

RE-CRAFTING A TROJAN HORSE: THOUGHTS ON WORKPLACE GOVERNANCE IN LIGHT OF RECENT BRITISH LABOR LAW DEVELOPMENTS

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INTRODUCTION

In June of 2000, Britain established a statutory union recognition procedure applicable to all private and public employers with more than twenty workers.¹ For a country with a history of voluntarism in labor-management relations,² the creation of a legal mechanism by which unions could compel recognition from employers was a major change. The Labour Party government modeled its new approach to a considerable extent on our National Labor Relations Act (NLRA).³ Unions seeking statutory recognition must apply through a government agency; disagreements over proposed unit size or scope are to be resolved early by the agency; the union must show majority support to succeed; this support can be demonstrated through non-electoral means but upon agency review a supervised election may be

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1. Trade Union and Labour Relations (Consolidation) Act, 1992, c. 53 (Eng.) [hereinafter TULRCA], amended by The Employment Relations Act, 1999, c. 26 (Eng.). The Employment Relations Act 1999 inserted Schedule A1 into TULRCA.

2. See generally JOHN BOWERS, EMPLOYMENT LAW 476 (6th ed. 2002); *Ford Motor Co. Ltd. v. Amalg. Union of Eng'g & Foundry Workers*, [1969] 2 All Eng. Rep. 481 (Q.B.). There was an unsuccessful legislative experiment with statutory recognition in the 1970s. See Nicholas Robertson, *Compulsory Trade Union Recognition: New Rights for Trade Unions in the United Kingdom*, 10 INT'L CO. & COMM. L. REV. 303, 303 (1999).

3. Pub. L. No. 74-198, 48 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)). See generally Editorial, *The Portability of Collective Bargaining Law*, 20 COMP. LAB. L. & POL'Y J. 1, 2 (1998) Hazel Oliver, *Trade Union Recognition: "Fairness at Work"?*, 20 COMP. LAB. L. & POL'Y J. 33, 34 (1998); Chris Ball, *Union City Blues*, THE EVENING STANDARD (London), Sept. 11, 2000, at 7.

ordered; and any such election is preceded by a campaign period of several weeks during which rules against employer threats and intimidation are enforced by the agency.

In addition, paralleling a philosophy ascribed to our Taft-Hartley Amendments, Britain's new recognition procedure reflects a commitment to employee freedom of choice. Workers may decide either to join a union that seeks legal recognition or to refrain from doing so. The public policy value attached to having union recognition and collective bargaining enforced through a government agency derives primarily from that arrangement being freely chosen by the employees, *not* from the preferred status of collective bargaining.⁴

Domestic criticism of the NLRA has persisted with some intensity since the early 1980s. Union leaders and many labor relations scholars in the United States believe that the statute as written and enforced has played an important role in the steady decline of union organizing and collective bargaining among private sector employees. British union leadership, aware of such widespread misgivings, had reason to fear the arrival of this gift from across the Atlantic.⁵ The concern was that an American-style union recognition system, based on adversarial representation campaigns and government-supervised elections, would invite if not encourage many of the same problems of excessive delay, employer abuse, and protracted and bitter litigation that have become entrenched under the NLRA.

The British statutory procedure is now in its seventh year of operation, and American-style problems have yet to materialize on any substantial scale. Although the number of employees organized through statutory recognition awards has been lower than anticipated,

4. See generally Bob Simpson, Research and Reports, *Dept. of Trade & Industry, Fairness at Work*, 27 IND. L.J. 245, 248-49 (1998).

5. See, e.g., Greg Gordon, *United They Stand?*, THE SCOTSMAN, Sept. 19, 2000 at 11 (reporting that British union officials "are crossing their fingers that the confrontational tactics of America's union-busting law firms and consultants will not be employed here"); Diane Taylor, *Working Lives: Who You Gonna Call?*, THE GUARDIAN, Nov. 1, 2000 (Features Sections), at 10 (quoting union supporters who urged government to adopt European model rather than election-based American system). See also Oliver August, *US Provides Lessons on Trade Union Law Changes*, THE TIMES, June 4, 1997, Business (reporting that NLRB chair warned labor government about excessive litigation and other serious deficiencies under U.S. system being used as a blueprint for British legislation); Joseph R. Grodin, *Some Thoughts on the American Model*, 20 COMP. LAB. L. & POL'Y J. 29 (1998) (expressing concerns of an American labor law scholar that Britain should hesitate before buying into the flawed NLRA model); Roy J. Adams, *Why Statutory Union Recognition is Bad Labour Policy: The North American Experience*, 30 INDUS. REL. J. 96 (1999) (expressing similar concerns of a Canadian law professor familiar with problems of NLRA model).

there has been a surge in voluntary recognition agreements negotiated in the shadow of the law.⁶ Further, the statutory procedure itself seems to have been well received by both labor and management, with only eight instances of judicial review sought for the first 600 agency determinations.⁷

It remains early in the life of this new approach—NLRA implementation in its seventh year (1941) hardly resembled or even foreshadowed the changed legal circumstances that emerged in ensuing years and decades. Further, there are culture-specific factors involved in British experience with workplace governance that caution against easy transplantation, even as concepts borrowed from the NLRA are likely to evolve very differently in British legal soil.⁸ Still, initial developments under this recognition procedure may offer some guidance as we contemplate ways to reinvent our own statutory approach to labor-management relations.

This article briefly addresses two aspects of the new British procedure, with an eye toward what they might contribute in the American setting. Part I discusses the multi-stage recognition arrangement, and why it has stimulated both sides to seek voluntary recognition agreements at various points. Part II examines the Central Arbitration Committee (CAC), the agency that administers and enforces the statute, focusing on how the CAC's decisionmaking framework and its method of appointment have contributed to an efficient and non-partisan adjudication process. In each part, the article suggests ways in which elements of the British experience might relate to the American context.

A threshold question is whether to bother with such an inquiry as part of a symposium addressing the future of governing the workplace. Both the United States and Britain have experienced a steady erosion in union membership since the 1970s, and there is reason to believe that union density may continue to decline, especially in the private sector. Given that collective bargaining agreements have been supplanted by statutes and regulations as the principal source of employee protections in the United States, why discuss ways to promote or preserve such collective agreements when examining possible new directions for workplace governance?

6. See Gregor Gall, *The First Five Years of Britain's Third Statutory Recognition Procedure*, 34 *INDUS. L.J.* 345 (2005); Sonja McKay & Siam Moore, *Union Recognition Agreements in the Shadow of the Law*, 33 *INDUS. L.J.* 374 (2004).

7. See *CENT. ARB. COMM., ANNUAL REPORT 2004–2005*, 15 (2005) (U.K.) [hereinafter *CAC ANNUAL REPORT 2005*].

8. See generally Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974).

Paul Weiler wrestled with this question nearly two decades ago, and as in so many other respects he was ahead of his time. Professor Weiler recognized that collective bargaining was unlikely to regain its former position of pre-eminence for reasons that went well beyond the inadequacies of the NLRA legal regime. He pointed unflinchingly to American workers' general perception of the labor market as delivering decent wages and employment conditions under a loosely competitive structure, and to workers' general reluctance to embrace traditionally hierarchical union organizations as an alternative to individual bargaining with their employers.⁹ At the same time, Weiler made a powerful case for why the nonunion labor market operates to distort workers' perceptions and expectations regarding the economic advantages associated with their jobs.¹⁰ Absent some form of ongoing workplace representation, employees often are denied benefits in a market-oriented system. They also are left unable to remedy employer misconduct much of the time in a rights-based regime.¹¹

Weiler's proposed solution included a different kind of employee participatory mechanism—mandated by statute at the workplace-specific level and charged with addressing a range of distributional decisions inside the firm.¹² Political realities in the United States may well preclude such a distinctive statutory approach, although a version of Weiler's proposal has been developing in Britain with assistance from the European Community.¹³ Meanwhile, labor organizations authorized to speak for employees as a group remain relevant in the American setting for the economic and participatory reasons Weiler elegantly recounted.

Accordingly, for present purposes I accept that unions should and will continue to play a role in overcoming certain market-based

9. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW*, 280, 282 (1990).

10. See *id.* at 63–78.

11. See, e.g., *id.* at 76–82 (discussing how in non-union setting, long-service employees and lower-salaried workers are worse off in terms of protecting job security); *id.* at 29, 84–87 (discussing importance of continuous union monitoring to safeguard effectiveness of reinstatement remedy, health and safety standards, and other legal norms).

12. See *id.* at 284–86 (recommending a German-style Works Council model).

13. See, e.g., TULRCA, *supra* note 1, §§ 188–94 (requiring employers to consult with employee representatives on proposed dismissals for redundancy); Transfer of Undertakings (Protection of Employment) Regulations 1981, S.I. 1981/1794 (U.K.), *amended by* Transfer of Undertakings (Protection of Employment) Regulations, 2006, S.I. 2006/246 (requiring employers to consult with employee representatives on proposed business transfers); Transnational Information and Consultation of Employees Regulations 1999, S.I. 1999/3323 (requiring large transnational employers to establish a mechanism at European level for informing and consulting employees about transnational issues.) Each of these British statutes was enacted to comply with European Council directives; the 1999 statute was Britain's response to the European Works Council Directive of 1994. See generally BOWERS, *supra* note 2, at 495–96.

barriers to improved working conditions, in monitoring the effective delivery of statutory rights, and in offering employees a meaningful voice to address their employer's resource allocation policies. I further assume (with guarded optimism) that incremental reform of our labor law statute may become possible within the foreseeable future. Against this background, I focus on two aspects of Britain's recent statutory experience with union recognition that warrant attention when considering revisions to our own statutory scheme.

I. ENCOURAGING VOLUNTARY AGREEMENTS

Over the past decade, many unions in the United States have pursued voluntary recognition as a successful alternative to organizing campaigns structured around elections supervised by the National Labor Relations Board (NLRB).¹⁴ The NLRB has long permitted employers to participate in neutrality agreements and card check recognition. Federal courts also have endorsed as conducive to labor peace a national policy of deferring to labor-management agreements that waive the right to utilize the Board's election machinery. The current Bush Board has expressed discomfort with this national policy, apparently believing that a growth in union organizing and collective bargaining outside the traditional elections process compromises the agency's jurisdiction if not its mission.¹⁵ On the other hand, the Employee Free Choice Act¹⁶—supported by organized labor and pending in Congress with considerable support—would require the Board to certify unions that have received majority approval through authorization cards, thereby precluding insistence on a Board-supervised election.

In this fractious setting, the British approach raises some intriguing options. The statute provides for a multi-stage procedure, operating under CAC supervision on a fairly compressed time schedule. A union initiates the process by applying to the CAC for a declaration that it should be recognized to conduct collective bargaining on behalf of a specified group of workers with regard to

14. See generally James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

15. Since 2004, the Board's Republican majority has granted review in three cases involving different aspects of neutrality/card check agreements. See *Dana Corp.*, NLRB Div. of Judges, JD-24-05 (Apr. 5, 2005); *Dana Corp.*, 341 N.L.R.B. 1283, 1283-84 (2004); *Shaw's Supermarkets*, 343 N.L.R.B. 963 (2004). See generally Charles I. Cohen et. al., *Resisting its Own Obsolescence—How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521 (2006).

16. See H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007).

wages, hours of work, and holidays. The CAC must first decide if it should accept this application, based primarily on whether 10% of the proposed bargaining unit are union members and a majority of employees in the unit are likely to support recognition—the latter is often a function of support demonstrated through petition signatures. If the CAC accepts the union's application, its second stage is to decide whether the proposed bargaining unit is appropriate.

Assuming an appropriate bargaining unit, the third CAC stage is to decide whether recognition should be declared without a ballot. In order for non-electoral recognition to be considered, more than 50% of the unit must be union members. Assuming this membership level is achieved, the CAC will confer recognition without an election unless either it has received credible evidence that a substantial number of union members do not want the union to conduct collective bargaining, or it determines that the interests of good industrial relations require a ballot. The fourth stage is for the CAC to arrange for an election if union membership does not exceed 50%, or if majority membership co-exists with one of the genuinely exceptional circumstances just described.

The election is preceded by a campaign period of roughly three weeks, during which the union must be given meaningful access to employees on the premises. In general, CAC-supervised access allows the union to conduct one large meeting for every ten days of the campaign as well as a set of individual or small group meetings for each ten day period. A union prevails in the election if it receives support from a majority of those voting; such support also must constitute at least 40% of all workers in the bargaining unit. If the union secures CAC recognition either without a ballot or by prevailing in an election, the employer is barred from challenging the union's majority status for three years. Conversely, if the union loses the election or withdraws an application in the later stages, it is barred from re-applying to the CAC for three years.¹⁷

Although the British statute is highly prescriptive and contains strict timetables, it also creates various opportunities and incentives for employers and unions to opt out of the formal recognition process. Before a union even applies to the CAC, it must request voluntary

17. For a detailed description of this four-stage process, see CAC ANNUAL REPORT 2005, *supra* note 7, at 15–17; CENT. ARB. COMM., THE CAC'S STATUTORY DUTIES, available at <http://www.cac.gov.uk>. For discussion of access provisions and other aspects of campaign regulation, see DEPT. OF TRADE & INDUS., CODE OF PRACTICE: ACCESS AND UNFAIR PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS 13–25 (2005). For a more general overview, see Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States*, 25 COMP. LAB. L. & POL'Y J. 227 (2004).

recognition from the employer and allow up to thirty days for an agreement to be reached. If there is interest in voluntary recognition, the employer and union can call on the CAC's sister organization for assistance in conducting negotiations.¹⁸

During the four-stage CAC procedure, the employer and union are free to work out voluntary recognition agreements at any time. Depending on when such agreements are reached, the employer may sidestep the intrusive access provisions associated with a CAC election, and both sides may avoid the prospect of a three year bar on revisiting the CAC-endorsed outcome. In addition, an employer choosing the voluntary recognition route bypasses the CAC's model procedures following recognition that establish certain minimum standards for the conduct of collective bargaining negotiations. Although these procedures do not entail any commitment to reaching a collective bargaining agreement, the litany of prescribed meetings, written communications, and provision of facilities and information can be time-consuming and burdensome.¹⁹

After six years of operation, it appears that the statutory recognition procedure has generated modest success in the CAC-supervised arena and more dramatic results in terms of voluntary agreements. With respect to CAC supervision, unions have won close to 65% of the elections held. In addition, for union applications that reach the third stage, the CAC has declared recognition without a ballot in one instance for every two that are resolved by election.²⁰

Admittedly, the number of CAC applications has been lower than initially anticipated; after six years, roughly 40,000 workers have secured recognition wholly or partially through the CAC procedure.²¹ Yet over the same period, roughly 2,000 new union recognition

18. See TULRCA, *supra* note 1, Schedule A1, ¶ 10(5) (discussing assistance to be provided upon request by the Advisory Conciliation and Arbitration Service (ACAS)). Although ACAS is under a statutory obligation to furnish the CAC with staff and office premises, the CAC is a separate entity in operational terms.

19. The specified method for conducting collective bargaining is contained in The Trade Union Recognition (Method of Collective Bargaining) Order, 2000, S.I. 2000/1300 (U.K.) [hereinafter STATUTORY INSTRUMENT 1300]. The ADVISORY CONCILIATION & ARB. SERVS., CODE OF PRACTICE 2: DISCLOSURE OF INFORMATION TO TRADE UNIONS FOR COLLECTIVE BARGAINING PURPOSES, is available on the ACAS Web site at http://www.acas.org.uk/media/pdf/2/q/CP02_1.pdf. See generally TONIA NOVITZ & PAUL SKIDMORE, FAIRNESS AT WORK 106 (2001).

20. See CENT. ARB. COMM., ANNUAL REPORT 2005–2006, 22–23 (2006) (U.K.) [hereinafter CAC ANNUAL REPORT 2006] (reporting applications through March 2006; of 128 ballots, union has prevailed in 81; there are 61 additional instances of union being recognized without ballot). As of August 31, 2006, there have been 132 ballots, of which 82 resulted in recognition, plus 67 additional instances of recognition declared without a ballot. See E-mail from Simon Gouldstone to author (Sept. 14, 2006) (on file with author).

21. See Gall, *supra* note 6, at 345–46.

agreements have been negotiated in the shadow of the statutory procedure, covering some 800,000 employees. About 90% of recognition arrangements in the first six years have resulted from voluntary agreements without government supervision. The vast majority of these voluntary agreements provided for collective bargaining, not simply consultation or "collective representation."²²

Several caveats are in order here. Given the British trade union tradition favoring voluntarism, and the failure of an earlier and more cumbersome statutory recognition effort, employers and unions presumably approach the new statutory procedure with certain reservations. Employers especially may be inclined to opt for an informal, voluntary approach more reflexively than would their American counterparts, at least until they have explored possibilities for resistance under the CAC process.

In addition, the new statutory procedure is hardly a panacea from British unions' perspective. Access to employer premises is conferred only after the election period has commenced, not at a point early enough to aid in informing and recruiting a potential majority. Remedies for employer unfair practices remain unclear and may not provide a sufficient deterrent to intentional employer misconduct. Further, the bargaining procedure triggered by a CAC award of recognition fails to cover important employment conditions such as occupational pensions or the promotion of equal opportunities in allocation of work.²³

Incentives to opt out of the new procedure may well diminish over an extended period. Nonetheless, the early returns, in which voluntary recognition accounts for more than 90% of newly organized workers, merit further examination. In particular, certain potentially durable factors may help account for why employers and unions are so willing to reach agreements outside the election-oriented statutory procedure.

To begin with, the procedure itself is sufficiently prescriptive and potentially burdensome to invite the parties' interest in greater flexibility. In this regard, employers considering the CAC election route face several obligations or restrictions not present under U.S. law. Employers must provide union organizers with extensive and

22. See *id.*, at 346-47; McKay & Moore, *supra* note 6, at 374; Peters, *supra* note 17, at 236-37.

23. See Employment Relations Act, 2004, c. 24, § 20 (U.K.) (excluding occupational pensions from CAC bargaining procedure applicable to "pay"); NOVITZ & SKIDMORE, *supra* note 19, at 101, 110-12 (discussing exclusion of equal opportunities workplace issues from bargaining procedure).

regular access on-site during the three week campaign period, whereas American law allows them to exclude non-employee organizers from the premises. Employers who lose in a recognition contest must wait three years before challenging the union's majority status, while under the NLRA they need only wait twelve months if no collective bargaining agreement has been signed. In addition, employers may have to conform to a range of procedural standards in the conduct of collective bargaining, including the convening of regular meetings under a formal "staged procedure" and the disclosure of more information than would likely be required under U.S. law.²⁴

On the other side, unions considering CAC recognition also face certain headwinds that would not be present under the NLRA. They must make a stronger majority showing among unit employees—either more than 50% who are actual union members or electoral support from over 50% of those who vote including at least 40% of the bargaining unit.²⁵ Unions that fail to gain statutory recognition must then wait three years to reapply, whereas under U.S. law they may petition for a new election after twelve months. Unions that prevail and proceed to collective negotiations can compel bargaining only on three topics—pay, hours, and holidays—a smaller list than the universe of mandatory subjects under the NLRA.²⁶

Because the stakes are relatively high for both sides, employers and unions each have reasons to want to communicate in a less structured and more unsupervised setting. Reinforcing these incentives is the fact that collective bargaining agreements based on voluntary recognition are not enforceable in court unless the parties

24. See STATUTORY INSTRUMENT 1300, *supra* note 19, at 4–5 (setting forth details of staged procedure for bargaining). The ACAS Code of Practice referred to *supra* at note 19 addresses disclosure of relevant financial information in detail and without regard to whether an employer is claiming inability to pay. This seems a broader obligation than would obtain under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). See *THE DEVELOPING LABOR LAW* 893–99 (Patrick Hardin et. al. eds., 4th ed. 2001).

25. The majority membership requirement simply does not exist under U.S. law, although British unions seeking to recruit over 50% membership do not face the obstacles that would be posed in our country by state right-to-work laws. The 40% ballot support requirement is more difficult to satisfy than the NLRB's "majority of votes cast" standard.

26. To be sure, labor unions in the U.S. also have ample incentives to avoid the NLRA's election-oriented recognition procedure. These incentives, however, reflect primarily unintended factors that over decades have rendered the Board-sponsored elections system deeply flawed. I refer here to the employee intimidation caused by lawful and unlawful employer resistance to unionization, the absence of effective remedies protecting employee free choice, and the chilling impact of prolonged delays and protracted litigation in the Board and courts. See Brudney, *supra* note 14, at 832–34, 868–72, and sources discussed therein. By contrast, the British statutory incentives referred to in text accompanying *supra* notes 23–25, combined with the multi-stage procedure discussed in text below, may be viewed at least in part as deliberate efforts to foster the development of voluntary recognition arrangements.

specify an intent to make their agreement legally binding. The presumptive lack of enforceability of voluntary labor agreements is a distinctly British feature, as our labor-management contracts have been enforceable through the federal courts since 1947. However, even if a British employer and union decide to make their collective bargaining agreement binding through the courts, the parties' negotiations outside the CAC-sponsored procedure may result in more flexible provisions to modify or abandon the contract. These negotiations also may cover a larger or smaller number of employment conditions than are specified under the statute.²⁷

Apart from creating pressure to avoid the burdens inherent in a CAC-sponsored recognition contest, the statute may encourage voluntary agreement more affirmatively by structuring prolonged interactions between the two sides. The statute mandates a period of up to thirty days in which the union and employer—guided on occasion by ACAS—are to explore possibilities for voluntary recognition prior to any consideration of the union's formal application. There follows a period of roughly four to five weeks when the CAC is deciding whether to accept the union's application. As part of this first stage, the CAC needs to verify union membership and support levels. When the employer questions the accuracy of union figures and the union seeks to protect the identity of individual workers, the two sides have often agreed on a confidential process for checking names under the supervision of a CAC case manager.²⁸ Similarly at the second stage, when the CAC has to identify the appropriate bargaining unit, the two sides have usually reached agreement on this issue without the need for a CAC determination; the proportion of agreed-upon units steadily increased over the first five years.²⁹

It seems plausible that the series of extended dealings between employer and union under the British statute's multi-stage recognition approach operates to help allay suspicions on both sides, making it easier for the parties to contemplate a long-term relationship.³⁰ When

27. In addition, voluntary agreements may cover a minority of employees at a given worksite. The new statutory procedure is based on majority support and exclusive representative status, but neither exclusivity nor majoritarianism are required aspects of voluntary recognition in Britain. See SIMON DEAKIN & GILLIAN MORRIS, *LABOUR LAW* 69, 827–28 (4th ed. 2005).

28. CAC ANNUAL REPORT 2005, *supra* note 7, at 15.

29. *Id.* at 16.

30. The NLRB is also quite successful in encouraging negotiated agreements as to bargaining unit scope and the identity of eligible voters. See 70 NLRB ANN REP. 14, Table 10 (2005); 69 NLRB ANN. REP. 14, Table 10 (2004) (reporting that some 85% of representation cases closed by elections involve election arrangements stipulated by the parties with Board

employers and unions can constructively converse on preliminary ground rules over a period of several months, facilitated at times by a government agency, they may tend to develop a degree of mutual comfort if not respect. The statute's formalized opportunities for voluntary exchange thus provide channels for engendering reliance and trust between the parties, important elements in developing a collective bargaining relationship. In this regard, the detailed recognition procedure performs a function that is also served when parties negotiate a neutrality agreement in the U.S. setting. American unions and employers have used the process of reaching agreement on certain procedural ground rules to facilitate the possibilities for longer-term trust on substantive bargaining.

Assuming that the various formal and informal statutory incentives discussed here have contributed to the initial success of voluntary recognition under British law, such a result is probably not inadvertent. Although the new British statute provides no special protections for voluntary collective bargaining agreements, it also does not view such agreements as unusual or disfavored. The expectation that voluntary agreements should co-exist comfortably with statutory recognition suggests a subtle but important distinction from NLRA law, which for decades has viewed voluntary recognition through card check as a legitimate but plainly exceptional doctrinal alternative.³¹

It is possible, of course, for Congress to confer upon majority support expressed through card check a legal status that co-exists with election-based majority support not just comfortably but co-equally, as is proposed under the pending Employee Free Choice Act (EFCA).³² Assuming the Democrats were to gain control of both Congress and the White House, however, some members of the new political majority are likely to view employer resistance to unionization as continuing to warrant special respect, on the theory that employers can contribute to information-sharing and reasoned debate thereby enhancing employee free choice. EFCA advocates

assistance). Elections are the endgame in this process, however; because of major difficulties involved in adversarial election campaigns (discussed at note 26 *supra*), these stipulated agreements often do not result in cooperative long term relationships. By contrast, the British statute does not funnel the parties toward elections in nearly the same way: it begins with a thirty day period in which the parties are required to pursue prospects for voluntary recognition, and the CAC's formal procedure ends in a declaration of recognition without an election for one-third of the cases that reach the pre-ballot stage three (discussed at note 20 *supra* and accompanying text).

31. See generally *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 302-10 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969).

32. See H.R. 800, S. 1041, *supra* note 16.

counter this argument—that adversarial presentations may be especially important to employee decisions about workplace representation—by maintaining that such decisions can be made freely and fairly in a far less contentious setting. The British recognition procedure suggests ways to complement the latter position. By creating a structure that effectively encourages employers and unions to consider not rolling the electoral dice, while providing them with extended opportunities for informal exchange that may augment mutual understanding, the statute increases the chances that both sides will in the end prefer to pursue a voluntary recognition strategy.

II. DISCOURAGING DELAY AND PARTISAN ADJUDICATION

This part focuses on two often-criticized aspects of NLRB adjudicative performance. One is the considerable delay associated with Board action. When a representation election includes contested issues, the NLRB typically takes eight to ten months to complete action, measured from the date employees petitioned to have a union.³³ For unfair labor practice allegations, the waiting period is even longer—it now takes one and one-half to two years from the date a charge is filed to the date of Board resolution.³⁴ These extended periods for agency consideration do not include the additional one to two years frequently involved when a Board decision is appealed to the federal circuit courts.

The lion's share of intra-agency delay is consumed by Board review of initial trial-type determinations. For unfair labor practices, the time between the post-hearing trial determination of an administrative law judge and issuance of a Board decision has averaged thirteen to fifteen months in recent years.³⁵ For representation cases, the Regional Director typically resolves all election-related matters within forty days following the petition, but Board review of contested issues adds an additional seven to nine months.³⁶

A second frequently identified problem has been the politicization of Board membership.³⁷ The Congress that created the

33. See NLRB ANN. REP., Table 23, *in vols.* 61 (1996), 62 (1997), 69 (2004), 70 (2005).

34. See NLRB ANN. REP., Table 23, *in vols.* 69 (2004), 70 (2005).

35. See sources in *supra* note 33.

36. See sources in *supra* note 34.

37. This paragraph and the next summarize points made in a recent prior article. See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y

NLRB conceived of an adjudicative body of non-aligned individuals, and in its first fifteen years Board appointees came either from government service or academia. But starting in the 1950s, and accelerating since 1980, Board membership has become distinctly partisan. Appointees have been chosen from the management bar in ever-increasing numbers over half a century, and they almost invariably return to management-side positions after their short Board tenure. Attorneys representing unions were not named to the NLRB until the mid 1990s, but it seems plausible to expect that their post-Board patterns of professional involvement also will include reemployment on the side from which they came.

The Board's unabashedly partisan makeup has undercut the agency's reputation as a neutral and principled adjudicator. Moreover, because the transformation has occurred during a period of Republican ascendancy in national politics, many unions and employees have become deeply disillusioned with the Board as a possible source for protecting or vindicating their statutory rights. In theory, the appointment of Board members with expertise in NLRA law could enhance agency performance even if the expertise were acquired representing employers. But management-side attorneys are chosen for Board service through a political appointments process controlled by a Republican party demonstrably hostile to unions and their agenda. When these attorneys remain at the Board for short stints before resuming their management-side careers, it is not surprising that perceptions of agency bias and lack of independence have become fairly widespread.³⁸

The new British statute, while broadly modeled on the NLRA, includes a distinctive approach to both the time spent on adjudication and the method of appointing adjudicators. Once again, the differences are potentially instructive.

The CAC's format for resolving labor-management disputes is simpler and more straightforward than what transpires at the NLRB. The British agency renders all decisions after hearing evidence and arguments in a single trial-type proceeding; there is no provision for appellate review within the CAC. Three-person panels resolve disputes over whether a recognition application should be accepted, whether a bargaining unit's scope and size are appropriate, whether recognition should be declared (without a ballot or following an

J. 221, 243-52 (2005). See also Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361 (2000).

38. See generally Michael R. Triplett, 'Bush Board,' *State of Labor Law Debated by Current, Former Members, Practitioners*, DAILY LAB. REP. (BNA), at B-1 (Aug. 9, 2006).

election), and whether unfair practices have been committed during a campaign (and if so what relief should be awarded). Decisions by a CAC panel may then be appealed directly to the courts.

In recent years, the CAC has received some 100 recognition applications on an annual basis.³⁹ The agency's caseload should increase—perhaps substantially—in the near future, as Parliament established the existence of unfair practices and gave jurisdiction to the CAC effective in late 2005.⁴⁰ Even with unfair practice cases, the number of CAC panel decisions following hearings is unlikely to approach the annual figures for hearing-based resolution of election disputes and unfair labor practice complaints under the NLRA.⁴¹ The smaller scale of CAC operations is primarily attributable to the smaller size of the national labor force covered under British law. Not surprisingly, the number of potential NLRB decisionmakers at this evidentiary level—regional directors or their designees, and administrative law judges—well exceeds the number who appear on the lists from which CAC panels are chosen.⁴²

The average duration of a CAC case—from application to final agency resolution—is about 140 days. This is somewhat shorter than the average time between issuance of an unfair labor practice complaint and an administrative law judge decision following trial, though somewhat longer than the average time between filing of a representation petition and final action by a regional director. More important, the 140 days for CAC determinations subject to judicial review compares very favorably to the current averages for NLRB cases that include appellate review by Board members—286 days

39. See CAC ANNUAL REPORT 2005, *supra* note 7, at 8–9 (describing fluctuation between 80 and 116 annual applications over past four years).

40. See *id.* at 2 (discussing unfair practices under 2004 Employment Relations Act, which became effective in October 2005). There were no unfair practice complaints filed with the CAC as of March 31, 2006. See CAC ANNUAL REPORT 2006, *supra* note 20, at 4. Subsequently, the CAC has issued three unfair labor practice decisions, holding on two occasions that the employer's campaign activities did not amount to unlawful conduct and on the third occasion that the union's campaign conduct was not unlawful. See *TGWU and Comet Group plc*, No. TUR1/501 (17 Aug. 2006); *GMB and JF Stone Investments Ltd.*, No. TUR1/492 (1 Nov. 2006); *Prospect & PCS and National Maritime Museum*, No. TUR1/529 (5 Dec. 2006). All three decisions are on file with author and available at <http://www.cac.gov.uk>.

41. See, e.g., 70 NLRB ANN. REP. 2 (2005) (administrative law judges issued 287 decisions of which 17 were noncomplaint election objection cases); *id.* at 14 (Regional Directors completed hearings in some 375 disputed representation cases (7.5% of 5,047 closed cases)).

42. There are forty-nine Regional Offices and sub-offices of the NLRB, each with several attorneys who may conduct hearings on representation disputes. There are fifty administrative law judges charged with conducting hearings and rendering decisions in unfair labor practice cases. For listings of regulatory offices and sub-offices, and the Division of Judges, see http://www.nlr.gov/about_us/locating_our_offices/index.aspx. By contrast, the CAC's three-person panels consist of members from three distinct lists that in total consist of some sixty-five individuals. See CAC ANNUAL REPORT 2006, *supra* note 20, at 8–9.

spent on representation cases and 659 days on unfair labor practice cases.⁴³ Elimination of the Board's separate review stage thus raises the possibility of reducing time expended inside the agency by some 50–75%.

Simplifying the NLRB's adjudication process in this way would presumably result in other adjustments. Administrative law judges could become neutral members of adjudicative panels based on the CAC model discussed below. In addition, the CAC's centralized and smaller-scale operation make it relatively easy to remain familiar with agency precedent and to develop case law in predictable terms. Reliance on a larger and more dispersed adjudicative network that includes regional administrators and/or administrative law judges may require a mechanism to assure regular information-sharing and encourage consistency in the elaboration of legal standards. There also may be a need to address how decentralized adjudication would dovetail with the promulgation of rules, assuming the agency overcomes its longstanding reluctance to engage in such rulemaking. Still, these and other adjustments might well be deemed minor details if agency adjudication could be expedited in such dramatic fashion.

With respect to the identity of adjudicators, the CAC—like the current NLRB—draws members directly from the union and management sectors. Its methods of appointment, compensation, and recruitment, however, diverge sharply from what is provided for and practiced under the NLRA.

The CAC operates through tripartite panels, assembled for each new case or dispute from the membership of three distinct rosters. The twenty-nine members with experience as representatives of employers are mostly current or former directors of personnel or human resources at major firms, or they are human resources consultants. The twenty-seven members with experience as representatives of workers are primarily current or former high ranking officials in a trade union. The eleven deputy chairmen who preside over panels are mostly career academics in law, industrial relations, or human resources management, although several are trial judges on the Employment Tribunal.⁴⁴

43. See 70 NLRB ANN. REP., Table 23 (2005). See also 69 NLRB ANN. REP., Table 23 (2004) (reporting average of 304 days spent on representation cases that include Board appellate review and average of 690 days on unfair labor practice cases that include Board appellate review).

44. See CAC ANNUAL REPORT 2006, *supra* note 20, at 8–9, for list of sixty-eight current CAC members and their affiliations. The CAC Chairman, Sir Michael Burton, is a high court judge. The Employment Tribunal is a specialized court that reviews statutory workplace-related

Members serve and are compensated on a part-time basis. The average time commitment is three days each month, and members are paid at a fixed daily rate (about \$450 in 2005) as well as being reimbursed for travel and subsistence expenses.⁴⁵ Persons interested in becoming CAC members apply to and are appointed by the Secretary of the Department of Trade and Industry (DTI), initially for three years. Assuming satisfactory performance, they will normally be offered re-appointment for additional three year terms until being terminated at age seventy. The CAC includes a permanent staff that is responsible for investigation, assessment, and advice related to pending cases, carried out under the direction of panel members.

Candidates for CAC membership submit a lengthy application form to DTI that emphasizes a consensual rather than partisan approach. Candidates must, for instance, describe experiences from professional life in which they overcame a risk of bias when making difficult objective decisions, helped a group to achieve consensus and assume collective responsibility, and succeeded in a particularly challenging negotiation experience.⁴⁶ Personal interviews and extensive telephone references also are part of the recruitment process.

In addition to significant experience at senior operational levels, and demonstrable expertise in negotiation and/or collective bargaining, successful candidates are evaluated for personal characteristics related to impartiality and consensus building. Traits emphasized in the selection process include the ability to ensure that judgment is not swayed by personal bias or interests, to challenge the opinions of others constructively, to resolve conflicting positions and interests using a realistic and practical approach, and to command the trust and respect of colleagues.⁴⁷

In short, the Central Arbitration Committee is structured and recruited to perform as a somewhat loose-knit board of arbitrators. Empanelled on a part-time basis, those appointed from the management or labor sectors retain their day jobs. When providing periodic service as collective decisionmakers, members do not sit on particular panels that could create a conflict of interest.

claims involving *inter alia* race and sex discrimination, wrongful discharge, and safety and health violations.

45. See DEPT. OF TRADE & INDUSTRY, 2005 APPLICATION MATERIALS, (U.K.) (on file with author) [hereinafter DTI FORM], listing £233 as daily rate. As of April 1, 2006, Deputy Chairs receive £429 per day and members with experience representing employers or workers receive £242 per day. See E-mail, *supra* at note 20.

46. See DTI FORM, *supra* note 45.

47. See *id.*

Despite coming from partisan backgrounds, CAC members seem to have transcended the interests of their current or former employers. The CAC has issued over 500 decisions related to statutory recognition since June 2000, and as a matter of policy all decisions are published as unanimous.⁴⁸ Moreover, judicial review has been sought in only eight of these 500-plus decisions, and courts have reversed the CAC exactly three times.⁴⁹

The parties' deferential stance toward CAC decisions over the first five years must be placed in some perspective. Agency decisions thus far have involved recognition disputes rather than unfair labor practices; the latter may be more likely to trigger requests for judicial review. In addition, the CAC's panel structure follows a relatively established adjudicatory model in British workplace law. Specialized labor courts, comprised of tripartite panels chaired by a neutral, have been resolving individual employment disputes since the 1970s with no evidence of bias or partisanship.⁵⁰ Nonetheless, the remarkable absence of polarization among management and labor appointees to the CAC, and the litigants' widespread willingness to accept agency decisions as final, are at least advertisements for further consideration of this approach.

The model of a tripartite arbitration board comprised of part-time members is certainly not the norm in American administrative law. The Railway Labor Act (RLA) provides for tripartite panels to assume jurisdiction over so-called "minor" disputes.⁵¹ Although these

48. See Simon Gouldstone & Gillian Morris, *The Central Arbitration Committee*, in *THE CHANGING INSTITUTIONAL FACE OF BRITISH EMPLOYMENT RELATIONS* 79, 82 (Linda Dickens & Alan C. Neal eds., 2006). Gouldstone (the CAC's Director of Policy and Operations) and Morris (one of the CAC's eleven deputy chairs), add that "in practice, there is a high degree of consensus within panels." The CAC has other statutory responsibilities besides union recognition and derecognition; it also handles applications for disclosure of information related to collective bargaining, disputes over the composition of European works councils, and applications under the U.K. information and consultation procedure as well as the European Company Statute. These other areas of dispute occupy only a small portion of CAC time and resources; the vast majority of CAC effort at present is devoted to statutory recognition.

49. In *BECTU and the BBC* (Case No. TUR 1/253) (26 Aug. 2003), the court ordered the CAC to rehear the issue of whether certain freelance cameramen/women fell within the statutory definition of "worker." In *TSSA and Gatwick Express* (Case No. TUR 1/261) (2 Sept. 2003) the court ordered the CAC to arrange for a ballot, quashing the panel's earlier decision to award recognition without a ballot. In *GMB & URTU and Ultraframe (UK) Ltd.* (Case No. TUR 1/313) (23 May 2005), the court quashed the CAC's decision to re-run a ballot, and the ballot result therefore stood. All three decisions are on file with author and available at <http://www.cac.gov.uk>.

50. See JEREMY McMULLEN ET AL., *EMPLOYMENT TRIBUNAL PROCEDURES* 3-11 (2002); John K. MacMillan, *Employment Tribunals: Philosophies and Practicalities*, 28 *INDUS. L. J.* 33, 37-43 (1999).

51. See 45 U.S.C. §§ 153, First (i),(l); 153, Second (2000); *THE RAILWAY LABOR ACT*, 52, 64-67, 72-73, 405-20 (Douglas L. Leslie Ed., 2d ed. 2005) [hereinafter *RAILWAY LABOR ACT*];

cases primarily require the interpretation of contract terms rather than statutory provisions, Congress in the RLA did decide that the various adjustments boards would have exclusive jurisdiction including the power to impose final and complete remedies.⁵²

More recently, Congress in 1993 authorized the creation of three-member Copyright Arbitration Royalty Panels (CARPs) to help resolve disputes regarding royalty fees for the commercial use of certain copyrighted materials.⁵³ The Librarian of Congress selected a pool of qualified arbitrators based on certain criteria and recommendations from professional arbitration associations. Panel members served part time and were compensated on an hourly basis; their recommended decisions were adopted unless deemed by the Librarian to be arbitrary or contrary to the statute.⁵⁴

There are, of course, objections that could be raised to a system of tripartite adjudication by part time arbitrators. Concerns about possible lack of predictability or consistency, bias stemming from inexperience as well as prejudice, and fiscal burdens in a high-volume setting would have to be addressed. The original tripartite National Labor Board, created by President Roosevelt in 1933 based on the early New Deal model of collaborative industrial self-government, foundered in a matter of months, although largely for reasons other than consistency, bias, and cost.⁵⁵

At the same time, we have entered an era in which arbitrators serving a part-time public law function often resolve the statutory claims of individual employees on an ad hoc basis, leaving these

FRANK N. WILNER, *THE RAILWAY LABOR ACT AND THE DILEMMA OF LABOR RELATIONS* 53 (1991).

52. See *RAILWAY LABOR ACT*, *supra* note 51, at 406–12; *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963). The RLA provides for a National Railway Adjustment Board (NRAB) with four divisions, each of which processes disputes involving distinct categories of employees. Each division has an equal number of members (from three to five) selected by management and labor; if a division cannot reach a majority decision, it selects a neutral member to sit on the case as well. There is also provision for limited judicial review. The RLA further authorizes parties to create by contract Special Boards of Adjustment (SBAs) that will resolve inter-party disputes. These SBAs typically consist of three members—one from the railroad, one from the labor organization, and a neutral chair.

53. See *Copyright Royalty Tribunal Reform Act of 1993*, Pub. L. No. 103–198, 107 Stat. 2304 (codified as amended in scattered sections of 17 U.S.C.), *amended by* Pub. L. No. 108–419 (2004) (replacing arbitration panels with Copyright Royalty Judges).

54. See *Copyright Arbitration Royalty Panel Rules and Procedures*, 37 C.F.R. §§ 251.3, 251.5, 251.6 (2006); *Copyright Arbitration Royalty Panel (CARP) Structure and Process: Hearing Before the House Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 107th Cong. (2002) (Statement of Marybeth Peters, Register of Copyrights); 107 Stat. 2306 (1993).

55. See *generally* GUIDE TO SOURCES OF INFORMATION ON THE NATIONAL LABOR RELATIONS BOARD 7–8 (Gordon T. Law, Jr. ed., 2002).

employees with limited recourse to agency or judicial review.⁵⁶ Given our investment in arbitration as a strategy for disposing of workplace law controversies, it seems worth exploring whether the structured and continuous arbitral approach developed in Britain might provide for adjudication in the labor-management arena relatively insulated from the heat of partisan agendas. Such an approach could allow for decisionmaking that is more likely to instill confidence in the rule of law than what has been occurring under our status quo.

CONCLUSION

This article has presented some modest ideas borrowed from recent British experience that could apply to a relative corner of the contemporary workplace law landscape. Improving the administration and enforcement of our national labor relations statute is not as pivotal as addressing the systemic absence of just cause protections or enabling unions to speak for employees outside of the collective bargaining setting. Still, changes such as those discussed here can help to broaden participation and enhance fairness in workplace governance.

At various points, the article has referenced Britain's distinctive approach to voluntarism in labor-management relations. The British tradition of viewing collective bargaining agreements as undertakings "binding in honour" rather than enforceable at law⁵⁷ is indicative of managerial attitudes toward unions that are notably less hostile than those now prevalent in the United States. Yet employer perspectives on unionization are not frozen in time or irreversible. Management responses to unions in the United States shifted from massive defiance in the late 1930s to relatively uneventful acceptance in the late 1950s, before reverting to a position of broad-based hostility that has characterized recent decades.⁵⁸ Moreover, government rules and institutions interact with the culture of labor-management relations, and the law may operate as a causal influence, not merely a reflection of underlying values or beliefs. Thus, it seems reasonable to assume that the most recent growth of management hostility in the United States is something less than fixed and permanent, and that future

56. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

57. See *Ford Motor Co., Ltd. v. Amalg. Union of Eng'g & Foundry Workers*, [1969] 2 All Eng. Rep. 481, 491-96 (Q.B.).

58. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Representation Under the NLRA*, 96 HARV. L. REV. 1769, 1774-86 (1993); John Logan, *Consultants, Lawyers, & the "Union-Free" Movement in the U.S.A. since the 1970s*, 33 INDUS. REL. J. 197 (2002).

changes in labor law are capable of influencing employer attitudes toward unions.

Paul Weiler persuasively demonstrated back in 1990 that unions and collective bargaining remain important to substantial segments of our workforce. In that context, recent British experience suggests possibilities for using a revised statutory structure to encourage voluntary agreements, as well as to expedite and de-politicize the process of adjudicating labor disputes. These possibilities emanate, somewhat ironically, from a statute that itself borrowed heavily from the "gift" of our own NLRA. That gift was understandably viewed with some suspicion at the time, and the experience of less than a decade is hardly conclusive in removing initial concerns. Nonetheless, for purposes of contemplating potential changes in American labor law, certain recrafted design features of the British model deserve our consideration.