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"Living in Interesting Times: President Obama and the Rebirth of the Labor Movement"

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Abstract

Legislation has been introduced in the United States that will allow workers to form unions without secret ballot voting among prospective members. This legislation, in its current form, is the most radical change in Federal law governing union recognition in its history. While passage of the legislation is far from certain, it has generated much discussion and argument, most of it polemical. This article examines the issue from a more academic perspective, reviewing the history of organizing and how management practices have developed that effectively use the current election process as a tool to resist organizing efforts, and the effect the legislation might have upon those practices.

Keywords: Legislation, Election, Effect, Form unions

There is an ancient saying: "May you live in interesting times." Depending on one's perspective, it is either a toast or a curse.

1. Introduction

The United States is on the verge of the most radical change in labor policy and law since Roosevelt's New Deal in the 1930's. The U.S. House of Representatives, controlled by pro-labor Democrats and with the backing of President Obama, has introduced legislation that will allow unions to form without a secret ballot vote among prospective members. The legislation, the Employee Free Choice Act (EFCA), commonly-referred to as "card-check" legislation, also provides stiff penalties for employer misconduct while opposing unionization efforts, as well as mandatory arbitration of collective bargaining agreements. If this legislation, or anything like it, becomes law there is likely to be a surge of labor organizing in American industry, with an attendant revitalization of private sector unionism. Also, the success rate for unions in representation elections is likely to be high, given that many of the tools and techniques companies have used to combat union organizing over the past sixty years will be either eliminated or greatly restricted if this legislation is enacted.

Any and all of these assumptions can be challenged. It is entirely possible the legislation will not pass this Congress in its current form. Alternatives have been proposed which will retain secret ballot elections but greatly shorten the time both sides can campaign. As this paper goes to press, other compromises are being discussed which would have similar effect (Greenfield, 2009). But political analysis is not the focus of this paper. What is clear is that any change in the law eliminating secret ballot elections, shortening the time for employers to resist unionizing efforts, or increasing penalties for unfair labor practices during such efforts, will have a dramatic impact on labor law and its practice in the United States.

2. A Brief History of Union Organizing and Industrial Resistance

The passage of the Wagner Act in 1935, which created labor law as we know it in the United States, was in and of itself a radical act at the time. In essence, it inserted government squarely at the intersection of capital and labor, which throughout most of American history – and to a certain extent human history - had been a private affair, and created a governmental body, the National Labor Relations Board (NLRB), to oversee it. With a stated pro-union bias at its inception (the language of the Wagner Act stated it was designed to "encourage the practice of collective bargaining"), and the economic tailwind of World War II, the percentage of private industry American workers joining unions expanded rapidly over ensuing years (see Smith, Merrifield, & St. Antoine, 1968). By 1950 the percentage of private sector workers covered by a labor contract grew to 35% percent. The number of representation elections supervised by the NLRB in that year was 5619, unions won 75% of them, and labor enlisted 753,000 new members (see Seeber & Cooke, 2009).

Although unions enjoyed general popular support during these years, as evidenced by their rapid expansion in membership, resistance from the courts and the legislative branch was growing. First, in a series of rulings the Supreme Court found the Wagner Act's tight restrictions on employer conduct during union campaigns an unconstitutional

infringement of a corporation's right of free speech (N.L.R.B. v. Virginia Electric Power, 1941). Secondly, in 1947 a Republican Congress, suffering from a bit of a New Deal hangover, passed the Taft-Hartley Act (the "Act") over President Truman's veto. The Act was an attempt to level what some saw as an uneven playing field (Smith, et al., 1968). Among other things, it made it clear that employers may express their opinions about unionism and vigorously contest organizing efforts as long as they do not threaten union supporters or wrongfully promise benefits.

Some commentators felt Congress went a bit farther than leveling the playing field. Archibald Cox, later to become Attorney General of the United States, suggested that Taft-Hartley "represent(ed) a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining" (Cox, 1947). However, as a recent chief counsel to the Chairman of the NLRB observed, the consensus view of the time was that Taft-Hartley reaffirmed much of the Wagner Act and was "hardly a fundamental change in philosophy" (Lopatka, 2007).

Unions continued to grow in power and total membership through the fifties and into the sixties, but this was driven more by growth in the major industrial unions such as the United Auto Workers than by organic growth (see Goldfield, 1989). Quietly, organizations and firms were being created to fight unionism, and in a broader context, what they saw as collectivism and corruption in American society (Miner, 1989). The facts backed them up. There was growing evidence of communist influence on the labor movement (Saposs, 1959), as well as evidence of organized crime influence (Hutchison, 1972; Jacobs, 2006). Companies seeking to resist organizing began doing so by presenting workers with these twin bogeymen, the mob and the Red Menace, no matter how benign a particular local union might be. Their efforts were given greater credibility in the mid-nineteen fifties by the publicity surrounding congressional hearings into American communism, followed by congressional investigations into ties between labor and the Mafia (McClellan committee, 1957). The latter led to a tough set of restrictions on labor power in the form of the Landrum-Griffin Act of 1959.

Given the ammunition provided by the more unsavory elements of the labor movement and the leeway afforded by the Taft-Hartley Act, employers were getting ever more effective at waging union resistance campaigns. Private sector union membership topped out at 39% in 1958, and went into a steady decline (U.S. Dept. of Labor, 2001). By 1980, unions were winning slightly less than half of representation elections, a percentage that remained roughly static until recently. Also, although many elections were taking place they covered much smaller groups of employees. In that year, although 7296 board elections were held, unions enlisted only 175,000 new members from their efforts (U.S. Dept. of Labor, id.).

It was hard to tell illness was spreading throughout the labor movement as long as the big industrial unions were healthy, or should we say as long as the big industrial conglomerates like General Motors and United States Steel were healthy. But the seeds of their eventual demise had been planted. For example, Japanese auto makers were taking market share away from Ford and GM and opening non-union plants in the South while other industries were moving jobs overseas (Farber, 2003). Additionally, technological change was rapidly turning America into a knowledge- based society dependant more upon the individual than the group (Drucker, 1991). Collectivist solutions such as those provided by unionism had little appeal to these workers.

The decline became more precipitous. The number of elections supervised by the Labor Board dropped almost five-fold from 1966 to 2006 and the number of persons voting in those elections (or eligible to do so) declined from 575,464 to 121,501 (U.S. Dept. of Labor, 2007; see Hirsch & Macpherson, 2009). In 2007, there were only 1526 board supervised elections and only 57,000 new members as a result, as the unionized percentage of private industry workers in the United States fell to under 8 percent (Hirsch & Macpherson, id.). Many were proclaiming the union movement dead (see, e. g., Steingart, 2008).

There is an anomaly that must be mentioned. Recently, the percentage of union victories in representation elections is slightly higher than in past decades (BNA, 2008). However, we cannot read too much into a sample base much smaller than those of historical levels. Rather than a union renaissance in the making, it is more likely that unions have become highly selective and only attempt to organize in situations close to "sure things," or when the company agrees to remain neutral in the campaign. Also, this data is skewed by the almost 75% success rate of the Service Employees International Union (SEIU) in 2006-7, a union which targets lower-wage employees, not traditionally a desirable unionization target (see Maher, 2007). In 2007, the highest number of representation attempts was made by the International Brotherhood of Teamsters. Their success rate of 48.6% is more in line with overall union organizing success rates since 1980 (BNA, id.).

An important factor in the acceleration of labor's decline since 1980 – some would say the primary factor – is the role of policy. Since former union man Ronald Reagan notoriously "broke" the air traffic controllers, oversaw the deregulation of the trucking industry, and gave the labor board a decidedly pro-employer flavor through his appointments, governmental policy has been not been particularly friendly to union organizing. Some claim it has been downright hostile: "union-busters (after Reagan's 1984 re-election) are in hog-heaven." (Goldfield, 1989, p. 6). President Clinton, while ostensibly supporting pro-labor positions, was seen to have turned his back on the labor

movement when he championed the North American Free Trade Act despite the obvious collateral damage it would inflict upon American unions (McArthur, 2001).

Other factors have contributed to the decline in unionism in the United States, such as the number of federal laws protecting worker rights passed in the last five decades (Bennett & Taylor, 2001), but these are not the central focus of this paper. There is little labor can do to reverse global economic trends, nor can it turn back the clock on technological change. It can, however, influence political policy and seek legislative change. For sustenance, it can look to the growth in the number of persons represented by unions in the European Union countries from the period 1970-2002. While there is much dissimilarity between labor laws in these countries and the United States, the EU experience provides vivid evidence that pro-labor governmental policy can mitigate macro-economic trends (Visser, 2006).

Labor has been waiting for this moment in history, along with its friends in Congress like Senator Edward Kennedy, who has called for a "leveling of the playing field for American workers" (Kennedy, 2008), and Representative George Miller, who claims the current Act is "skewed" in favor of those opposing unions (Congressional Record, 2007). The AFL-CIO calls the legal mechanics for forming a union "broken," and demand for the passage of the somewhat disingenuously named "Employee Free Choice Act (EFCA)" is a central part of organized labor's backing of the Democratic party (AFL-CIO, 2008).

3. Proposed Legislation

An examination of the EFCA in the historical context of labor policy in the United States shows that is will revolutionize the labor movement in the United States. In contrast to the bombast offered on web and editorial pages by both sides of the debate, there have been few scholarly analyses of the Act (a recent search of the University of Pennsylvania library data base showed fewer than ten published to date), scholars are largely united in their opinion that it promises dramatic change. One, examining the Act from a management perspective, goes so far as to say its "foreseeable consequences . . . could be cataclysmic" (Matchulat, 2009, p.41).

Any and all of these assumptions could be challenged. It is entirely possible the EFCA will not pass Congress, or even if it does, modifications in the legislation could occur. Certainly, whether the Democrats have a filibuster-proof majority in the Senate – which is uncertain as this goes to press – will be a key factor. But political analysis is not the focus of this paper; instead, it is about the potential impact on the law and its practice should this legislation succeed in anything approaching its current form.

The aspects of the EFCA that promise dramatic change are in three areas: card check recognition, arbitral imposition of a first contract, and increased legal risk for companies opposing organizing campaigns. Each will present a remarkably different way of doing business for any person working in labor relations today, regardless of which side he or she may represent.

As noted above, companies have used the procedures for secret ballot elections to wage long and generally effective campaigns against union organizing. The EFCA effectively eliminates this feature of the Act and replaces it with a requirement that employers recognize a union once a majority of employees in a certain group sign cards authorizing the union to be their agent for collective bargaining. That is it – no discussion, no counter-appeal, no campaign as it is traditionally understood by the labor relations industry. This is a truly radical departure from current labor law, where the courts and the NLRB have maintained consistently that the secret ballot is the preferred measure of determining employees' wishes on the issue of unionization (Fisk, 2002). To its opponents, the EFCA is no less than an assault on free speech, freedom of assembly, and the essential role the secret ballot has played in Western society since the Enlightenment (see, e.g., Matchulak, J. 2009). Even stripped of hyperbole, it is quite clear that union organizing will be very different if elections are not part of the process.

The EFCA's proponents, not surprisingly, argue that the effectiveness with which employers and firms have used the time between the filing of a petition for election notice and the actual vote to oppose unionization renders the current procedures inherently unfair, since employers control the site of the organizing. (AFL-CIO, 2007) Whether fair or not, it is true that private industry has created something close to a science of opposing union organizing, with an arsenal of campaign tactics and techniques honed over the years. It is these weapons the EFCA intends to make relics of history.

Many non-union companies, and the firms advising them, pride themselves upon their ability to resist unionization by "tough," albeit legal, campaigning. Young labor lawyers are trained to run labor resistance campaigns by "walking to the edge of the line (of the law)" when advising clients on aggressive tactics (L. Forrester, personal interview, August, 1982). This approach, quite common in the labor relations industry, has been facilitated by the relatively benign enforcement powers of the NLRB for those occasions the line is crossed.

The role of the NLRB is focused more on remedial than enforcement actions, unlike other agencies such as the Securities and Exchange Commission. Since neither prison time nor punitive damages for unfair labor practices are provided for in the Act, aggressive actions against labor organizing carry little risk. The EFCA strives to make the penalty for campaign violations more closely approximate what its supporters perceive to be the magnitude of the crime.

Chief among them are greatly increased monetary damages and fines for illegal conduct, and requiring – rather than permitting – the NLRB to seek injunctive relief for violations. Accordingly, the risk of relying upon tried and true resistance tactics will be vastly increased, discouraging companies from combating union organizing with the vigor of the past. Those companies who do not understand they cannot rely upon the standard playbook at the first hint of card activity have not fully grasped the import of the sanctions provisions of the EFCA and are in for a rude awakening.

Finally, the EFCA will remove the ultimate backstop non-union companies have relied upon to minimize their exposure to union organizing. Current law doesn't require – even when a union wins an election – the company agree to a collective bargaining contract, only that it attempt in "good faith" to reach one. Critics of the law have long maintained that many employers never intend to reach a contract, and exhibit "good faith" only to the extent required to avoid legal action. Studies showing that as many as 40 percent of union contracts never culminate in a contract.

The EFCA will amend the Act by providing that after ninety days of bargaining, either party may submit the dispute to a process that eventually results in binding arbitration. In other words, an employer can no longer delay or "hardball" a negotiation – should the union choose, a third party will impose a contract on the parties that will be binding for two years.

4. American Industry Unprepared

Despite the dramatic ramifications of this legislation and the intense lobbying by pro-business interests, private industry in this Country is generally unknowledgeable about the dramatic change the EFCA will bring. "Companies have been lulled to sleep," says David Hagaman of Ford and Harrison, a labor and employment law specialty firm in Atlanta. "Nobody wants to talk about union avoidance because they don't think it matters anymore" (D. Hagaman, personal interview, July, 2008). Although few companies will admit the extent to which they conduct union avoidance training, it is the experience of the author that few companies have increased their training in this area.

In addition to industrial inattention, the makeup of most human resources departments today doesn't prepare private industry for the onslaught of organizing that will accompany passage of the EFCA or similar legislation. Traditionally, industrial companies had large, sophisticated personnel departments with an emphasis on labor relations. Twenty five years ago it was quite rare to find a senior human resources executive without labor experience, and it wasn't unusual for the top human resources officer with one of the largest industrial companies in the US to claim human resource executives without labor experience "aren't worth the powder to blow them to hell" (S. Hazen, personal interview, July 1990).

However, as unions have receded from the scene in private industry, human resources practice has focused itself on seemingly more modernistic topics such as diversity, talent management, and leadership training. Labor expertise is not a sought-after trait when corporate America searches for a top human resources officer today (unless the position is narrowly focused on labor negotiating). Jane Howze, Managing Director for the executive search firm The Alexander Group, notes that human resource searches in recent years have focused on skills other than labor. She also notes that should pro-labor legislation be enacted, "there will be a huge demand for human resource executives who have labor relations experience – and there is a very limited supply of these folks left." (J. Howze, personal communication, September, 2008). Her conclusion is similar to that of Emory Mulling, CEO of the Mulling Corporation, a leading human resources consulting firm: "Labor isn't something most companies look for in HR professionals anymore, which will leave companies in a bind if anything close to EFCA passes." (E. Mulling, personal communication, May, 2009).

A similar phenomenon has taken place in the law and consulting firms that represent private companies. Although most large law firms have a "Labor and Employment" department, the number of associates and younger partners with any true union representation campaign experience in most firms is small, and the ranks of the more senior practitioners have thinned.

Much of the evidence of this is anecdotal, inasmuch as there is little hard data on how many of the 22,000 members of the American Bar Association's Labor and Employment Law Section are traditional labor lawyers representing private employers. But conversations with long-time practitioners in this area are instructive. "Nobody is a real labor lawyer anymore," says Paul Beshears, a partner in a major law firm, with only slight exaggeration. "When I entered the practice in the early 80's that was where the action was. But the work dried up so it seems like the entire bar focused on discrimination lawsuits," (P. Beshears, personal interview, March, 2008). Mr. Beshears' impression is similar to that of Lisa Jern, head of the labor and employment practice at Sutherland, an American Lawyer Top 100 firm. "It is very difficult to provide proper training in labor matters to our younger lawyers because of the scarcity of the work." Her partner, Allegra Lawrence-Hardy, adds that "we are working to find ways to provide the necessary training because we feel this might get very busy under this administration" (L. Jern & A. Lawrence-Hardy, personal communication, August, 2008).

John Wymer, a labor law partner at Paul, Hastings, Janofsky and Walker, and a Fellow in the College of Labor and Employment Lawyers, explains why: "Beginning in the mid-to-late 1980s, more and more lawyers started specializing

in employment law, and the numbers of traditional labor law practitioners dwindled, through lack of work or retirement. There has been hardly anybody coming in to replace them, and few people left to train or mentor young lawyers in what can be an arcane area." (J.Wymer, personal communication, August, 2008).

These statements should not be surprising. Given the fact, as noted above, there were only 1526 representation elections in 2007 as compared to 7296 in 1980, it stands to reason that the number of practitioners in the field declined by a roughly corresponding amount.

Some would argue, paraphrasing Mark Twain, that rumors of the death of the labor bar are greatly exaggerated. There are several large national firms that have active and excellent labor practices, and many smaller boutique firms with equal levels of expertise. There are also numerous consulting firms, as well as individual experts, who specialize in supervising union campaigns, as an internet search will quickly confirm. None would contest, however, that the overall size and expertise of the labor bar has shrunk along with the decline in union membership, and will be challenged to meet the significant increase in organizing activity the EFCA is likely to engender.

5. Conclusion

There are questions that must be answered before we can gauge the real impact of the EFCA. What is the impact of globalism? Has is made unionism in the United States permanently irrelevant by eliminating all manufacturing work that can be shipped overseas (see Gely & Chandler, 2008)? Also worthy of consideration is the fact that the American worker is a very different creature than he or she was during the heyday of unionism. The rise of the knowledge worker and the demise of the assembly line worker have been well-chronicled (see, e. g., Drucker, 1991). Combined with the independence the internet provides, as well as the increasing advent of offsite work and telecommuting, there are serious questions as to whether the intellectual and physical collectivism that supports union organizing still exists to any large scale.

Regardless of the long-term health of the labor movement or what legislative changes occur to the EFCA, some things seem likely. There will an increased level of labor organizing in the United States under this administration. Restrictions will be placed upon the techniques employers have traditionally relied upon to resist organizing: at the same time the ranks of those experienced in their use has greatly diminished. As the ancient toast, or curse, suggests, we are about to "live in interesting times."

References

AFL-CIO (2008). *The system for forming unions is broken.* Retrieved August 30, 2008. Available on the World Wide Web at www.AFLCIO.org/issues/politics/issues_efca.cfm.

Baldwin, R. E. (2003). *The decline of US labor unions and the role of trade.* Washington, DC: The Institute for International Economic Work.

Bennett, J. T. & Taylor, J.E. (2001). Labor unions: Victims of their political success? *22 Journal of Labor Research 2.* (2001).

BNA (June 2, 2008). *Daily Labor Report*, No. 105, pp. B1-B9. Retrieved May 10, 2009. Available on the World Wide Web at http://manoa.hawaii.edu/irc/june/08.

Cox, A. (1947). Some aspects of the Labor Management Relations Act of 1947*, 61 Harvard Law Review 1*, 24.

Drucker, P. F. (1994). The age of social transformation. *1 Atlantic Monthly 2. Employee Free Choice Act.* H. R. 1409. 111th Cong (2009).

Farber, H. S. (2005). *Union membership in the United States*. Working paper 503. Princeton University, Industrial Relations Section, 36, 37.

Fisk, C. (2002). Union lawyers and employment law. *23 Berkeley Journal of Employment and Labor Law, 57,* 78.

Gely & Chandler (2008). Card check recognition: New house rules for union organizing? *35 Fordham Urban Law Journal 247.*

Goldfield, M. (1989). *The decline of organized labor in the United States.* Chicago: University of Chicago Press.

Greenhouse, S. (2009, May 5). Lines shift a bit on a senate labor bill. *The New York Times,* p. C1.

Hirsch, B. & Macpherson, D. A. (2009). *Union membership, coverage, density and employment among private sector workers, 1973-2006.* Retrieved May 1, 2009. Available on the World Wide Web at http://www.trinity.edu/bhirsch/unionstats.

Hutchinson, K. (1972). *The imperfect union: a history of corruption in American trade unions.* New York: Dutton.

H.R. 800: *Employee Free Choice Act.* 153 Congressional Record E260 (February 5, 2007) (testimony of Representative Miller).

International Brotherhood of Teamsters. (2007). *The Teamsters century.* Retrieved January 15th, 2007. Available on the World Wide Web at www.teamster.org.

Jacobs, J. B. (2006). *Mobsters, unions, & feds: The mafia and the American labor movement.* New York: New York University Press.

Kennedy, E. M. (2008). Leveling the playing field for American workers: The Employee Free Choice Act. *Perspective on work: The magazine of the LERA.* Retrieved April 9, 2009. Available on the World Wide Web at http://www.lera.uiuc.edu/Pubs.

Labor Management Relations Act ("Taft-Hartley Act"). 61 Stat. 136; 29 U. S. C. 141-97 (1947).

Labor Management Reporting and Disclosure Act ("Landrum-Griffin Act"). 73 Stat. 519; 29 U.S.C. 401-531 (1959).

Lopatka, K. T. (2007). A contemporary first amendment analysis of the NLRA section 8(A)(2)- 2(5) anachronism. *2 Charleston Law Review 1,* 1.

Maher, K. (2007, January 22). Are unions relevant? SEIU's Andy Stern thinks so, but also sees need for attitude adjustment. *The Wall Street Journal,* p. 1.

Martin, A. W. (2009). The institutional logic of union organizing and the effectiveness of social movement repertoires. *2 American Journal of Sociology 1067*, 1089.

Matchulat, J. (2009). The unions rejoice act: An examination of the intent and potential impact of the EFCA. *34 Employee Relations Law Journal 4,* 16-55.

McArthur, J.R. (2001). *The selling of "free trade:" NAFTA*, *Washington, and the subversion of American democracy.* Berkeley, CA: University of California Press.

Miner, C. (1989). *Grede of Milwaukee.* Witchita, KS; Watermark Press.

National Labor Relations Act ("Wagner Act"). 49 Stat. 449; 29 U.S.C. 151-69 (1935).

National Labor Relations Modernization Act. H.R. 1355, 111th Congress (2009).

N.L.R.B. v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

Saposs, D. J. (1959). *Communism in American unions.* New York: Mc-Graw Hill.

Seeber, R.L. & Cooke, W.N. (2008). The decline in union success in NLRB representation elections. *22 Industrial* Relations*: A Journal of Economics and Society 1,* 34-44.

Smith, R. A., Merrifield, L.S., St.Antoine, T. J. (1968). *Labor relations law: Cases and materials (*4th Ed.). New York: Bobbs-Merrill.

Steingart, G. (2008). *The world war for wealth: The true story of globalization or why the flat world is broken.* University of California: Mc-Graw Hill.

U.S. Department of Labor, Bureau of Labor Statistics. (Jan. 25, 2007). USDL, No. 07-0113. Table 3.

U.S. Department of Labor, Bureau of Labor Statistics. (2006). Retrieved on November 15, 2008. Available on the World Wide Web at http://www. blsgov/opub/mir/2006/01.

U.S. Department of Labor, Bureau of Labor Statistics. (2001). Retrieved on May 14, 2009. Available on the World Wide Web at www.publicpurpose.com/lm_unn2001.htm.

Visser, J. (2006). Union membership statistics in 24 countries. *38 Monthly Labor Review 1.* Retrieved on May 1, 2009. Available on the World Wide Web at http://www.blsgov/opub/mir/2006/01.

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