25. *Labor Law*

The goal of an economic system is to increase the standard of living of the society. It makes little sense to distinguish between producers and consumers in that context, since we are all both producers and consumers. It also makes little sense outside discredited Marxist theory to distinguish between management and labor, since we all share the benefits of increasing economic efficiency and profitability. The Walton family became wealthy from the success of Wal-Mart, but even more benefits were received by the employees and customers of the company.

Unfortunately, U.S. labor law is still based on outmoded notions from the 1930s about mass production and oppressed workers. It is time to accommodate our labor laws to the information age. Only about 11 percent of private-sector workers belong to unions, yet Congress still gives organized unions strong legal advantages. To create a level playing field and allow economic arrangements to develop in the marketplace, Congress should

- **adopt H.R. 1341;**
- **repeal section** 8(a)2 **of the National Labor Relations Act, as amended (NLRA);**
- **codify the Supreme Court's ruling, in** ***NLRB v. Mackay Radio & Telegraph*** (1938), **that employers have an undisputed right to hire permanent replacement workers for striking workers in economic strikes;**
- **protect the associational rights of state employees by overriding state and local laws that allow NLRA-style unionism in state and local government employment;**
- **repeal the 1931 Davis-Bacon Act.**

H.R. 1341

The purpose of the bill, introduced by Rep. Dick Armey (R-Tex.) in the 103d Congress, is to repeal exclusive representation and to remove

any requirement that individual employees join or pay dues or fees to labor organizations. Those are two separate ideas.

Exclusive representation now applies in all 50 states, including the right-to-work states. It is the principle that if a majority of employees vote to be represented by a union, the winning union gets to represent all the workers who were eligible to vote. It gets to represent those workers who voted for it, those who voted against it, and those who did not vote. The winning union has an affirmative duty to represent fairly all workers. While workers should be free, on an individual basis, to hire a union to represent them, they should not be forced to do so by majority vote. Unions are not governments; they are private associations. For government to tell individual workers that they must allow a union that has majority support among workers to represent them is for government to violate those individuals' freedom of association.

Union security is the principle under which workers who are represented by exclusive bargaining agents are forced to join, or at least pay dues to, the union with monopoly bargaining privileges. In the 21 right-to-work states, such coercive arrangements are forbidden by state law. (Section 14[b] of the Taft Hartley Act gives states the right to pass such laws.) The union justification for union security is that some people whom they represent would otherwise get union-generated benefits for free. Note that if exclusive representation were repealed, only a union's voluntary members could get benefits from the union because the union would represent only those workers. The right-to-work issue would be moot. Forced unionism would, at long last, be replaced by voluntary unionism.

Members-only bargaining (or proportional representation) was endorsed by President Franklin Roosevelt in his March 1934 Automobile Settlement. He opposed Sen. Robert Wagner's 1934 Trade Disputes bill precisely because it was based on exclusive representation. He signed the 1935 version of the Wagner bill—notwithstanding that it, too, was based on exclusive representation—out of anger with opponents of Wagner who applauded the Supreme Court's unanimous decision in *Schechter Poultry Co. v. U. S.* (1935), which nullified the National Industrial Recovery Act. Notwithstanding that exclusive representation, a privilege granted to unions by federal law, amounts to an unconstitutional delegation of government authority to private groups (see *Schechter* and *Carter v. Carter Coal Co.* [1936]), the Supreme Court upheld the constitutionality of the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.* (1937). It did so by a five-to-four vote under the threat of Roosevelt's court-packing plan. In a perfect

illustration of the tortuous reasoning so characteristic of the New Deal Court, it did not even refer to *Schechter* or *Carter* on the issue of congressional delegation of governmental powers to private groups. Worse, the Court disingenuously dismissed the issue by asserting that the NLRA permits individual workers to make their own contracts with employers. Then in 1944, in *J.I. Case Co. v. NLRB*, the Court simply asserted the NLRA *does not* permit individual contracting, and it did not even refer to its earlier assertion to the contrary in *Jones & Laughlin*. By any reasonable reading of the U.S. Constitution, the NLRA is unconstitutional. Congress has no enumerated power to pass such legislation; most collective bargaining does not involve interstate commerce; and the NLRA serves the particular interests of unionized labor rather than the general interests of all labor and abrogates one of the most important privileges and immunities of U.S. citizens—the right of each individual worker to enter into hiring contracts with willing employers on terms that are mutually acceptable. No subsequent Court has ever had the courage to take up the issue. It is time for Congress to do so.

Failing the repeal of exclusive representation, Congress should at least adopt a national right-to-work law. Under that option workers would still be forced to let certified unions represent them, but no worker would be forced to join, or pay dues to, a labor union—a poor second best to members-only bargaining.

Failing passage of a national right-to-work law, Congress should, at the very least, protect forced dues payers from having to pay for union expenditures that are not directly related to collective bargaining. Congress should do so by codifying the U.S. Supreme Court's decision in *Communications Workers of America v. Beck* (1988).

In doing so Congress should incorporate, for private-sector workers, the procedural and substantive protections that were granted to government workers who are forced dues payers in *Chicago Teachers Union v. Hudson* (1986).

Repeal Section 8(a)2 of the National Labor Relations Act, as Amended

This is the section that outlaws so-called company unions. More important, it is the section that unions have discovered they can use to block any labor-management cooperation that is not union-management cooperation. Labor-management cooperation is crucial to America's ability to compete

in the global market. It must not be constrained to union-management cooperation.

Moreover, Congress must not allow labor-management cooperation to be used by unions as a club against workers who want to have a voice in company decisionmaking but who also want to remain union free. A 1994 national poll of employees in private businesses with 25 or more workers, conducted by Princeton Survey Research Associates, revealed that 63 percent preferred cooperation committees to unions as a way of getting a voice in decisionmaking. Only 20 percent preferred unions.

In the *Electromation* case (1992), the National Labor Relations Board (NLRB) declared that several voluntary labor-management cooperation committees, set up by management and workers in a union-free firm to give employees a significant voice in company decisionmaking, were illegal company unions. The Teamsters union then argued that the only kind of labor-management cooperation the government could allow was union-management cooperation. On the basis of that argument the Teamsters won a slim majority in a certification election.

In response to the *Electromation* decision, Polaroid Corporation was forced to disband voluntary labor-management cooperation committees that had been in existence for 40 years.

In the *DuPont* case (1993), the NLRB ruled that labor-management cooperation committees in a unionized setting were illegal company unions because they were separate from the union. The voluntary committees were set up to deal with problems with which the union either could not or would not deal. (Under exclusive representation, management must deal *only* with a certified bargaining agent in a unionized firm. The solution here is to abolish exclusive representation.)

The report that was issued by the Dunlop Commission on January 9, 1995, recommends "clarifying" rather than doing away with section 8(a)2. It says that voluntary worker-management cooperation programs "should not be unlawful simply because they involve discussion of terms and conditions of worker compensation where such discussions are incidental to the broad purposes of these programs." That will do little to solve the problem. What is "incidental"? Who will decide? Answer: the NLRB that has already given us the *Electromation* decision.

It is time for Congress to stop delegating its lawmaking function to administrative agencies by enacting statutes replete with musty, ill-defined words like "incidental" and leaving regulatory agencies to interpret them. Congress should unequivocally state that employers and workers may

formulate and participate in any voluntary cooperation schemes they like so long as any individual worker may join and participate in any union he or she chooses without penalty. It really is that simple.

Short of repealing section 8(a)2 outright, Congress could amend it to prevent management formation and support of "labor unions" rather than, as now, "labor organizations." If that route were taken, section 2(5) of the NLRA would have to be amended to define a "labor union" as one that "collectively bargains with" management rather than, as now, a "labor organization" that "deals with" management. If this route is followed, the right of management and Workers to voluntarily set up labor-management cooperation programs that deal with issues other than direct terms and conditions of employment, such as productivity- and quality-enhancement committees, must be explicitly affirmed.

Codify the Supreme Court's Ruling in NLRB v. Mackay Radio & Telegraph *(1938)*

Once and for all, it should be made clear that although strikers have a right to withhold their own labor services from employers who offer unsatisfactory terms and conditions of employment, strikers have no right to withhold the labor services of workers who find those terms and conditions of employment acceptable. Strikers and replacement workers should have their constitutional right to equal protection of the laws acknowledged in the NLRA.

Protect the Associational Rights of State Employees With a Federal Statute

Congress has constitutional authority under the Fourteenth Amendment to protect the privileges and immunities of citizens of the United States. Thus it is not necessary to undo the harm of government employee unionism state by state.

The principles of exclusive representation and union security abrogate the First Amendment rights of government employees who wish to remain union free. Government is the employer, hence there is sufficient government action to give rise to Bill of Rights concerns.

Under the Bill of Rights, government is not supposed to intrude on an individual citizen's right to associate or not associate with any legal private organization. A voluntary union of government employees is a legal private organization. But forcing dissenting workers to be represented by, join,

or pay dues to such an organization is an abridgement of those workers' freedom of association.

Moreover, in government employment, mandatory bargaining in good faith (which is a feature of the NLRA) forces governments to share the making of public policy with privileged, unelected private organizations. Ordinary private organizations can lobby government, but government employee unions have the added leverage of laws that force government agencies to bargain in good faith with them. Good faith bargaining is conducted behind closed doors. It requires government agencies to compromise with government employee unions. Government agencies are forbidden to unilaterally set terms and conditions of government employment (questions of public policy) without the concurrence of government employee unions. Not even the Sierra Club has that special access to government decisionmakers or that kind of influence over decisionmaking. In short, government employee unionism, modeled on the NLRA, violates all the basic values of democratic process. It should be forbidden. That is why Title VII of the 1978 Civil Service Reform Act greatly restricts the scope of bargaining with federal employee unions and forbids union security in federal employment. It ought also to forbid exclusive representation and mandatory good faith bargaining in federal employment.

Repeal the 1931 Davis-Bacon Act

This law was passed at the beginning of the Great Depression. It had two purposes: to attempt to arrest falling prices and wages and to keep blacks from competing for jobs that had hitherto been done by white unionized labor. Both of its purposes were wrong. Falling wages and prices were precisely what was needed to reverse the collapse of real income and employment in the early 1930s. (Both fell from 1929 to 1933, but prices fell by more than wages. Thus the real cost of hiring workers increased during that time period.) The purchasing power fallacy that misled first Herbert Hoover and later Franklin Roosevelt (e.g., the National Industrial Recovery Act) did as much to deepen and prolong the Great Depression as did the Smoot-Hawley tariff.

The racist motivation behind the legislation is plain to anyone who reads the *Congressional Record* of 1931. For example, Rep. Clayton Allgood, in support of the bill, complained of "cheap colored labor" that "is in competition with white labor throughout the country."

While most current supporters of Davis-Bacon are not racists, the law still has racist effects. There are very few minority-owned firms that can

afford to pay union wages. As a result, they do not get Davis-Bacon contracts, and many of them stop even trying to do so.

Moreover, Davis-Bacon adds over a billion dollars each year directly to federal government expenditures, and billions more to private expenditures on projects that are partially funded with federal funds, by making it impossible for union-free, efficient firms to bid on construction contracts financed in whole or in part with federal funds. Today it serves no interest whatsoever other than to protect the turf of undeserving, white-dominated construction trade unions.

The claim, on January 6, 1995, by Robert A. Georgine, president of the AFL-CIO Building and Construction Trades Department, that Davis-Bacon has long been supported by the GOP because it adheres to "free market principles by recognizing existing wages within each community set by the private marketplace, not by imposing an artificial standard or deleterious government interference," is self-serving nonsense. Prices set by the free market do not need any government enforcement at all. They are the prices at which the production and exchange plans of buyers and sellers of inputs and outputs are coordinated with each other. They are the prices that would exist in the absence of any government involvement. The AFL-CIO, and its constituent unions, want government to impose prices that are more favorable to their members and officers than those the marketplace would produce. The "prevailing wage" or "community wage" set by the Department of Labor under the Davis-Bacon Act is always the union wage, not the free-market wage. After all, unions are insistent that their members make wages higher than market-determined wages. No member of Congress, of either party, who supports the free market can be against repealing Davis-Bacon.

One of the crucial differences between a market economy and a statist economy is the existence of free markets for labor and capital. Workers must be free to sell their services to any willing purchaser, with wages and working conditions determined by bargaining. Congress should not mandate particular arrangements, and it should not forbid management and employees to make arrangements that are mutually satisfactory.

Suggested Readings

Baird, Charles W. "Are Quality Circles Illegal? Global Competition Meets the New Deal." Cato Institute Briefing Paper no. 18, February 10, 1993.

_____"The Permissible Uses of Forced Union Dues: From *Hanson* to *Beck*." Cato Institute Policy Analysis no. 174, June 30, 1992.

Bernstein, David. "The Davis-Bacon Act: Let's Bring Jim Crow to an End." Cato Institute Briefing Paper no. 17, January 18, 1993.
Reynolds, Morgan O. *Making America Poorer: The Cost of Labor Law.* Washington: Cato Institute, 1987.

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