

LEGAL OBSTACLES TO A MARKET FOR EMPLOYEE REPRESENTATION SERVICES

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Introduction

The National Labor Relations Act (NLRA)¹ was passed in 1935 with a professed objective of guaranteeing that workers would have the freedom to decide whether or not they wanted union representation and collective bargaining. Section 7 of the NLRA states:

Employees shall have 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, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Thus, aside from the final clause sanctioning “union shop” agreements, which make union membership a condition of employment, the law implies that employees are to have freedom of choice in deciding to unionize or not.

And freedom of choice there should be. The ability to choose among alternative goods or services in the *sine qua non* of consumer sovereignty. When consumers are free to choose, sellers must be ever-attentive to consumers’ preferences. If sellers desire to succeed, they must discover precisely what consumers want and produce goods and services as efficiently as possible. Freedom of choice also minimizes the likelihood and severity of mistakes—decisions that leave consumers worse off. Because individuals know their own

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¹The text of the National Labor Relations Act is found in Title 29 U.S. Code, Sections 151–68.

tastes, feelings, desires, and goals better than anyone else does, their choices are most apt to leave them satisfied with the results of free trade. However, if consumers should make choices that they subsequently regret, they can rectify their mistakes by recontracting in open markets.

Freedom of choice is just as important and beneficial to workers as it is to consumers. Workers benefit from freedom of contract because it allows them to freely negotiate with potential employers. And free trade in labor markets leads to mutual gains, just as in other markets.

Unfortunately, the NLRA does not ensure effective employee freedom of choice in the selection of bargaining methods and representatives. Far from protecting freedom of choice, the law actually restricts it and thus prevents the emergence of a market for employee representation services. The provisions of the rest of the statute and the case law emanating from it are often so much at odds with a policy of freedom of choice that the language of Section 7 has to be regarded as mere window dressing. This paper will explore the various ways in which the NLRA obstructs freedom of choice and will examine the consequences that follow.

That the NLRA is not really neutral with respect to the choices of employees is suggested by the language of Section 1. After asserting that

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates . . . and by preventing the stabilization of competitive wage rates and working conditions within and between industries.²

The statute then proceeds to declare that it is

[T]he policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection [emphasis added].

²The inequality of bargaining power justification for federal regulation of labor relations has frequently been attacked. See, for example, Hutt (1974) and Dickman (1987).

If employees are to have freedom of choice, why have a law that is supposed to encourage collective bargaining? If collective bargaining is desirable, why bother with freedom of choice? Why give workers any choice if collective bargaining is so desirable?

As we shall see, the law is much more pro-union than it is pro-choice. Collective bargaining, while not mandated, is certainly favored. The drafters of the NLRA presumed that collective bargaining through unions with the power of exclusive representation was best. The law pays lip service to freedom of choice, but stacks the deck in favor of one of the possible choices.

Let us now examine the law's specific provisions that operate against freedom of choice for employees. This paper will discuss four main points: majority rule, the duration of the union's status as exclusive bargaining representative, restrictions on the flow of information, and the prohibition of company-sponsored unions.

Majority Rule and Exclusive Representation

Section 9(a) of the NLRA provides that

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

The law, therefore, establishes a decisionmaking procedure for labor union representation that is essentially the same as the procedure used for choosing political representatives in a democracy. The candidate who receives a majority of votes is victorious and then will be the sole representative of the people of that electoral district for a term in office. Similarly, if a union receives a majority of votes cast in a representation election, it then becomes the exclusive bargaining representative for *all* employees in the unit. Or, if a majority votes to have no union, there will be no union representation for *any* employee in the unit.

The question here is whether majority rule is compatible with freedom of choice. Majority rule means each person is entitled to participate in making a choice, but not that each is entitled to his or her own choice. Just as voters who preferred a losing candidate have to accept the majority's decision and put up with representation by someone they may vehemently disapprove of, so must losing voters in a union election. If union A wins a majority of the votes cast, it will represent all of the workers. Those who voted for union B or who voted against any union representation cannot have their preference.

Contrast majority-rule political decisionmaking with market decisionmaking, in which people contract individually to purchase the goods or services they desire. No one is required to pay for any good or service he or she has not chosen. A person who desires the services of an investment adviser, for example, makes a choice, reflecting his or her own desires as closely as possible given the limits of personal knowledge about the market for this service. Another person seeking the services of an investment adviser may choose differently, perhaps preferring someone of more cautious temperament. A third person might prefer to have no investment adviser at all. This is an instance in which each individual can have a choice, and each would be worse off if compelled to accept someone else's preference.

Market decisionmaking permits the closest matching of the goods or services people want with the goods or services they get. To require that the decision on labor union representation be made politically by majority rule rather than individually by unanimity rule virtually ensures that some employees will be compelled to abide by a decision they do not support. In other words, some workers will be worse off than if they had been free to choose on an individual rather than a collective basis.

Consider, for example, the following situation. A union is victorious in a National Labor Relations Board (NLRB) election, and it proceeds to negotiate a contract with the employer that leaves some workers worse off. These workers approach the company seeking to make individual contracts, and the company agrees, giving them better terms than under the collective bargaining contract. The union then sues to block the individual agreements on the grounds that it is, by law, the exclusive bargaining representative for all workers. If the union's suit succeeds, it is obvious that those disaffected workers have been made worse off.

This case is not merely hypothetical. It is *J.I. Case Co. v. N.L.R.B.*³ The Supreme Court ruled in that case that the employer is forbidden to negotiate individual contracts with workers who desire to do so once a union has been certified. (This holding, incidentally, runs contrary to *dictum* in the Supreme Court's landmark decision in *N.L.R.B. v. Jones & Laughlin Steel*,⁴ in which the Court read Section 9 as not precluding individual contracts.) The Court justified the infringement on individual freedom of choice by saying,

[A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with

³321 U.S. 332 (1944).

⁴301 U.S. 1 (1937).

organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group.⁵

Speculative collective benefits thus triumph over the concrete benefits derived from freedom of choice.

The NLRA, however, does show some sensitivity to the problem of majoritarianism by requiring in Section 9(b) that the NLRB choose appropriate "bargaining units" of employees for the purposes of deciding upon union representation. In the language of the statute,

The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

In settling upon an appropriate bargaining unit, the Board's major criterion is to place within a unit employees who have common interests. For example, the NLRB has held that registered nurses should constitute a separate bargaining unit from other health care professionals in a hospital.

But if it would not be appropriate for all hospital employees to vote together on union representation on the grounds that there is an insufficient commonality of interests among them, why is it any more logical to have all the registered nurses vote as a unit?⁹ Certainly there can be as much difference of interests between two registered nurses when it comes to the question of union representation as between, say, a registered nurse and a lab technician.

If we are going to recognize differences in interests to the extent of permitting the registered nurses in a hospital to choose a different bargaining representative (or none at all) than the one chosen by the lab technicians or orderlies, why not carry this argument to its logical extreme and allow each employee individually to decide on this matter?

The answer usually given to this question is that if some employees form a union, others might choose to become free riders, that is, partaking of at least some of the benefits of others' collective action, but giving no support to it. The result could be an erosion of support for and the eventual demise of the union. Some commentators have found this line of reasoning to be persuasive (Pulsipher 1966), while others maintain that the possibility of free riding does not justify requiring all to go along with the vote of the majority.

⁵321 U.S. 332, 338.

Taking the latter side, Moorhouse (1982) argues that not only do most union services fail to qualify as true public goods, but that compelling all employees to support a union voted for by a majority of their fellow workers “solves” the free-rider problem only at the expense of creating a “forced-rider” problem. According to Moorehouse (1982, p. 628):

What seems more probable is that those who refuse to support the union (if given the opportunity) do so either because of genuine philosophical reservations or because they expect to suffer economically as a result of union action. . . . Only the individual can assess the subjective benefits of union membership; no outside, objective measure of these benefits exists to be imposed on individuals without giving rise to unintended and detrimental side effects, e.g., rank and file apathy toward the union, corruption, and employer-union leadership discrimination against employees. Little attention has been focused on the welfare implications of the “forced rider.” How do the benefits unions accord the majority of their members compare with the costs imposed on a minority by forcing them to support the union?

One important aspect of the “forced-rider” problem, which has engendered a significant amount of litigation in recent years, is the union’s use of dues money to support political candidates and legislation that some members find objectionable. If union X spends 25 percent of the dues it collects to support political party Y, and union member Z abhors party Y, he is being compelled to help elect people he deems to be working against his own best interests.

The Supreme Court first dealt with this problem in *International Association of Machinists v. Street*.⁶ The plaintiff in the case demonstrated that union dues were being used to help finance campaigns for federal and state candidates whom he opposed. The Court held that the union was not allowed to use its funds to finance political activity that any of its members opposed. However, the Court said nothing about what remedy would be appropriate.

More recently the problem of forced political support has arisen in *Communications Workers of America v. Beck*⁷ and *Chicago Teachers Union v. Hudson*.⁸ In *Communications Workers of America v. Beck*, the trial court appointed a Special Master to determine the extent to which the CWA was using union dues to finance political activity. His finding was that only 19 percent of the dues collected was being spent on activities directly related to collective bargaining. The

⁶367 U.S. 740 (1961).

⁷108 S.Ct. 2641 (1988).

⁸106 S.Ct. 1066 (1986).

remaining 81 percent was being funnelled into political activities. The trial court later revised the figures slightly—to 21 percent and 79 percent—but it was still clear that Mr. Beck's union was using most of the money it collected from him for political purposes he found objectionable. The Supreme Court held that such use of dissenters' dues was illegitimate.

In *Chicago Teachers Union v. Hudson*, the plaintiff argued that more than half of her dues money was being improperly devoted to political activities of which she disapproved, and that the union's procedure by which objectors could seek refunds of a portion of their dues did not adequately protect her First Amendment rights. The Supreme Court held in her favor.

The debate on this issue is no longer whether forced political contributions are illegal, but how best to protect employees' rights. Any refund system is going to impose some burden on all objectors, intimidate some, and lead to litigation over the proper amount to be refunded. The Gordian Knot-cutting solution is obvious: Allow workers to choose their union affiliation, if any, *individually* and drop it if they do not like what the union does.

Even if a satisfactory procedure is found for protecting the rights of those who must accept union representation but dissent from its political activities, any number of other reasons remain as to why workers might believe the costs that the union imposes on them exceed the benefits they derive from the union. Some degree of "forced riding" with exclusive representation seems as likely as some degree of free riding without it. There is no way of measuring the disutility created by these two effects. However, it must be noted that any problems free riding might cause (and the author is not aware of any instance before the NLRA in which a union collapsed because of excessive free riding) can be readily solved.

Suppose that a union were established at some firm and succeeded in obtaining improved wages and benefits for the members. Suppose further that, over time, enough members decided to drop out of the union and become free riders—still receiving the higher wages and benefits resulting from collective bargaining, but paying no dues—that the union was so weakened that it was no longer able to negotiate wage and benefit increases. Certainly the employees would be able to understand what had happened and why. Nothing would now prevent them from reestablishing or revitalizing their union through a contract in which all agreed to remain members for at least a certain number of years. Voluntary action, then, can minimize utility losses resulting from free riding.

On the other hand, the utility losses incurred by forced riders last as long as workers are represented by the undesired union. They can, of course, quit and find other employment, but that will usually involve substantial costs to them.

In summary, majority-rule unionism is not consistent with individual freedom of choice, and the utilitarian justification usually given for it is, at best, unconvincing.

The Duration of the Union's Status as Exclusive Bargaining Representative

A second important restriction on the employee's freedom of choice concerns the duration of the union's status as the exclusive bargaining representative. Once a union has been certified by the NLRB, it remains so for at least one year, as Section 9(c)(3) states that "no election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

But conspicuous by its absence is any provision setting a maximum time period for the union's certification. Unlike contracts made in the market, which are either terminable at will or have a definite time limit and then are open for renegotiation if the parties see fit, a union's certification as exclusive representative is indefinite. It lasts until the union is decertified or has clearly lost its majority support.

The open-endedness means that a certified union can remain so for decades, even though most or all of the employees who originally voted for it have left the company's employment. Suppose that a union won a representation election at Acme Enterprises in 1954. Today probably very few of the original employees who desired representation by that union are still working at Acme. Nevertheless, the union chosen in the 1954 election is still the bargaining representative for all employees in the unit, despite the fact that the huge majority who were hired after 1954 have never had the opportunity to express their desires. To be bound by a decision made years ago by other people is hardly consistent with freedom of choice.

The law does allow the employees to petition for an election to decertify an incumbent union. To obtain a decertification election, the employee's petition to the NLRB must show that at least 30 percent of the members in the bargaining unit desire to have such an election. If, in the decertification election, a majority votes to decertify the union, then the union loses its representative status. Otherwise, it retains its position.

There are several reasons for believing that the law here is inadequate to guarantee true freedom of choice. First, workers who are dissatisfied with their union's services and want either no union or some other union have to take the initiative to petition the NLRB for a decertification election. Employers may not file such petitions. To do so is to commit an unfair labor practice. Many workers, however, would not know that such an election is possible or, if they did know, would not know how to go about writing, circulating, and submitting the petition without assistance.

The NLRB and the courts have ruled that such assistance cannot come from the employer. For example, in one case, company officials told their unionized employees that they would be given medical and hospitalization coverage if the union were decertified. A supervisor called the regional NLRB office to obtain a copy of a decertification petition, which was then given to the employees to circulate and sign. The union complained, and after investigating, the NLRB concluded that the company had committed an unfair labor practice by its "aggravated intrusion upon the self-organization rights of the employees."⁹

Thus, what to most observers would appear to be action to facilitate freedom of choice is regarded by the NLRB as a violation of employee rights. The employer is allowed to respond to employee questions, but may not offer any unsolicited advice regarding decertification, or promote or participate in any way in the petition drive. The employer must not even do anything that would give the appearance of approval of the petition.¹⁰

After the petition has been returned to the NLRB and a decertification election set, the employer may express a preference as to the outcome, but may not act in such a way as to "interfere" with the employees' rights—for example, promising a wage increase if the union is decertified.

The legal asymmetry here is strong. A union is allowed to initiate an organizing campaign and to pour resources into it. The employer, however, is required to remain passive once the union has been certified. Almost any management involvement in the decertification drive risks an unfair labor practice charge. And once an unfair labor practice charge has been filed, it blocks any action toward decertification until the charge has been resolved. Freedom of choice is restricted if workers do not know that they can vote to decertify an unsatisfactory union or, if they do, do not know how to go about doing

⁹Allou Distributors, Inc., 201 N.L.R.B. 47 (1973).

¹⁰For a thorough discussion of the employer's position, see Peirce (1982).

it. The union certainly will not bring the matter up, and management is forbidden to do so.

There is yet another reason why the legal procedure of decertification is objectionable from a freedom of choice perspective. Even if workers know that decertification is possible and know how to proceed, they may be deterred from initiating the petition out of fear of harassment by the union. Retaliatory actions by a union against members who assert their rights are illegitimate, but workers would probably not be familiar with such details of labor law. Even if they had been told that any union retaliation would be legally actionable, they still might decide that an attempt to decertify was not worth the risk. Litigation afterward would be slow, costly, and uncertain. Fear, whether well-founded or not, might lead many an unhappy employee to decide that living with an unsatisfactory union is preferable to trying to have it decertified.

Let us compare the situation facing workers in a unionized plant with that facing consumers of any market-provided service. If consumers are dissatisfied with the service or think it is too costly, they simply choose not to contract again with that provider. No petitions need to be signed and submitted to government agencies. There is no reason to fear retaliation from the disfavored provider. And most important of all, there is no need to persuade a majority of other customers of this provider to vote with you. Getting out of union representation that workers do not want is very much more difficult than it need be or should be.

The small (although growing) number of decertification elections held each year is evidence that suggests the costs and impediments in NLRA imposes to deter workers from exercising freedom of choice. In 1986, the NLRB conducted 857 decertification elections, in which a total of 36,221 employees cast ballots (NLRB 1986). With a total number of private sector union members and nonmembers covered by collective bargaining contracts at about 12 million, only 0.3 percent of those employees had an opportunity to vote on maintaining union representation that year.

It might be argued that this merely shows a phenomenally high degree of satisfaction with union representation services. That argument, however, seems implausible when one notes that a majority of those voting in representation and decertification elections in recent years have voted against the union.

The only way to find out how satisfied workers are with their union representation is to permit them to contract individually for this service if they desire it. Our current system of certifying a union indefinitely as the exclusive bargaining representative of all workers

in the bargaining unit interferes with freedom of choice, and allowing decertification elections does not remedy the vice. The costs of arranging for such an election are so high that an incumbent union knows that it has a highly secure captive market. Freedom of choice is an illusion.

Information Restrictions

Freedom of choice is enhanced as decisionmakers acquire more and more information about the costs and benefits of the various options they face. Conversely, if they are prevented from acquiring information that they might regard as pertinent, their freedom of choice has been effectively restricted. Therefore, to the extent that federal labor law blocks or raises the costs to workers of obtaining information relevant to their decision on union representation, it necessarily limits their freedom of choice and leaves them presumptively worse off.

Promise of Benefit

One very important restriction on the flow of information to workers is the NLRA's prohibition against any promises of benefits from the employer to the employees if the union should be defeated. Section 8(a)(1) of the NLRA states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." That is to say, employers are forbidden to do anything that could be said to interfere with, restrain, or coerce employees when it comes to choosing whether to unionize or not.

As we shall see, if the employer communicates certain kinds of information to employees, he will be held to have interfered with, restrained, or coerced them. Furthermore, even if the employer's communications do not amount to an unfair labor practice, his communications may invalidate the results of the representation election. In the 1948 General Shoe case,¹¹ the NLRB stated that its duty in conducting representation elections was to provide "laboratory . . . conditions as nearly as possible, to determine the uninhibited desires of the employees."

Communications intended by employers to bring certain facts or possibilities to the minds of employees may be declared to upset the NLRB's notion of "laboratory conditions" and thereby invalidate the election results.

¹¹77 N.L.R.B. 124 (1948).

First, if employers give or promise to give any increase in wages or benefits when a representation election is pending, they violate the law. The prescription against grants or promises of benefits is so deeply ingrained that even the generally promanagement 1947 Taft-Hartley Amendments contain language prohibiting such conduct. Section 8(c), which was added to the law to protect employers' freedom of speech, states that "The expression of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be the evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

An illustrative case on the law's hostility to grants or promises of benefits is *N.L.R.B. v. Exchange Parts Co.*¹² Prior to a representation election, the company's management sent a letter to the employees. The letter reminded them of past benefit increases that had been obtained without a union; pointed out that "only the company can put things in pay envelopes"; and stated that for the upcoming year benefits would include a birthday holiday, a new system for computing overtime, and a revised vacation schedule. This letter was the first announcement of these changes, all favorable to the employees. The union lost the election and then filed unfair labor charges against Exchange Parts, arguing that its letter had "interfered" with the employees' right to unionize.

The NLRB found that the company's promises were made with the intention of inducing the employees to vote against the union and, therefore, violated Section 8(a)(1). The Fifth Circuit Court of Appeals reversed, however, holding that there had been no unfair labor practice since the benefits were promised (and in fact given) unconditionally and permanently.

The Supreme Court reversed. Justice Harlan, in his opinion for the Court, wrote,

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged.¹³

But to whom is the information a danger? If the employer is prepared to better the pay, benefits, or other treatment of employees, letting them know that is hardly dangerous. The knowledge does not "interfere" with free choice. Rather, such a communication enhances freedom of choice by informing the employees that their choice is

¹²375 U.S. 405 (1964).

¹³375 U.S. 405, 409.

follows:

Brunner (1983) discusses monetary policy.

Cato Journal Style Requirements

- (1) Manuscripts should be typewritten on one side of the paper only, double-spaced with wide margins. All pages should be numbered consecutively. Tables, references, and legends for figures should be typed on separate pages. Titles and subtitles should be short. Each major section of the paper should be identified with an appropriate heading.

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tively throughout the manuscript. Footnotes should be substantive only and not used for textual references. (The only exception is if the author has a string of references.. In that case, the proper format is to include the references in the footnote rather than in the text. For example, the following string of references is more suited to a footnote format than for inclusion in the text:

1
For a further discussion of this point, see Buchanan (1983), Alchian (1977), Bomhoff (1977), and Rasche (1977).

Footnotes should appear in a list of footnotes and follow the last page of text.

(3) In the text, references to publications should appear as

not just between keeping the status quo or supporting the union with its set of promises and blandishments, but between the union and improved conditions without it. The only danger here is that the union will lose the election if enough workers decide that the company's promises are credible and offer a more attractive alternative than unionization. If freedom of choice is the key consideration rather than the success of unions, however, this danger is of no consequence.

Justice Harlan went on to defend his position by saying,

The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective bargaining from calculated good will of this sort deprives the employees of little that is of lasting value.¹⁴

In other words, information about any improvements employers are willing to make is not worth having, since employers might fail to keep their promise, or even if they do keep it, they might refuse to make any future pay or benefit increases, once the immediate threat of unionization has been "removed."

The weakness in the Court's position here is glaring. Even if the union loses the election, the threat of unionization is not removed. It is only delayed for one year. The employees are free to petition for a new election one year after an election has been held, so if the employers fail to keep promises made during the campaign or for any other reason fail to keep the employees satisfied, they will probably find another organizing campaign in progress uncomfortably soon. The wiser employees would most likely be disinclined to believe anything employers would say this time around. Insincere promises or negligible benefit increases cannot stave off unionization for very long.

In fact, it may even be questioned if they help to stave it off at all. As one commentator has observed,

Most union organizers do not consider the employer's economic advantage to be a major threat. In fact, organizers can turn a grant to their advantage by claiming that the threat of organization is responsible for the employer's action, thus strengthening a union's claim that it can improve working conditions. If unions do not consider the granting of benefits to be a major problem, the Board should not either [Hamilton 1981].

¹⁴375 U.S. 405, 410.

Thus, if the Court's rule is premised upon the assumption that employer promises or grants of benefits are too powerful for the union to counter, it seems to be in error.

The *Exchange Parts* rule prohibiting any promises of benefits by the employer is certainly wrong when we take freedom of choice as the paramount concern of employees. During organizing campaigns, unions make promises to the workers as to what they will do or try to do for them. These promises do not interfere with or coerce them in making their decision on unionization. The information provided by the union, even though it may exaggerate the benefits to be had while understating the costs, is nevertheless useful to the employees.

Similar information from the company is likewise useful to employees in their attempt to estimate the costs and benefits of unionizing. To prevent employers from supplying information on the benefits they are willing to give in order to dissuade their employees from unionizing creates a legal asymmetry that is contrary to the interests of the workers.

It will be objected that allowing employers to promise their employees benefits in exchange for remaining non-union allows the company to "buy out" of unionization. That observation is incorrect. All the company can do is offer what it hopes the workers will regard as a better deal. Like any offeree, the employees are free to reject the company's offer of improved pay or working conditions and go with the union's offer if they conclude that doing so will make them better off. In essence, the union and the company are bidding for the allegiance of the workers. The law should not restrain or interfere with this process (to use the language of the statute) or try to manage the outcome.

A final point: It is perfectly legal for employers to attempt to manage their business in such a way as to keep employees content and thereby deter union organizing campaigns. Ordinarily, there is nothing wrong in employers announcing their decision to raise pay or improve working conditions. It becomes an unfair labor practice only if done after an election has been scheduled. Why should that matter? Why should the fact that 30 percent or more of the employees have indicated a desire to have an election over unionization suddenly silence the employer? The employees still have just as much interest in hearing what the employer is prepared to do for them. The only party involved that stands to gain from preventing any further employer promises of benefits is obviously the union. No doubt it helps unions win elections if the employees are kept from hearing what the company will offer to induce them to vote no. However, the

law is not supposed to assist unions, but rather to ensure freedom of choice.

Threat of Reprisal

A second restriction on the flow of information to employees pertinent to their decision to unionize is the law's prohibition of "threats." Here we have the reverse of the rule against making promises of benefits. The law attempts to shield workers from hearing bad news as well as good news. Section 8(a)(1), it will be recalled, makes it an unfair labor practice for the employer to "interfere with, restrain, or coerce" the employees in their decision to unionize or not. To threaten the employees with the possible loss of jobs, pay, or benefits if they should decide to unionize has long been held to be an 8(a)(1) violation. Or, as with promises of benefits, even if the employer's conduct does not amount to an unfair labor practice, the NLRB may find that it has upset the "laboratory conditions."

The leading case on this point is *N.L.R.B. v. Gissel Packing Co.*¹⁵ The company was facing a representation election, and prior to the vote, the management sent literature to the employees and made speeches arguing that the firm was in a precarious financial position and would probably be unable to withstand a strike. The result could be the plant's closure and difficulty for the workers in finding new employment. Furthermore, the union in question was called a "strike-happy" outfit. These communications evidently had their intended effect. The union lost the election and then filed unfair labor practice charges.

Did Gissel's management commit an unfair labor practice by telling employees they would be better off if they rejected the union? The Supreme Court thought so. Chief Justice Warren's opinion granted that employers are permitted to say whatever they want about unions, and they may make predictions about the negative effects they believe unionization would have. However, he continued, any such negative prediction

must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in the case of unionization. . . . We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless,

¹⁵395 U.S. 575 (1969).

which is most improbable, the eventuality of closing is capable of proof.”¹⁶

The difficulty with the Court’s formulation is that in something as unpredictable as collective bargaining, nothing is “demonstrably probable.” There certainly have been instances in which, after unionization, bitter strikes, plant closings, and unemployment have resulted. In any of these cases, though, would the employer at the time of the representation campaign have had evidence strong enough about the future course of labor-management relations to have been able to make such a prediction without having to worry about unfair labor practice charges? It is hard to see how this could ever be the case. The employer is no more able to show that adverse consequences are “demonstrably probable” from unionization than the union is able to show that adverse results (more on-the-job accidents, perhaps) are demonstrably probable from a failure to unionize.

The effect of *Gissel* is to make any employer’s communications very risky if they deal with the possible negative results of unionization. The Court’s palliative that the employer can avoid trouble simply by refraining from “conscious overstatements” is of little practical use. Even if employers believe that they are not overstating the danger of unionization, they cannot be certain that the Board and courts will agree. A rule that makes the permissibility of speech turn on a judicial assessment of the speaker’s subjective beliefs is a rule that will deter a large amount of speech.

Charges and countercharges about the likely outcome of unionization can be rebutted by the opposing party, leaving it to the voters to decide where they believe the probabilities lie. If the company tells workers that unionization might lead to a plant closure, the union has every opportunity to argue that such an outcome is unlikely. The union could point to the company’s financial position (if it is reasonably strong) or the union’s history of maintaining tolerably good relations with employers (if that is the case) to weaken the persuasive force of dire predictions from management. Of course, it may be that the company is in a weak financial position and could not survive a strike. Or it might be that the union in question has a history of militancy that has left some plants closed and workers unemployed. It would then be difficult to argue convincingly that management’s talk about unionization hurting the workers was nothing more than campaign rhetoric, but that is precisely when the employees stand to gain the most from a discussion of the issue. As Judge Friendly said in his *General Electric* dissent,

¹⁶395 U.S. 575, 618 (citation omitted).

Congress had enough faith in the common sense of the American working man to believe that he did not need—or want—to be shielded . . . from hearing whatever arguments his employers or unions decided to make to him. Freedom of choice . . . after hearing all relevant arguments is the cornerstone of the N.L.R.A.¹⁷

Unfortunately, Judge Friendly's view of the law has not prevailed.

During Collective Bargaining

A third way in which the law restricts the flow of information has less to do with the employees' original decision whether or not to unionize than with their ability to evaluate the union's value to them once the union has been certified. This restriction is against the employer announcing to the workers, prior to the onset of collective bargaining, exactly what he is going to offer. The relevant case here is *N.L.R.B. v. General Electric Co.*¹⁸ The case arose out of a strike against General Electric in 1960. Before negotiations began with the International Union of Electrical, Radio, and Machine Workers (IUE) in 1960, General Electric formulated what it called a "fair, firm offer" and undertook a campaign to "sell" its offer to the employees. The company's theory was that the typical collective bargaining negotiations (negotiations in which the union would have exceedingly high demands, the company would initially offer nothing, and after months of negotiations, agreement would be reached approximately where both sides knew it would be at the beginning) were not only a waste of time, but also made it appear that all wage and benefit increases were due solely to the union's bargaining prowess. General Electric wanted people to see it as "doing right voluntarily" and, therefore, sought to persuade the employees that whatever offer it put forth was fair and reasonable in light of business conditions. In previous years, this tactic had led to no difficulties, but in 1960 the company and the union could not arrive at an agreement, and the IUE called a strike.

The strike proved to be disastrous for the union. It was unpopular and quickly collapsed at most GE plants (Northrup 1964). Subsequently, the union filed unfair labor practice charges, claiming *inter alia*, that the company had refused to bargain in good faith with it, as mandated by Section 8(a)(5) of the NLRA. The case reached the Second Circuit Court of Appeals in 1969, where it was finally resolved. (The Supreme Court subsequently refused to hear the case.)

¹⁷418 F.2d 736, 771 (1969).

¹⁸418 F.2d 736 (2d Cir., 1969).

There were numerous issues involved in the case, but the one that matters here was General Electric's policy of communicating its bargaining position directly to the employees. The NLRB found that GE had, given the "totality of the circumstances," failed to bargain in good faith with the union. The "fair and firm offer" approach, which was characterized by the NLRB as "take-it-or-leave-it" negotiating, was an important part of the determination.

The Second Circuit agreed. Judge Kaufman wrote,

General Electric . . . chose to rely entirely on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. Bypassing the national negotiations in favor of direct settlement dealings with local officials forms another consistent thread in this pattern. The aim, in a word, was to deal with the union through the employees rather than with the employees through the union."¹⁹

General Electric's conduct was designed, the court said, "to derogate the union in the eyes of its members and the public at large."²⁰

The court did not hold that communicating directly to the employees about the company's bargaining position prior to negotiations with the union was necessarily an unfair labor practice in and of itself. If a company does so, however, it is taking a step toward a possible unfair labor practice charge. In the court's words, "We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the best-offer-first bargaining technique is forbidden. . . . We hold that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is unable to alter a position once taken."²¹

Thus, while the GE decision does not expressly forbid an employer from communicating a bargaining stance directly to employees, it makes such communication risky. Unions so fear this management tactic that they will almost certainly file an unfair labor practice charge against any firm that uses it. Even if the union were to lose on the merits of the case, it still would have created a costly legal battle for the employer. The absence of reported cases revolving around this same point of law subsequent to the General Electric case suggests that direct communications to the employees of the firm's bargaining position are deterred.

¹⁹418 F.2d 736, 759.

²⁰418 F.2d 736, 756.

²¹418 F.2d 736, 762.

Furthermore, the court's vague "totality-of-circumstances" language leaves employers uncertain as to exactly what they may or may not say, a point stressed by Judge Friendly in his dissent. That uncertainty is also likely to deter employers from trying anything like the GE approach. We get the sort of *chilling effect* that figures prominently in so many Supreme Court decisions regarding freedom of speech in other contexts. A digression into First Amendment theory is not in order here, but it is not obvious why employer to employee communications are entitled to little or no constitutional protection.

If the law deters such communications, that law makes it much more difficult for union members to assess the benefits of their union representation. Without knowing what the employer was offering voluntarily in the way of wage and benefit increases, the members may believe that all gains are due to the efforts of the union. Their demand for union representation might be significantly different if they were able to compare the employer's offer with the eventual collective bargaining agreement. If employees were not prevented from getting this information, some—possibly many—might conclude that the benefits of union representation are not worth the cost.

Summary

To summarize, the law is quite asymmetrical with regard to the ability to convey information to employees. As we have seen, employers face restrictions on their communication of promises to increase benefits to workers, on the communication of the firm's bargaining position going into negotiations, and on the communication of the possible adverse consequences of unionization. Unions, on the other hand, are subject to no such restrictions.

Surveying the state of the law, one cannot disagree with the assessment of one commentator, who wrote,

As the situation stands today, management is at an extreme disadvantage in the unionization struggle. Management is put on the defensive as soon as organizational efforts are initiated. The [NLRB and court] decisions, while allowing expansive union expression, have highly restricted the range of permissible management communication, thus creating an unjustifiable double standard [Swift 1973, p. 81].

The stifling of employer communications increases the probability of union victory in elections and also strengthens the position of incumbent unions. The entire rationale of the NLRB's tight regulation of employers' speech during representation campaigns has come under devastating criticism (Getman, Goldberg, and Herman 1975).

In the interest of promoting freedom of choice, all legal restrictions on communication between employers and employees should be eliminated.

The Proscription against Company Unions

Yet another way in which federal law interferes with freedom of choice is its proscription against company unions. Section 8(a)(2) declares that it is an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”

The purpose of Section 8(a)(2) was to stamp out competition for employees’ allegiance (and also dues) from company-sponsored unions. Prior to the passage of the NLRA, company-sponsored unions were common, and organizers for the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO) often found that the workers thus represented had little interest in changing to one of their unions.

In fact, during the mid-1930s, many so-called recognition strikes occurred at plants where AFL and CIO organizers were able to get only a few employees to sign up with them in preference to the existing company union. The union’s tactics would then be to have those relatively few employees strike, and the union would support them with “flying squadrons” of outside pickets whose sole function was to intimidate the majority of the employees who wanted to continue work under their current arrangements (Baird 1984). Such strikes, however, were costly and did not always succeed. Far better, from the independent union’s point of view, was to simply have company-sponsored unions declared illegal. The NLRA did this for the independent unions.

The prohibition of company-sponsored unions was defended with the argument that the interests of employees could be served only by independent—and adversarial—unions. Company unions were denounced as mere management fronts. If that were so, however, it should have been easy for the independent unions to persuade employees to abandon their company unions. A blanket legal prohibition is hardly justified and is clearly antithetical to freedom of choice. If workers are the best judge of their own interests, why not allow them to decide what type of union is most satisfactory?

The law’s hostility to freedom of choice was laid bare early on. *N.L.R.B. v. Newport News Shipbuilding*²² involved an NLRB order

²²308 U.S. 241 (1939).

that the company's union be disestablished because it was supported by the firm. The Supreme Court upheld the order despite findings that the employees were apparently satisfied with the union, that they were free to join other unions if they so desired, and that the union had helped to solve labor disputes. This reading of Section 8(a)(2) reminds one of the way the Court reads the Establishment Clause—just as the state may have virtually no entanglement with religion, so must an employer have virtually no entanglement with a union. In the words of one writer,

This rigid rule has meant that an employer may be found in violation if he asserts or defrays the costs of elections for a labor organization, helps in or is present at the drawing of its charter, arranges for its attorney, supplies a place . . . for its meeting, furnishes any direct financial support, no matter how meager, provides any indirect financial aid, or . . . allows the organization to use its safe, mimeograph machine, or telephone, or provides secretarial services.²³

The courts have interpreted Section 8(a)(2) as prohibiting not only company-sponsored unions, as in the *Newport News* case discussed above, but even employee or shop committees. In *Cabot Carbon Co. v. N.L.R.B.*,²⁴ the issue facing the Court was whether employee committees that the employer had formed at several plants were company-dominated "labor organizations" within the law's definition.

The committees, established in 1943 at the suggestion of the War Production Board, consisted of two or three employees who were chosen by the employees. Each member served for one year. The bylaws of the committees stated that their purpose was to meet regularly with management to consider employee's ideas, to address grievances, and to discuss problems of mutual interest. The committee collected no dues, had no funds, and had never been involved in collective bargaining.

In 1954, the International Chemical Workers Union filed unfair labor practice charges against Cabot Carbon. The union maintained that the employee committees were illegal and sought an order disestablishing them. Ultimately, the Supreme Court agreed with the NLRB that the committees were, in fact, illegal employer-dominated labor organizations and ordered their disestablishment.

The employee committees were voluntary and evidently useful organizations. The union wanted them eliminated only because they occupied some of what it regarded as its turf. Whether the workers

²³"New Standards for Domination and Support under Section 8(a)(2)," unsigned student note, *Yale Law Journal* 82 (1972-73): 512.

²⁴360 U.S. 203 (1959).

liked these committees was not an issue at all. Some might have preferred to have kept the committees and still had union representation. Others might have thought that the committees alone best served their interests. But, as we have seen throughout, freedom of choice is of very little consequence under the NLRA.

Section 8(a)(2) compels workers to choose between independent (and generally adversarial) unions or none at all. Certainly, however, it is conceivable that some type of company-sponsored union would find favor with many workers. The company union predominates in Japan. It might prove popular in the United States as well. By prohibiting any sort of company-sponsored labor organization, we shield independent unions from a source of potential competition, limit freedom of choice, and, as Baird (1987) has pointed out, stifle entrepreneurial discovery of the most desirable modes of labor-management relationships.

Conclusion

The National Labor Relations Act, the National Labor Relations Board, and the federal courts have established a regulatory system over the field of labor relations that is hostile to freedom of choice for workers. Union representation decisions are made collectively by majority vote rather than individually. A union once chosen remains the exclusive representative for the bargaining unit indefinitely. Decertifying an incumbent union is a difficult process, and since decertification elections are rare, only a very small percentage of unionized workers ever get the chance to vote either to keep or to oust their union.

The law restricts the flow of information from employer to employee in a number of ways, making it harder for employees to accurately assess the costs of unionization and advantages of remaining nonunion. Finally, the law prohibits any company-sponsored labor organization, whether or not such organizations might be favored by some workers. The law pays only lip service to freedom of choice. Under the law, as enacted, a system has emerged that "subordinates individual rights and values to group interests and values" (Petro 1973, p. 466).

The law's restrictions on freedom of choice have prevented the emergence of a market for employee representation services. For a market to function, individuals must be free to contract as they choose, the flow of information must not be hindered, and people must be free to offer any sort of product or service to consumers. Those conditions do not exist in the realm of labor relations today.

Labor unions have long professed that it is their goal to take labor out of competition, but the NLRA serves to take unions themselves out of competition. Just as protected producer monopolies are contrary to the interests of consumers, so are protected labor union monopolies contrary to the interests of workers. The case for allowing the market to operate in this field is just as compelling as allowing it to operate anywhere else.

The legal changes that are necessary if we are to allow a market in labor representation services are as follows: First, the decision on union representation must be an individual decision. Section 9, which collectivizes this decision, should be repealed. Until that can be done, we could require periodic recertification elections as a second-best solution.

Second, restrictions on the flow of information from employer to employee should be eliminated. Employers should not be prevented from promising (or giving) benefits, disclosing their bargaining stance to the workers directly, or discussing the possible adverse effects of unionization. The flow of information, arguments, and rebuttals should be no less free when it comes to unionization than in political campaigns. Section 8, which has been interpreted to forbid communications of the types mentioned above, should be rewritten.

Third, the law's proscription against company-sponsored unions should also be eliminated. We cannot have truly free choice if the field is closed to some potential competitors. Section 8(a)(2) should be repealed.

Making these legal changes will place freedom of choice as the law's paramount consideration and will establish the necessary conditions for the emergence of a market for employee representation services. Of course, just as any market process is unpredictable, it is impossible to say exactly what such a market would look like.

Will existing unions insist on representing all workers in a "bargaining unit" (a legal concept that would necessarily disappear under a regime of free choice), or would some unions accept paying customers where there was less than unanimous support for the union? If two or more unions represent workers doing the same job, how will negotiations be conducted? Would unions advertise for customers as other businesses do? What type of contract would a union make with members? How will managements deal with workers who decide to drop out of collective bargaining and seek to make their own contracts? Will alternatives to the current style of unions be created? If so, by whom? Will some existing unions go out of business similar to the shake-out that usually accompanies deregulation? To these

and other questions, the only possible answer that can be given is: We shall have to wait and see.

A few predictions, however, can be made with confidence. Operating in an environment of freedom of choice and open competition, unions will certainly become more member-oriented if they want to prosper. Union leaders often lament the decline, which has been apparent for more than a decade, in union membership. That decline might be reversed if unions were perceived more as organizations designed to satisfy customers than as bureaucratic monopolies.

We can also predict that the unions' organizing campaigns will be less vehement, shorn of their "winner-take-all" implications. Furthermore, there will almost certainly be a decline in litigation. Deregulating the field of labor relations will greatly reduce the sphere of authority of the NLRB and the federal courts. Success in labor relations, therefore, will depend far more on influencing individual workers than on obtaining favorable decisions from bureaucrats and judges.

Freedom of choice has been missing from labor relations for more than 50 years. It is now time to remove the legal obstacles to a market for employee representation services. Such a change will restore freedom of contract as a mutually beneficial device for resolving labor disputes.

References

- Baird, Charles W. *Opportunity or Privilege: Labor Legislation in America*. Bowling Green, Ohio: Social Philosophy and Policy Center, Bowling Green State University, 1984.
- Baird, Charles W. "Labor Law and Labor-Management Cooperation: Two Incompatible Views." *Cato Journal* 7 (Winter 1987): 933-50.
- Dickman, Howard. *Industrial Democracy in America*. LaSalle, Ill.: Open Court, 1987.
- Getman, J.; Goldberg, S.; and Herman J. "N.L.R.B. Regulation of Campaign Tactics: The Behavioral Assumptions on which the Board Regulates." *Stanford Law Review* 27 (1975): 1465-92.
- Hamilton, D. J. "N.L.R.B. Proscription on Granting of Benefits during Election Campaigns—A Detriment to Employees." *Arizona State Law Journal* 13 (1981): 723-48.
- Hutt, William H. *The Strike-Threat System*. New Rochelle, N.Y.: Arlington House, 1973.
- Moorhouse, John C. "Compulsory Unionism and the Free-Rider Doctrine." *Cato Journal* 2 (Fall 1982): 619-35.
- National Labor Relations Board (NLRB) Fifty-first Annual Report*. Washington, D.C.: U.S. Government Printing Office, 1986.
- "New Standards for Domination and Support under Section 8(a)(2)." Unsigned student note. *Yale Law Journal* 82 (1972-1973): 510-32.

LEGAL OBSTACLES

- Northrup, Herbert R. *Boulwarism*. Ann Arbor, Mich.: University of Michigan Press, 1964.
- Peirce, Ellen R. "Employer Participation in the Decertification Process: How Big a Helping Hand?" *Buffalo Law Journal* 31 (1982): 737-95.
- Petro, Sylvester. "Civil Liberty, Syndicalism, and the N.L.R.A." *University of Toledo Law Review* 5 (1973): 447-513.
- Pulsipher, A. G. "The Union Shop: A Legitimate Form of Coercion in a Free Market Economy." *Industrial and Labor Relations Review* 19 (July 1966): 529-32.
- Swift, R. A. "N.L.R.B. Overkill: Predictions of Plan Relocation and Closure and Employer Free Speech." *Georgia Law Review* 8 (1973): 77-100.