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## Naked Feminism: The Unionization of the Adult Entertainment Industry

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# NAKED FEMINISM: THE UNIONIZATION OF THE ADULT ENTERTAINMENT INDUSTRY

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## I. INTRODUCTION

With the power and membership of labor unions declining every year<sup>1</sup> and the popularity and revenue from adult entertainment products and services rising at astronomical rates,<sup>2</sup> it is logical that

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1. Union membership has declined steadily since the 1960s and last year fell another 159,000 to 16.1 million members, just 14 percent of the work force. To replenish its diminishing ranks, the American Federation of Labor—Congress of Industrial Organizations (AFL-CIO) now vows to actively recruit women, who make up approximately 40% of the nation's trade union membership. See Kieran Murray, *Dwindling Labor Unions Recruit Women*, CHI. TRIB., Apr. 19, 1998, at 9.

2. Revenues from the legal adult entertainment industry are conservatively estimated at least \$10 billion a year and include home video sales and rentals at \$3.1 billion a year; adult content films and sexually oriented interactive games on CD-ROMs at \$300 million a year; internet services; cable, satellite, and pay-per-view TV; and "gentlemen's clubs," upscale strip

organized labor would, at some point, turn its attention to one of the last unorganized and disenfranchised groups of workers in America: adult entertainers.<sup>3</sup> Not only are adult entertainers appropriate for union organization,<sup>4</sup> but they want to be organized.<sup>5</sup> Nevertheless, organized labor has all but turned its back to the exotic dancers and pornographic movie actors seeking assistance in securing minimum wages, benefits and job security.<sup>6</sup> But, unlike most workers who are

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clubs offering tuxedoed doormen, valet parking, and stock options traded on NASDAQ, which bring in over \$100,000 a week, not to mention revenues from the over 2,200 more traditional strip clubs, peep shows, X-rated theatres, and adult bookstores. See Anthony Flint, *Skin Trade Spreading Across U.S. High Tech Finds Boon for \$106 Industry*, BOSTON GLOBE, Dec. 1, 1996, at A1.

3. See generally Tom Kuntz, *Dancers of a Tawdry World, United: Organized Labor's Red-Light Beacon*, N.Y. TIMES, Apr. 20, 1997, at 7 (discussing the first union contract in the nation covering workers in the sex trade).

4. The mission of the AFL-CIO includes: "To aid workers in securing improved wages, hours, and working conditions . . . to promote the organization of the unorganized into unions of their own choosing for mutual aid, protection and advancement . . . to encourage all workers without regard to race, creed, color, sex, national origin, religion, age, disability, or sexual orientation to share equally in the full benefits of union organization." AFL-CIO CONST., art. II, Objects and Principles 3-4.

5. Exotic dancers' unionizing efforts date back to the 1940s when the American Guild of Variety Artists (AGVA) individually represented a large number of dancers through recognition agreements, casual engagement contracts, and standard contracts for minimum wages on a dancer-by-dancer, club-by-club basis. The relationship between AGVA and dancers ended abruptly in 1973 when a federal court first declared nightclub performers to be independent contractors. Telephone Interview with Paul Bales, Executive Director of AGVA, Southern California Chapter (Apr. 14, 1998).

Group organizing efforts started up again, without AGVA's assistance, in the early 1990s at Pacer's, a San Diego, Cal. strip club. See Martha Irvine, *San Francisco Strippers Enjoy Union Coverage*, LAS VEGAS REV. J., May 12, 1997, at 1A. Those efforts were short-lived, however; the dancers voted to decertify the union in 1993, due largely to management's misinformation, threats, and the hiring of dancers who would not join the union. *Id.* See also WIS. STATE J., Sept. 4, 1993.

In early 1996, strippers of the Lust Lady peep show in San Francisco, Cal. began organizing themselves in an effort to persuade club management to remove the one-way mirrors in customer booths that allowed customers to clandestinely photograph and videotape dancers, the product of which they feared would begin appearing on the Internet or on bootleg videos without dancer permission or financial gain. See Kuntz, *supra* note 3, at 7; see also Telephone Interview with "Jane," Organizer/Dancer at the Lusty Lady (Apr. 10, 1998); Jane, *No Justice, No Piece* (last modified June 12, 1997) <[http://www.bayswan.org/Edjust\\_piec.html](http://www.bayswan.org/Edjust_piec.html)> (explaining how strippers went from no recognition to union contact ratification). Since then, organizing efforts have begun in Hollywood, Cal.; Philadelphia, Pa.; Anchorage, Alaska; Massachusetts; New Jersey; and some provinces within Canada. NEWSLETTER 10 (Exotic Dancers' Alliance, San Francisco, Cal.) 1998 (on file with author).

6. In what is generally representative of the working condition demands of most strippers, the Lusty Lady dancers' first collective bargaining agreement secured for them the right to be treated by management "with dignity, respect, courtesy, and trust;" to be free from "an intimidating, offensive, or hostile work environment;" to "just cause" dismissals which include "[e]mployer's opinion regarding employee sexiness while performing, customer interaction and/or customer satisfaction . . ."; to one paid sick day; to be free from the arbitrary docking of pay for missed meetings and sick days; to family/personal leave, provided that "the [e]mployer approves . . . based on scheduling considerations, the employee states, in writing, when she expects to return, the dancer's appearance has not changed materially since she started her leave (i.e., employee has no additional tattoo or piercing . . . no significant weight gain or loss), employee returns to work within one week or stated return date;" to a guaranteed

customarily approached by union organizers<sup>7</sup> these adult entertainers have had to go door-to-door at the AFL-CIO in an effort to find a union willing to represent them;<sup>8</sup> or, in the porn actress's case, right to the door marked "Screen Actors' Guild."<sup>9</sup> So why then, won't these labor

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pay scale ranging from \$12.00 per hour for new hires to \$21.00 per hour for dancers employed 31 weeks, plus tips; extra pay for working in the Private Pleasures/talk dirty booth at 50% of gross receipts; to 10-minute breaks every 40 - 50 minutes on stage, and a 30-minute lunch break, provided that it is "taken before midnight, Sunday through Thursday, and before 1:00 a.m. Friday and Saturday"; to paid 15 minutes preparation time; to pay for dancers who undertake the "selecting, purchasing, and programming" of music; to time plus 1/10 pay for working New Year's Eve; to remove the one-way windows; to a grievance and arbitration procedures; and support staff [bouncers, cashiers, and janitors] to receive two 15-minute paid breaks and one unpaid 30-minute lunch. See Collective Bargaining Agreement (CBA) between Multivue, Inc., The Lusty Lady and Local 790, Service Employees International Union, and AFL-CIO, ratified Apr. 4, 1997 (on file with author); see also Kuntz, *supra* note 3; Irvine, *supra* note 5.

In their second CBA, ratified on April 4, 1998, the benefits increased to include up to four paid sick days (based on hours worked) with no monetary penalty for additional sick days; time and one-half pay for New Year's Eve; a guaranteed pay scale of \$22.00, which the employer can increase to \$23.00 - 26.00 per hour; and their biggest coup, a hiring cap on the number of dancers employed at a particular time. See Jane, *supra*, note 5 (contract on file with author).

7. See *It's the Naked Truth*, TULSA WORLD, May 4, 1997, available at 1997 WL 3636315.

8. The Lusty Lady dancers, who sought out Service Employees International Union (SEIU), Local 790 for representation, initially encountered resistance from the union; but Local 790 had an informal affiliation with the Exotic Dancers' Alliance, a San Francisco-based advocacy group, and with their assistance, persuaded Local 790 to represent them. See Jane, *supra* note 5.

In the cases of dancers in Philadelphia and Anchorage the situation was much worse. At the Oakford Inn in the Philadelphia suburbs, the International Brotherhood of Teamsters, AFL-CIO, initially agreed to represent the dancers, and had gone so far as to collect signature cards, petition the NLRB for approval, schedule an election, and begin a campaign, when they inexplicably abandoned the effort and the dancers, in mid-campaign. See Jane, *supra* note 5. Unsurprisingly, the dancers failed to get enough votes to certify the union, and the effort failed. *Not Covered Strippers Reject Chance to Form Union*, MILWAUKEE J. SENTINEL, Oct. 30, 1997, at 5.

In Anchorage, the Alaska Exotic Dancers' Union, an independent union, sought out and initially affiliated with the Teamsters. The Teamsters agreed to represent the dancers of the Showboat Show Club, but they suddenly abandoned the dancers mid-campaign, warning organizers "not to call back." Telephone Interview with Tora Brawley, Alaska Exotic Dancers' Union, Dancer/Organizer of the Showboat Show Club (Apr. 21, 1998) [hereinafter Brawley Interview]. As a result of diligent efforts on the part of the dancers' organizer, the Showboat's dancers informally affiliated with the Hotel Employees Restaurant Employees, AFL-CIO. *Id.*

9. As its name suggests, the Screen Actors' Guild (SAG) is the major representative for movie actors, with a membership of nearly 90,000. Dade Hayes, *Porn Actress Takes Case to National Labor Board Films: Performer Files Complaint After Getting Cold Shoulder From the Screen Actors Guild*, L.A. TIMES, Nov. 8, 1997, at B5. It operates as a closed union, requiring applicants to either work on a project financed by a guild signatory (usually a major movie studio or production company), work three days (or collect three vouchers) as an extra on approved shows, or be a member of an affiliated entertainment union, prior to being eligible for membership. *Id.*

In November 1996, Dalny Marga Valdes, star of more than 70 X-rated films, was denied Guild membership, and as a result filed charges with the National Labor Relations Board (NLRB) against SAG for discriminatory and arbitrary denial. Telephone Interview with attorney, NLRB, Southern Cal. Office (Apr. 4, 1998). Those charges were eventually dismissed by the NLRB for lack of cause. *Id.* Ms. Valdes seemingly did not meet SAG's standards for admission and now has little recourse because SAG, as a private organization, is entitled to set standards for admission so long as those standards are not constitutionally forbidden. *Id.* SAG is under no legal duty as a labor union to accept everyone seeking membership. *Id.*

unions accept ready-organized contingents of strippers or porn stars?

Although one could speculate that labor's reluctance is due to the controversial and sexual nature of these professions,<sup>10</sup> the industry's reputed ties to organized crime,<sup>11</sup> fear of public backlash, or any combination thereof, the primary reason for labor's reluctance may actually be our nation's labor laws.<sup>12</sup>

The National Labor Relations Act [hereinafter "NLRA"] grants most employees the right to organize and join unions.<sup>13</sup> It does not, however, grant those same rights to supervisors or independent contractors, and therein lies the distinction.<sup>14</sup> By arbitrarily classifying their exotic dancers as "independent contractors"<sup>15</sup> rather than "employees" and

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10. Organized labor's reaction to strippers is representative of the general public's, and includes such sentiments as "not taking [them] seriously" and assuming that exotic dancing/entertaining is "not an honest day's work." Wesley Pruden, *A Jungle Out There and It's Boiling Hot*, WASH. TIMES, May 6, 1997, at A4. The porn industry has taken a bold step to be heard above the roar of condemnation: lobbying. In a successful effort to defeat California state legislation that would have taxed pornographic materials, a 40-person porn star delegation went to the state capital and personally lobbied state representatives. The porn industry currently keeps a full-time lobbyist on payroll. See Mark Katches, *Touch of Savvy Helps Porn Industry Avoid Tax*, ORANGE COUNTY REG., June 22, 1997, available at 1997 WL 7429157; see also, Free Speech Coalition, *Celebrate Free Speech Lobbying Days 1998* (last modified Feb. 10, 1999) <<http://www.freespeechcoalition.com/industry/legislation/celebrate.htm>>.

11. Rumored affiliations between strip clubs and organized crime are numerous and notably include: ties to Jack Ruby and the assassination of John F. Kennedy (Ruby, a strip club owner, said he was not at the assassination because he was at his club dealing with union/Mafia problems), Report of the President's Commission on the Assassination of President John F. Kennedy [a.k.a., Warren Commission Report], Sept. 24, 1964; ownership of San Francisco strip clubs, including Mitchell Brothers O'Farrell Theatre, the club subject to a class-action suit discussed herein, *Interview by Siobhan Brooks with Dawn Passar, Co-Founder of the Exotic Dancers' Alliance*, (visited Apr. 18, 1999) <<http://www.bayswan.org/sioblntw.html>>; "Scores," a high-class New York City strip club that is the focus of a recent extortion case brought by the government against John Gotti, Jr., alleging that he demanded payments of both the dancers and the club owner, Greg B. Smith, *Junior's Brand New Jam: Enforcer Implicates Gotti in Extort Cases*, N.Y. DAILY NEWS, Apr. 3, 1998, at 7; Showboat Show Club, the Anchorage, Alaska strip club, which is the subject of current unionizing efforts by dancers, rumored to be controlled by the Hell's Angels motorcycle gang, a rumor supported in the continued presence of leather-clad, armed Hell's Angels at management-union meetings. Brawley Interview, *supra* note 8.

12. See *infra* notes 13-18 and accompanying text.

13. The National Labor Relations Act's (NLRA) most important provision, section 7, 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." 29 U.S.C. § 157 (1994).

14. *Id.*

15. Independent contractors are explicitly excluded from the NLRA's section 7 rights and other related provisions by section 2(3). 29 U.S.C. § 152(3) (1994). This distinction is important because, although it is not widely known, exotic dancers are of one of two types: "house" dancers or "features." See Christine Fuentes, *Boogie Nights: The '70s Are Alive and Well at S.F.'s Gold Club*, S.F. EXAMINER, Nov. 30, 1997, at M16. House dancers comprise the majority of exotic dancers and are the ones misclassified as independent contractors. *Id.* Generally, these women work on a continuing basis for one particular club; on exception they may alternate or simultaneously work for more than one club located in the same area and owned by the same enterprise. *Id.* However, it is rare for a dancer to work equal amounts of time for two more

charging them fees to work<sup>16</sup> rather than paying them wages, proprietors of strip clubs have, until recently, been able to stop organizers in their tracks, thereby denying dancers the protection and benefits of collective action.<sup>17</sup> The courts have become an active partner in the continuing financial exploitation of adult entertainers (namely exotic dancers) by legally classifying various types of stage entertainers as independent contractors, and thus denying these workers protection of the labor laws enacted for their benefit.<sup>18</sup>

That may be about to change, however. Several class action law suits, collectively involving over 5000 exotic dancers and thirty-one strip clubs, have been filed<sup>19</sup> in the state courts of California<sup>20</sup> and Nevada.<sup>21</sup> The

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independently owned strip clubs. Thus, a multiple-employer situation would not arise during unionization and collective bargaining. *Id.*

A "Feature" is hired by the club for promotional purposes for a limited engagement. The feature is often a pornographic movie actress, magazine centerfold, or other sex industry celebrity, who will sign autographs or take photos with customers but rarely dance. *See, e.g.,* Fuentes, *supra* note 15, at M16. Those who do dance tend to be individually recognized and advertised as they travel a "circuit" of strip clubs (i.e., Los Angeles to San Francisco to Las Vegas). *Id.* When the clubs visited are owned by separate enterprises, the feature dancer is properly classified as an independent contractor, and would not be able to join a union. *Id.* An exception may arise, however, if the visited clubs are all owned by the same enterprise (which they often times are). Existing labor law permits union members, once properly part of a bargaining unit, to work at different job sites of a single employer, and in some cases of different employers, so long as each employer is party to a collective bargaining relationship with the union. *See Combined Century Theatres, Inc. v. NLRB*, 120 N.L.R.B. 1379 (1960), *mod. and enforced*, 278 F.2d 306 (2d Cir. 1960) (stating that thirteen movie theatre companies are considered a single employer under the NLRA).

16. An outrageous industry-wide practice requires exotic dancers to pay their employing strip club for each shift they work. This practice is believed to have originated at the Mitchell Brothers O'Farrell Theatre in the late 1980s, quickly spreading nationwide. Brooks, *supra* note 11. These fees, commonly called "stage fees," "house," "tip-out," "rent," "commission," "leases," etc., purport to be for the right of use of the owner's facilities as dancers ply their "independent trade." Brooks, *supra* note 11. The fees are often fixed amounts, usually referred to as "stage fees," and range between \$25-100 per shift. Alternatively, the fees are "tip-outs"—where the amount to be remitted to the club is determined by a percentage of the dancer's daily earnings on "tips," the price customers pay dancers directly for private table or lap dances. NEWSLETTER 8 (Exotic Dancers Alliance, San Francisco, Cal.) 1997 (on file with author). At some clubs, such as the Market Street Cinema and Century Theater in San Francisco, the fees reach amounts as high as \$150 per shift. *Id.*; *see Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 160 (Wash. 1997) (adjudicating where the Club charged dancers \$65 or more for a six to eight hour shift).

17. Brooks, *supra* note 11.

18. *See Associated Musicians of Greater Newark v. Bow & Arrow Manor*, 206 N.L.R.B. 581 (1973) (orchestra leader and strolling musicians of restaurant club considered independent contractors under NLRA); *Harrah's Club v. NLRB*, 446 F.2d 471 (9th Cir. 1971) (casino house band members considered to be independent contractors under NLRA); *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943), *affirming* 50 F. Supp. 329 (S.D.N.Y. 1942) (holding movie theatre intermission stage performers are to be considered independent contractors).

19. Prior to publication of this article, the first of two California cases, *infra* note 20, settled for \$2.85 million, which included attorneys' fees and restitution. Julie N. Lynem, *O'Farrell Settles With 500 Dancers: \$2.85 Million Includes Restitution, Legal Fees*, S. F. CHRON., July 10, 1998, at A22. Because the settlement reportedly did not include any admission of liability, the claims and issues contained therein remain untested in the courts. It is, therefore, in this author's opinion, appropriate to discuss the issue as a pending matter (with this disclaimer).

legal basis of each suit is that strip club proprietors have improperly classified their exotic dancers as independent contractors, rather than employees, in violation of state and federal wage and hour laws.<sup>22</sup> Success on the merits would mean the dancers are legally entitled to back wages, reimbursement of stage fees, and other damages.<sup>23</sup> To win their cases, these women must demonstrate that their classification as independent contractors is a subterfuge (likely created by club owners to avoid employment-related costs and taxes);<sup>24</sup> that the reality of their employment situation clearly demonstrates that club owners, not dancers, control the actual working conditions within the clubs; and that, accordingly, exotic dancers lack the business independence required for classification as independent contractors.<sup>25</sup>

This article explores the legal basis for the dancers' claims, from the treatment of employees and independent contractors under the NLRA, the Fair Labor Standards Act, and California and Nevada state laws, to the corresponding federal and state courts' interpretations, tests, and

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20. Two class-action lawsuits have been filed in California to date. In the first, *Vickery v. Cinema Seven, Inc.*, 480 former exotic dancers of the O'Farrell Theatre—a unique multi-theme roomed strip club in San Francisco, billed as “the adult Disneyland,” and best known for on-stage and private seating live performances of sexual acts involving multiple dancers and/or sexual “props/toys”—sued the club for back wages and reimbursement of stage fees. See Caren Benjamin, *Strippers Expand Wage Lawsuit to Additional Las Vegas Clubs*, LAS VEGAS REV. J., June 12, 1997, at 5B. The dancers alleged that in 1988 the club impermissibly changed the classification of its exotic dancers from employees to independent contractors, simultaneously stopping the payment of wages and implementing the practice of charging stage fees. *Id.* The dancers were granted class action status in May 1995. See *id.*

The second lawsuit, filed in Los Angeles Superior Court on December 9, 1998, pits five exotic dancers (seeking to represent a class that includes all dancers employed at the clubs since 1994) against 23 strip clubs in the Southern California, San Fernando Valley region. See Peter Hartlaub, *Strippers Sue Clubs Over Work Status*, L.A. DAILY NEWS, Dec. 10, 1998, at N8. Here too, the dancers allege a “sham independent contractor arrangement” exists between the clubs and the dancers that work at them. *Id.* The dancers hope that this lawsuit will reward them with punitive damages and employee-status, and the benefits that accompany that status, such as hourly wages, disability insurance, job benefits, workers' compensation and overtime pay. *Id.*

21. In *Roe v. Cheetah's Lounge*, over 5000 former and present exotic dancers as a § B(2) class, are suing for unpaid wages, overtime wages, reimbursement of monies paid to the clubs as “tip-outs, rent, commission, locker fees,” reimbursement for costume/uniform expenses, and declaratory judgment prohibiting the future sharing of tips and gratuities, and requiring payment of minimum wages. Petitioner's First Amended Complaint for Class Action Relief at 8-13, *Roe v. Cheetah's Lounge* (D. Ct. Nev.) (No. A371500) (on file with author).

22. Benjamin, *supra* note 20, at 5B.

23. Benjamin, *supra* note 20, at 5B.

24. The manner in which the principal handles any tax obligations is of no significance in determining employment status under California law. Letter from Miles Locker, Attorney for Cal. Labor Comm'n (Oct. 10, 1997) (citing *Toyota Motor Sales v. Superior Court*, 220 Cal. App. 3d 864, 877 (1990) (“An employer cannot change the status of an employee to one of an independent contractor by illegally requiring him to assume a burden which the law imposes directly on the employer.”)) (on file with author).

25. See *Yard Bird, Inc. v. Virginia Employment Comm'n*, 503 S.E. 2d 246, 253 (Va. Ct. App. 1998) (explaining that the club exercised actual or potential control over dancers, and dancers were not engaged in independently established businesses).

classification of exotic dancers.<sup>26</sup> The facts suggest that these cases would be successful under both California and Nevada law, as well as federal law.<sup>27</sup> Furthermore, these lawsuits present the court with an ideal opportunity to apply the Fair Labor Standards Act's model of employee/independent contractor law to the adult entertainment industry. Such a definitive judicial application would not only benefit public policy and the working conditions of thousands of working women, but may also have possible persuasive value in any subsequent NLRA action.<sup>28</sup>

Assuming that judicial determination of exotic dancers' employee status on a class-wide basis would subsequently lead to an industry-wide change in the practice of treating dancers as independent contractors -- either voluntary, through further legal action, or by collective action on the part of dancers -- this article explores the future of their unionization and the unavoidable implications for the feminist movement.<sup>29</sup>

## II. APPLICABLE LAWS

The primary statute granting employees the right to organize and collectively bargain is the NLRA. Since 1935, despite subsequent amendments in 1947<sup>30</sup> and 1959, it has acted as the primary power-equalizing tool for employees.<sup>31</sup> Not only does the NLRA grant

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26. *See infra* Part II.

27. *See infra* Part II.

28. It should be noted that the NLRB has complete autonomy in deciding cases arising under the NLRA, and therefore would not be bound by a trial court's determination of dancers' employee status. The Board may, however, be influenced by such action. *See* 29 U.S.C. § 141 (1994) (stating the purpose of the Act to be to benefit public policy and working conditions).

29. *See infra* Part II (discussing how the case of pornographic movie actors differs from that of exotic dancers in that their unionization issues turn more on the labor laws regarding union representation and membership, rather than wage and hour laws). Unfortunately, there is no legal precedent holding a union responsible to an individual for denied membership in that union. As a result, the unionizing efforts of pornographic movie actors will not be specifically discussed further in the context of this article.

30. In 1947, an anti-Labor, Republican-led Congress amended the NLRA with the Taft-Hartley Act, which was significant in two respects: First, it specifically excluded independent contractors from NLRA protection, a direct response to the Supreme Court's decision in *NLRB v. Hearst Enterprises*, 322 U.S. 111 (1944) (using the "economic factors" test [a.k.a., "statutory purpose" test] and finding newsboys to be employees covered under the NLRA); second, the amendments permitted employers to actively campaign against unions during the pre-election campaign, provided that there was "no threat of reprisal, or force, or benefit."

31. As stated in the National Labor Relations Act:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours,