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B. R. Skelton

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ECONOMIC ANALYSIS OF THE COSTS AND BENEFITS OF EMPLOYER UNFAIR LABOR PRACTICES

B.R. SKELTON†

Despite the 1935 National Labor Relations Act's ban on employer unfair labor practices, businesses continue to fight unionization with illegal tactics. In this Article, Professor Skelton provides an economic rationale for the behavior of businesses confronted with union organizational efforts. Professor Skelton suggests that firms will choose the least costly economic option to avoid unions even if the option is illegal. He contends that the insignificant sanctions imposed by the Act encourage rather than discourage the use of unfair labor practices and argues that the Act should be amended to provide for punitive sanctions, specifically, a system of fines. Such a change would increase the costs of violating the Act and would thus make the use of illegal means to fight a union economically unattractive.

I. INTRODUCTION

Business firms generally prefer to maintain unorganized labor forces rather than those represented by unions. This attitude has led to frequent confrontations between business and unions that, prior to the passage of laws implementing collective bargaining as national policy, usually evolved into power struggles between the two groups. Unions fought for recognition through strikes, pickets, boycotts, and other concerted activities. Employers, on the other hand, countered with strike-breakers, company unions, court injunctions, and adverse personnel actions, usually with overwhelming success.

In response to this struggle between management and unions, Congress in 1935 enacted the National Labor Relations Act (NLRA).¹ The purpose of the Act was two-fold: to establish guaranteed collective bargaining rights for employees working in interstate commerce and to restrict employer unfair labor practices. The National Labor Relations Board (NLRB) was created to administer the Act and was authorized to settle questions of representation, process unfair labor practice complaints and establish appropriate remedies for unfair labor practice violations.

Despite the passage of the NLRA, however, employer opposition to unions has not subsided, and some firms continue to fight union organization with both legal and illegal tactics. Principal preelection unfair labor practices include interference with the election process, restraint or coercion of workers who seek to organize and bargain collectively, and adverse personnel actions

† Professor of Economics, Clemson University.

1. 29 U.S.C. §§ 151-169 (1976).

against workers who engage in union activities, the latter two practices being section 8(a)(3) violations.² The employer's choice between legal and illegal means of opposing unions usually depends upon its estimate of the relative benefits and costs of each. Therefore, given a limited budget with which to avoid an election, or to persuade workers to vote against a union, a firm may choose to employ both legal and illegal tactics.

*Cost-Benefit Analysis*³

In their efforts to realize profits, all business firms seek to combine resources used in production so that basic costs will be minimized. This requires that all resources be utilized such that the marginal benefit of the resource is equal to its marginal cost. In theory, profits will be maximized once this is achieved.

Most employers feel that unions make the achievement of this profit maximizing goal more difficult because they impose added costs on the firms. These costs can be direct economic expenditures in the form of wages and fringe benefits, or they can be indirect costs, such as employer rights, or "language items,"⁴ that erode managerial decision-making authority. Thus, faced with the possibility of union organization, and having determined the approximate added costs to the firm, the decision-makers within the firm must decide whether it would be economically advantageous to oppose the union. This essentially becomes a cost-benefit decision since a firm may incur added costs as well as realize potential benefits from opposition to the union.

Theoretically, the firm is willing to spend the additional money (cost) that it determines will be saved (benefit) should the union be avoided. This amount becomes the budget constraint for the firm, which then must decide how to distribute the money in the fight against the union. Obviously, numerous legal and illegal means are available. They range in scope from attempts to persuade employees to vote for the company in the event of an election, to the dismissal of union activists, or in some cases, to the closing of the plant itself.

2. *Id.* § 158(a)(3)(1976). Evidence of the increasing number of employer unfair labor practice violations can be found in the statistics reported in the NLRB Annual Reports.

3. Cost-benefit analysis is a basic tool of economics. For applications of cost-benefit analysis to case studies from the Council on Wage and Price Stability see J. MILLER III & B. YANDLE, *Benefit-Cost Analyses of Social Regulations* (American Enterprise Institute 1979). For application to motor vehicle offenses and tax evasion see Tullock, *An Economic Approach to Crime*, 50 Soc. Sci. Q. (June 1969); see also G. TULLOCK, *THE LOGIC OF THE LAW* (1971). For an application of these principles to the problem of political "dirty tricks," see McKenzie & Yandle, *The Logic of "Irrational" Politics: Nixon's Reelection Committee*, 8 Pub. Finance Q. 39 (January 1980). For a more general treatment of the economics of crime, see Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 69 (March/April 1968); Firey, *Limits to Economy in Crime and Punishment*, 50 Soc. Sci. Q. 72 (June 1969).

Cost-benefit analysis is applicable to many employer and union decisions other than those discussed in this Article. Among these are additional unfair labor practices committed by both employers and unions, intentional violations of the Occupational Safety and Health Act and the Environmental Protection Act, and violations of wage and price guidelines. Even employer opposition to and union encouragement of labor law reform are subject to cost-benefit analysis.

4. See part II *infra*.

Each of these options involve costs, benefits, and varying risks of success or failure. Within a given budget constraint, expenditures earmarked for fighting the union will be allocated so that the last dollar spent for each alternative will equal the benefit received from the particular expenditure.⁵ Depending upon the employer's estimate of costs and benefits, it is likely that both legal and illegal alternatives will be considered. Because unfair labor practices do in fact occur, it can be inferred that an employer often estimates the costs of illegal activities to be low relative to the benefits of such activities, or that the estimated probability of success is greater when unfair labor practices are instituted.

II. MARGINAL BENEFIT

The benefit derived by a company in avoiding a union is best illustrated by analyzing the potential effect the union can have on the firm. When a union is certified by the NLRB as a bargaining representative, management is required by the NLRA to engage in good faith bargaining in an effort to reach contractual agreement. Clauses agreed upon and included in a contract as a result of such bargaining generally represent items over which management previously exercised unilateral control, except for those previously dictated by governmental rules and regulations. These clauses can be categorized into two general groups: economic items and language items.

Economic items represent direct monetary outlays for wages and fringe benefits. They are subject to quantification, but only to the extent of estimates *ex ante*, since neither the company nor the union knows the range of actual costs until a final agreement is reached. Language items, on the other hand, do not necessarily involve direct monetary outlays, although their application could result in expenditures at a later date. Language items include provisions pertaining to seniority, just cause for discipline and discharge, and grievance procedures. While these clauses may not initiate direct monetary outlays, they do represent encroachment on managerial prerogatives, some of which are held dear.

The marginal benefit a firm derives by avoiding a union is the sum of these additional costs plus the costs of potential concerted activities, such as strikes, pickets, and boycotts. In this particular context, therefore, the word "benefit" refers to "cost saving," since such potential expenses would revert to benefits if the firm avoids the union.

5. In other words, the allocation of expenditures between possibilities will be such that:

$$\frac{MB_a}{MC_a} = \frac{MB_b}{MC_b} = \frac{MB_c}{MC_c} = \dots = \frac{MB_i}{MC_i} = \$1$$

where

MB = marginal benefit of the option

MC = marginal cost of the option

a, b, c ----- i = options available to fight unions

III. MARGINAL COSTS

The actual cost incurred by a firm in opposing a union is dependent upon its choice between legal and illegal actions. Legal options involve relatively few costs, namely attorneys fees and management time diverted to the campaign. Illegal options, on the other hand, usually entail greater costs but may result in potentially greater benefits to the firm. The typical costs incurred by a firm engaging in unlawful efforts to avoid a union are the sanctions imposed by the NLRB. These costs, over and above the firm's legal fees, serve as remedies for unfair labor practice violations. The typical remedy, however, is relatively costless to the firm, a fact that tends to encourage rather than discourage illegal activity.⁶

Employers generally commit two types of unfair labor practices with regard to union organizational efforts: interference with workers' organizational rights, and discriminatory personnel actions based on a worker's union activity, section 8 (a) 3 violations.⁷ These unfair labor practices can affect when and if an election will be held as well as determine its actual outcome. When workers are threatened with the loss of their jobs, or in fact lose their jobs due to union-related activities, it becomes clear to them that the employer has no intention of allowing a union to represent the employees. These wrongful activities serve to prevent workers from expressing their true feelings, and thereby discourage them from signing the necessary union authorization cards. In some cases, the violations of the NLRA serve to erode an already existing union majority and hinder the election process, usually resulting in the defeat of the union if the election is held.⁸

In order to restrain employers from committing unfair labor practices, the courts have ruled that remedies must be appropriate for the violations involved and cannot be punitive. For example, the typical remedy for a section 8 (a) 1 violation is a cease and desist order, which may be accompanied by a required posting of notices detailing the violations and, in certain instances, the reading of the notices to assembled employees.⁹ On the other hand, the usual remedy for a section 8(a)(3) violation, discriminatory discharge, is simply reinstatement of the worker with back pay.¹⁰

The initial cost to the firm of a cease and desist order is minimal, primarily because it requires little direct monetary outlay other than for legal fees and management expenses. While continued violations of these orders over a period of time could result in contempt of court citations and possibly fines,

6. See text accompanying note 12 *infra*.

7. 29 U.S.C. § 158(a)(3) (1976).

8. See Getman, Goldberg & Herman, *The NLRB Voting Study: A Preliminary Report*, 1 J. LEGAL STUD., 233-58 (1972) (concluding that campaigns by employers and unions have little effect on the outcome of elections). Whether conclusions on campaigns can be generalized to employer unfair labor practices is uncertain.

9. See, e.g., *Textile Workers v. NLRB*, 388 F.2d 896 (2d Cir. 1967); *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 105 (1967).

10. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Local 57, Ladies Garment Workers v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967).

courts have not been inclined to take this type of action. The direct monetary outlay for discriminatory discharge, on the other hand, can be significant, but compared to the potential benefit to the firm, this tactic actually may prove to be relatively inexpensive if the discharge decreases the risk of successful unionization.¹¹ In fact, these remedies impose little cost on the employer relative to the potential benefits that may accrue as a result of the violations. Firms derive from this statutory impotence added incentive to commit unfair labor practices in their opposition to unions.¹²

IV. POLICY IMPLICATIONS

The substantial number of unfair labor practice allegations filed annually offers proof that the potential benefits gained by employers who use illegal means to keep unions out exceed the anticipated costs of their actions. This revelation reinforces the premise that remedies available to the NLRB for section 8(a)(1) and section 8(a)(3) unfair labor practices do little to deter future violations.

The NLRA encourages rather than discourages labor law violations because its sanctions were created on the assumption that 100 percent of all violators will be charged, found guilty, and forced to make restitution to the party bringing the charges. However, there is always the chance in any case that charges will not be filed against the firm, or that if found guilty it will not have to "make whole" the charging party. Thus, because the guilty party may not have to pay for his wrongdoing for one reason or another, there exists economic incentive to violate the law.

An analogy may serve to clarify this position. Suppose the only remedy the courts can legally impose for bank robbery is to require the thief to repay the bank the money he has stolen. Suppose further that there is some fixed probability, say fifty percent, that the thief will be apprehended, convicted, or forced to repay. The likelihood, therefore, that the robber eventually will have to reimburse the bank is a multiplicative function of apprehension, conviction, and reimbursement, or $.5 \times .5 \times .5 = .125$. This means that there is one chance in eight that the robber will have to return the money to the bank. Under such conditions bank robbery could very well prove to be a worthwhile endeavor.

This same rationale applies to unfair labor practice violations. The basic shortcoming of the NLRA is that it was not designed to deter violations but

11. Costs of this type are readily quantifiable, although it may prove difficult *ex ante* to determine the length of time for which back pay is to be awarded or to ascertain other adjustments that the NLRB will make in the award.

12. When the NLRA was enacted in 1935, Congress apparently believed that the law would deter labor-related violations. This, however, has not been the case. The number of charges filed for § 8(a)(1) and § 8(a)(3) violations more than doubled during the 10 year period 1969-78; further, charges for these same violations per election held nearly doubled during the same interval. See 34 N.L.R.B. ANN. REP. (1969) through 43 NLRB ANN. REP. (1978) Tables 1 and 2. This increase can be attributed in part to the labor force's improved knowledge of the protection afforded by the NLRA, and in part to the expanded efforts by less easily organized firms to avoid unions. It is likely that intentional violations will continue, since the nature of the available remedies serves to encourage rather than discourage them.

merely to remedy situations in which violations have already occurred. When a law is not punitive and imposes only "make whole" remedies, it is reasonable to expect it to be violated, especially when there exists a substantial probability that the violator will not even have to "make whole" the offended party.¹³ This reduces the cost of labor law violations to businesses and therefore encourages them to resort to illegal tactics in fighting unions.

In order to deter unfair labor practices, Congress must revise the NLRA so as to either reduce the benefits that employers derive from illegal activities or increase the projected costs of fighting the unions. It appears, however, that little can be done to reduce the firm's marginal benefit from opposing unionization other than to increase the probability that the union will win an election or be certified as a bargaining representative. It is true that the NLRB has fashioned a remedy that reduces the probability of a successful anti-union fight by issuing bargaining orders based on preelection unfair labor practices. Under the *Gissel*¹⁴ doctrine, bargaining orders can be issued even though the union loses an election if significant unfair labor practices are found to have eroded a previously existing union majority.¹⁵ Expanding this concept to situations in which fair elections are impossible might in turn decrease the benefit to the firm and therefore could result in a decrease of unfair labor practice violations.

A more effective restraint on unfair labor practices, however, would be amending the NLRA to increase the cost of violating its provisions. Any change in statute, the NLRB, or court procedures that increases the likelihood that a violator will be found guilty will of course increase the cost of violations. In addition, changes that affect the monetary aspect of the remedy by converting its "make whole" provisions to punitive ones will produce similar effects on costs.

Of the choices available that increase the costs of engaging in unfair labor practices, a system of punitive sanctions appears to be the most feasible.¹⁶ Theoretically, such a system would increase the firm's marginal costs, bring about a drastic reduction in the firm's unfair labor practices,¹⁷ and force the firm to revert to legal means in fighting the union. Overall, a system of fines would produce the desired results and impose few significant costs on society in general.¹⁸

13. Any probability less than 100% that the violator will have to "make whole" the offended party reduces the marginal cost of such violations. See Becker, *supra* note 3; Tullock, *supra* note 3.

14. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

15. *Id.* at 610-16. For a discussion of this ruling and its effect see S. Brown, *The Effectiveness of the Remedies Used in Protecting and Promoting the Employee's Right to Organize* (May 1972) (unpublished L.L.M. Dissertation, University of Pennsylvania).

16. Brown concludes that Congress should not impose sanctions until the Board fully uses the powers it has under the Act. See S. Brown, *supra* note 15, at 190-92.

17. Becker considers increases in the likelihood of punishment and harsher penalties as deterrents to crime because they increase the cost of violations. See Becker, *supra* note 3, at 177.

18. In the event that a fine system is implemented, a method would still have to be devised to distinguish accidental violations from intentional ones. The NLRB and the courts could use the frequency or severity of violations to prove the firm's intent to commit unfair labor practices.

V. CONCLUSION

Although the National Labor Relations Act was designed to deter employer unfair labor practices, statistics indicate that the Act has failed to achieve this goal and, in fact, may have had the effect of encouraging the use of illegal tactics. Why do intentional violations of the Act occur? In short, given the Act's lack of meaningful sanctions, the benefits realized by a firm engaging in unfair labor practices equal or exceed the costs of engaging in those practices. As a result, law violations are frequently the least cost economic alternative.

Also, the use of discretion in determining the amount of fines would permit first offenders to be treated accordingly, while progressively costlier fines could be levied for repeat offenders.

