For example, contractual obligations may make it more expensive to discharge employees who may not be terminated except for cause as contractually defined. But most employees have no such contract, so that exception normally does not apply. Courts have sometimes limited the arbitrariness of the at-will rule by enforcing oral and written promises of job security, notwithstanding the fact that the parties failed to reduce those promises to a formal contract. And sometimes courts have limited the at-will doctrine simply by concluding that its application in a particular instance violates public policy, such as when employers discharge workers for filing workers' compensation claims or for missing work to serve as jurors (Summers 2000, Roseman 2008, Lofaso 2010).

But pertinent to the issue of job security, the law generally privileges management decisions that turn on reasonable business judgments in response to economic circumstances, viewing such decisions not only as good reasons to terminate or lay off workers but also as decisions that should be made unencumbered by others, such as union representatives. Along these lines, the law may be even more lenient when it comes to managerial decisions to close plants during times of economic distress. For example, the Worker Adjustment Retraining Notification Act (the WARN Act, 29 U.S.C. §§ 2101-2109), the federal law requiring covered employers to give workers 60 days' advance notice of a mass layoff or plant closing, makes exception for, among other things, unforeseeable business circumstances. And the National Labor Relations Act (NLRA, 29 U.S.C. §§ 151-169), the federal law that regulates private-sector labor relations by promoting "the practice and procedure of collective bargaining" (29 U.S.C. § 151), permits employers to close plants for any reason—even to avoid unionization and bargaining obligations. In *Textile Workers Union* v. *Darlington Manufacturing Company* (380 U.S. 263, 269 [1965]), the U.S. Supreme Court recognized this doctrine, explaining that "an employer has the right to terminate [its entire] business whatever the impact of such action on concerted activities" protected under NLRA Section 7 (29 U.S.C. § 157). In that context, the court recognized (*id.* at 273-75) a limitation on this otherwise unencumbered managerial right to close shop; an employer may not discriminatorily close down part of its business merely to circumvent its bargaining or other obligations under the NLRA.

To understand why the law privileges managerial decisions to cut labor costs, it is instructive to imagine the vulnerable firm during a recession. In recession the profits of many firms are down, and managers of struggling firms may feel compelled to cut labor costs just to survive. The manager may not want to cut any part of the workforce but is under orders from upper management to reduce payroll expenses. It is this picture of the struggling firm that policy makers in industrialized countries, such as the United States, seem to have in mind when making public policy decisions about workforce reductions. And so, at least in the United States, there is a powerful story favoring the struggling firm that pushes policy makers toward making it as easy as possible for managers to cut labor costs for economic reasons.

There are, however, both theoretical and real limitations on the manager's privilege to cut labor costs through layoff, reduced work hours, and plant closures. As a theoretical matter, the law did not have to develop in the way it did. There are several options open to policy makers other than at-will employment. These options range along the following scale of employer obligations: No obligation → Notification → Information → Consultation → Negotiation → Codetermination. From the employee's point of view, the options range along a scale of rights: No protection → Notification → Information → Consultation → Negotiation → Codetermination (Lofaso 2010). I examine each of these categories in turn. For each category, where applicable I describe how the option has been translated into federal law.

No Employer Obligation/No Worker Protection

This is the basic at-will doctrine that permits employers to terminate workers for any reason, good or bad, or for no reason at all (Bastress 1988, Hirsch 2008, Lofaso 2010). In other words, under this doctrine, employers have no obligation to workers, even good, loyal, and productive workers, to keep them working. As I have discussed, the law could be, and has been, harsh in its application. For example, in *Payne* v. *Western & Atlantic Railroad Company*, (81 Tenn. 507, 1884 WL 469, *6 [1884]), the case credited as the first to articulate the at-will doctrine, a Tennessee state court went so far as to conclude that employers can discharge their employees "even for cause morally wrong, without being thereby guilty of legal wrong." This harsh application took root through the states over the next 75 years into the middle of the 20th century. And although judges and law makers have cut back on the harshness of this rule during the latter half of the 20th century (Bastress 1988, Summers 2000, Muhl 2001, Dana 2004, Hirsch 2008, Roseman 2008, Lofaso 2010), there has been little give on the idea that managers should be free to cut labor costs by termination because of economic reasons.

From the employer's vantage point, this policy can be viewed as valuing the firm's autonomy to make firing decisions or engage in business judgments about labor costs (Hayek 1960, Epstein 1984). And this theory would make sense if, under an at-will employment system, neither side actually had any expectation that the other would remain in the employment relationship. But in general, both parties usually expect the other to stay—so long as things are going well—and both want to limit the other's right to unilaterally terminate the relationship. But whether such a policy actually values the autonomy of the firm, its owners, its managers, any or all, is the subject of another paper. My point here is that, even if there is some important social, economic, or liberty value embodied in the at-will doctrine, that doctrine inflicts at least some harm on workers, and probably on employers as well—neither of whose expectations is well met in the at-will system (Lofaso 2007). In valuing employer autonomy to engage in unencumbered decision making, the law devalues the autonomy of workers to become part-authors in decisions affecting their own working lives and de-dignifies those workers by privileging the decision-making power of employers over worker input (Lofaso 2010).

Notification

The law could compel firms to give workers advance notice of mass layoffs and plant closures. United States Department of Labor regulations (29 C.F.R. § 639.1[a]) reveal the purpose of notification as giving "workers and their families . . . transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market."

Since 1988, federal law under the WARN Act has required managers, in some cases, to give advance notice to workers or their representatives and to state dislocated worker units (Lofaso 2010). The WARN Act covers employees, regardless of whether they are represented by unions.

But employer obligations to notify workers under the WARN Act are greatly limited by the size of the employer, the number of employees terminated or laid off, the length of the layoff, and even the reasons for the layoff. As a threshold matter, the WARN Act covers only those businesses that employ 100 or more full-time workers that effectuate a plant closing resulting in the layoff of at least 50 full-time workers; and businesses that employ 100 or more workers that effectuate a reduction in force of at least one-third of the workforce (for businesses laying off fewer than 500 workers) or for a total of 500 workers (U.S. General Accounting Office 2003[2]). The number of terminations is significant. To illustrate, in *Oil, Chemical and Atomic Workers Int'l Union, Local 7-629* v. *RMI Titanium Co.* (199 F.3d 881, 886 [6th Cir. 2000]), the appellate court found no WARN Act liability where the employer laid off two workers shy of the "number necessary to make this action a mass layoff." Moreover, the employee right to advance notice under the WARN Act (29 U.S.C. § 2101[a][6]); 20 C.F.R. § 639.3[f]) is limited to layoffs exceeding six months, and reduction in work hours "of more than 50 percent during each month of any 6-month period." And employees who retire or employees who refuse transfers are entitled to no advance notice under the act (20 C.F.R. § 639.3[f][3][i]).

The WARN Act also allows for several exceptions, most notably the unforeseeable business circumstances exception (29 U.S.C. § 2102[b][2][A]) and the faltering company exception (29 U.S.C. § 2102[b][1]). Both exceptions, which permit employers to shorten the 60-day advance notification period, show the extent to which this federal law privileges the employer's vantage point or vulnerability over the worker's vulnerability in similar circumstances. For example, employers "may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." Accordingly, federal law (20 C.F.R. § 639.9[b]) does not make employers liable for "sudden, dramatic, and unexpected . . . condition[s] outside the employer's control" or even require employers "to accurately predict general economic conditions that also may affect demand for its product or services."

The faltering company exception, which applies only to plant closings, provides an even clearer example of the employer's legally privileged vantage point. As the court in *Childress* v. *Darby Lumber, Inc.* (357 F.3d 1000, 1009 [9th Cir. 2004]) explained, the employer may order the plant closing without giving full notice where "(1) the employer was actively seeking capital at the time that sixty-day notice would have been required; (2) there was a realistic opportunity to obtain the financing sought; (3) the financing would have been sufficient, if obtained, to enable the employer to keep the facility open for a reasonable period of time; and . . . (4) 'the employer reasonably and in good faith . . . believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.'" In sum, the tangible effects of the unforeseeable business circumstance and the company's faltering financial condition are borne not by the employer, who arguably is in a better position to bear those burdens, but by the workers (Lofaso 2010).

Information

Federal labor law does not obligate employers to provide information, financial or otherwise, to a firm's nonunionized workers regardless of economic circumstances. But there is a well-established duty on employers to provide information to a union relevant to performing its bargaining and other obligations. The Supreme Court, in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), explained that this legal duty requires an employer to furnish unions with information to substantiate, for example, an economic inability to pay wages.

The employer's legal duty to furnish relevant information grew out of the theory that access to information is vital to a robust, well-functioning, industrial democracy that features collective bargaining as its corner stone. This theory has made its way firmly into labor jurisprudence. In *Proctor & Gamble Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979), for example, the appellate court compared an employer's refusal to furnish relevant information upon request as "conflict[ing] with the statutory policy to facilitate effective collective bargaining." Another court of appeals, in *Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979), explained that "[a] broad disclosure rule is crucial to full development of the role of collective bargaining under the [NLRA]" because "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiations cannot occur."

Consultation

United States federal labor law does not require employers to consult with workers either before or after deciding to lay off workers or close a plant. The idea that managers would be legally compelled to consult with workers' representatives prior to make those core entrepreneurial decisions would be viewed by many Americans, at first blush, as antithetical to the basic values underlying the American economic system. Accordingly, I look to the European Union for guidance on this issue.

The European Union Collective Redundancies Directive (Collective Redundancies Directive, 98/59/EC) requires employers who are "contemplating collective redundancies (mass economic dismissals) . . . [to] begin consultations with the workers' representatives in good time with a view to reaching an agreement." Significantly, according to the European Court of Justice in *Keskusliitto AEK ry* v. *Fujitsu Siemens Computers Oy*, Case C-44-08, 2009 ECJ 747, ¶ 38 (Sep. 10, 2009), this duty is "imposed on the employer . . . prior to the employer's decision to terminate employment contracts." The plain language of the directive points out that the purpose of imposing this consultation obligation on employers is to compel discussion about the "ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant."

Negotiation

The National Labor Relations Act is perhaps the world's greatest legislative embodiment of labor's fundamental right to ban together for mutual aid or protection and to bargain collectively over matters of significant interest to workers. As a threshold matter, NLRA Section 7 grants "employees . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 157). To ensure that those fundamental rights are protected, Congress placed five correlative duties on employers, among which is the affirmative duty to bargain collectively with its employees' representatives (29 U.S.C. § 158[5], now codified as 29 U.S.C. § 8[a][5]). By 1947 legislative amendment, Congress further refined the duty to bargain by expressly defining the employer's obligation as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions or employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party" (29 U.S.C. § 158[d]).

In line with the NLRA's uniquely American brand of collective bargaining as liberating the labor market, Congress explained that the duty to bargain does "not compel either party to agree to a proposal or require the making of a concession" (29 U.S.C. § 158[d]). The Supreme Court has repeatedly highlighted this aspect of the duty to bargaining originally by clarifying, in *NLRB* v. *American National Insurance Company* (343 U.S. 395, 404 [1952]), that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." The court later explained, in *H. K. Porter Co.* v. *NLRB* (397 U.S. 99, 102 [1970]), that the National Labor Relations Board (NLRB), the government agency charged by Congress with the authority to administer and interpret the NLRA, "is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."

Section 8(d) (29 U.S.C. § 158[d]) also defines the contours of the statutory duty to bargain, by limiting mandatory bargaining "to wages, hours, and other terms and conditions or employment." The Supreme Court in *Ford Motor Co.* v. *NLRB* (441 U.S. 488, 498 [1979]) and other cases since clarified that these mandatory subjects of bargaining include only matters that are "plainly germane to the 'working environment' " and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.' "

The bifurcation of bargaining subjects into mandatory and nonmandatory has great implications for job-security issues (Lofaso 2010). In particular, courts have construed the NLRA as not requiring bargaining over the actual business decision to close a plant. In *Textile Workers* v. *Darlington Manufacturing Co.* (380 U.S. 263, 268 [1965]), for example, the Supreme Court explained that "an employer has an absolute right to terminate his entire business for any reason he pleases." Then, in *First National Maintenance Corp.* v. *NLRB* (452 U.S. 666 [1981]), the court clarified that the management decision to shut part of its company's business for purely economic reasons was not, under the facts of that case, a mandatory subject of bargaining. Significantly, the court recognized the union's legitimate "interest in participating in the decision to close a particular facility or part of an employer's operations [as rooted in] its legitimate concern over job security" (*id.* at 681). But it nonetheless held that "an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision" (*id.* at 686).

The court in *First National Maintenance Corp.* (452 U.S. at 677 n.15) noted an important corollary to the doctrine that an employer is not obligated to bargain with a majority union over the decision to shut down its plant. In particular, employers remain obligated to bargain over the effects of that decision. The NLRB has further elaborated on the employer duty to engage in meaningful effects bargaining. In *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990), the Board explained that unions are entitled to "as much notice of [a] closing and termination of employees as [is] needed for meaningful [effects] bargaining at a meaningful time."

Codetermination

The law could go farther than compelling negotiation between the parties over the effects of mass layoffs or plant closings. The law could bestow co-decision-making authority on firm and worker representatives over these subjects. A good example of such a system would be one that placed workers' representatives on corporate boards of directors or went so far as to allow labor to determine the scope of layoffs. Codetermination would dignify workers and allow them to have meaningful decision-making authority over their own working lives (Lofaso 2007). But that solution is unlikely to be acceptable to firms in the short run and is certainly much less likely than my proposed solution to be acceptable to firms. Accordingly, discussion of codetermination awaits another paper.

Expanding the Law's Role

Wagner Act Lesson: Using Collective Bargaining To Restore the Free Flow of Commerce

Historical analysis reveals the importance of collective bargaining in dealing with difficult economic issues affecting workers' wages, hours, and other terms and conditions of employment (Befort and Budd 2009). One question presented during the early stages of industrialization was how to get from the observation that employers generally have much more bargaining power than workers to the argument that inequality of bargaining power obstructs the free flow of commerce. Making that connection was important in ensuring the constitutionality of the NLRA, or the Wagner Act as it was popularly called. In other words, the NLRB had to show that inequality in bargaining power eventually leads to greater inequality in the distribution of firm profits (to those with the greater bargaining power), which leads to industrial strife in the form of strikes, which in turn obstructs the free flow of commerce. In *NLRB v. Jones & Laughlin Steel Corporation* (301 U.S. 1, 30-32 [1937]), the Supreme Court ultimately agreed with a variation on that argument and declared the NLRA constitutional.

Although Congress, the NLRB, and the courts have accepted this picture as true, the problem with this picture for free market skeptics is that it ignores the potential obstructions caused by collective bargaining. The economic literature contains studies that showcase these potential obstructions. The challenge for proponents of collective bargaining then is not only to demonstrate its utility in promoting human rights values such as dignity and autonomy, but to show that the labor market is fraught with market failure and that the obstructions created by individual bargaining are thus worse than those created by collective bargaining.

In this short paper, I cannot fully develop the proposition that collective bargaining is socially optimal in all contexts. Instead, I focus on one market failure—the collective action problem—in the context of economic contraction and then show how individual preferences are better implemented through collective bargaining prior to layoffs than through individual bargaining.

Solution: Collective Bargaining To Circumvent the Collective Action Problem

In the context of economic contraction, potential plant closings, or mass economic dismissals, an employer of a nonunionized workforce could not possibly negotiate with every individual about his or her preferences affected by the impending layoff. Many individuals might prefer a pay cut to the layoff. And we have already established that an across-the-board wage cut is often preferable to the firm. And even if the firm were to negotiate with each individual about a pay cut, those individuals cannot bind their coworkers to a wage reduction. Accordingly, firms often make the socially suboptimal decision—to effectuate a mass lay off or plant closing—rather than to reduce wages.

Mandatory collective bargaining or at least consultation prior to making the labor-cost-reduction decision and with full information disclosure circumvents this problem, resulting in the allocatively efficient solution (Coase 1960). Requiring employers and workers representatives, regardless of union status (Bellace 2002), to discuss the firm's financial problem allows the employer to gather information relevant to the decision to lay off or to reduce labor costs in some other way. For example, workers representatives, armed with the firm's financial information, can persuade employers that workers would in fact prefer a wage cut to a layoff or plant closure. Firms would not have to worry that the decision to cut wages would lead to a backlash because they would have worker buy-in through formal participation in the decision-making process (Michelman 1977). Nor would firms have to lose valuable, experienced workers either by exit (because they fear the axe coming) or by layoff (because the firm had no choice but to cut to make such deep cuts in labor costs that it had to cut some of its most productive workers; Hirschman 1970, Freeman and Medoff 1984).

To implement this solution effectively, the scope of discussion should include most of the subjects required by the European collective redundancies directive (98/59/EC, article 2): "ways and means of avoiding [mass economic dismissals or plant closure] or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant." To paraphrase the directive (98/59/EC, article 3[b]), discussion should also include information from the employer to the workers' representative regarding the reasons for the projected dismissals, the number of categories of workers to be laid off, the number of categories of workers normally employed, the period over which the projected layoffs are to be effected, the criteria proposed for the selection of the workers to be laid off, and the method for calculating any severance payments or other pay incentives used to encourage workers to leave their jobs voluntarily.

One practical problem with implementing this solution concerns the method for designating the workers' representatives. Naturally, in the case of a unionized workforce, the union would be the designated representative. In other cases, workers' representatives would have to be designated or elected for this purpose. Other countries, such as the United Kingdom, faced the same problem when the European Court of Justice ruled that national laws had to be harmonized to comport with the collective redundancies directive (Lofaso 2010).

Conclusion

Requiring meaningful and timely discussions over these issues ultimately promotes allocatively efficient solutions to problems faced by a financially strapped firm. Firms might gain valuable cost-saving information from workers who are much more familiar with the details of shop work than are managers. Firms might also gain valuable insight into what is important to their workers—reduced hours, reduced pay, or leisure. This solution gives workers a chance to make their case, thereby simultaneously dignifying workers, by treating them as an equal worthy of input into these important decisions, and also liberating workers by allowing them to become part-authors of their own working lives. This allocatively efficient solution is thus also compatible with promoting an advanced capitalist society that takes seriously the values of worker autonomy and dignity and keeps the autonomous dignified worker at work (Lofaso 2007).

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Notes

[1] Even using the official unemployment statistics reported by the U.S. Bureau of Labor Statistics, at least two difficulties remain in accurately comparing unemployment data. First, the government has occasionally revised the definition of unemployment. For example, in 1994, the government substantially redesigned its Current Population Survey, a monthly survey designed to measure the extent of unemployment (U.S. Bureau of Labor Statistics 2010b, 2010c). Second and related to the definition of unemployment, the statistics do not include the long-term unemployed—among other, those who have felt compelled to leave the work force for educational opportunities because they could not find a job. The first problem relates to comparing data from different time periods when different definitions have been used. The second relates to accurately measuring the amount of cyclical, structural, and other types of unemployment in our economy at any given time.

[2] In particular, employers who employ 100 or more full-time workers (29 U.S.C. § 2101[a][1]; 20 C.F.R. § 639.3[a]) are obligated to provide 60 days' notice of employment loss in two circumstances: a plant closing and a mass layoff. These two events are themselves statutorily limited by definition. The WARN Act (29 U.S.C. § 2101[a][2]; 20 C.F.R. § 639.3[b]) defines a plant closing as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees." The act (29 U.S.C. § 2101[a][3]; 20 C.F.R. § 639.3[c]) also defines a mass layoff as "a reduction in force which . . . is not the result of a plant closing; and results in an employment loss at the single site of employment during any 30-day period for . . . at least 33 percent of the employees (excluding any part-time employees); and . . . at least 50 employees (excluding any part-time employees); or . . . at least 500 employees (excluding any part-time employees)."

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