33. Labor Relations Law

Congress should

- eliminate exclusive representation, or at least pass a national right-to-work law, or codify the U.S. Supreme Court's decisions in *NLRB v. General Motors* (1963) and *Communications Workers of America v. Beck* (1988);
- repeal section 8(a)2 of the National Labor Relations Act, or at least permit labor-management cooperation that is not union-management cooperation only;
- 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;
- overturn the Supreme Court's ruling in *NLRB v. Town & Country Electric* (1995) that forces employers to hire paid union organizers as ordinary employees;
- protect the associational rights of state employees by overriding state and local laws that impose NLRA-style unionism on state and local government employment; and
- repeal the 1931 Davis-Bacon Act and the 1965 Service Contract Act.

In a market economy it makes little sense to distinguish between producers and consumers because most people are both. It also makes no sense, outside discredited Marxist theory, to distinguish between management and labor since both are employed by consumers to produce goods and services. Management and labor are complementary, not rivalrous, inputs to the production process. Unfortunately, U.S. labor relations law is based on the mistaken ideas that management and labor are natural enemies; that labor is at an inherent bargaining power disadvantage relative to

management; and that only unions backed by government power, which eliminate competition among sellers of labor services, can redress that situation. The National Labor Relations Act, as amended, is based on ideas that might have seemed sensible in the 1930s but do not make any sense in today's information age. That act is an impediment to labor market innovations that are necessary if the United States is to continue to be the world's premier economy in the new millennium. The NLRA ought to be scrapped, or at least substantially amended so it reflects modern labor market realities.

The Labor Front Today

Unions represent a small and declining share of the American labor market. In 1997 only 9.8 percent of the private-sector workforce was unionized. That figure has been declining since 1953 when it was 36 percent, and by the year 2000 it will be no higher than 7 percent—exactly where it was in 1900. Unions, at least in the private sector, are going the way of the dinosaur. They are institutions that cannot succeed in the competitive global economy of the future. Firms and workers must be more innovative and have the freedom to adjust to changing market conditions if they are to reap the rich rewards of a more prosperous world economy.

Further, nearly half of union members now work for federal, state, and local governments. In 1997, 37.2 percent of the government-sector workforce was unionized. Even that number has declined from its 1994 peak of 38.7 percent. Yet despite the decline of unions, the old regime that supports them is still in place.

Exclusive Representation and Union Security

The principle of exclusive representation, as provided for in sec. 9(a) of the NLRA, mandates that if a majority of employees of a particular firm vote to be represented by a particular union, that union is the sole representative of all workers whether an individual worker voted for or against it or did not vote at all. Individual workers are not free to designate representatives of their own choosing. 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 their coworkers to

represent them is for government to violate those workers' 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. (Sec. 14[b] of the NLRA gives states the right to pass such laws.) The union justification for union security is that some workers whom unions represent would otherwise get union-generated benefits for free. But if exclusive representation were repealed, only a union's voluntary members could get benefits from the union because the union would represent only its voluntary members. The right-to-work issue would be moot. Forced unionism would, at long last, be replaced by voluntary unionism.

The NLRA serves the particular interests of unionized labor rather than the general interests of all labor, and it 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. Unfortunately, no court has had the courage to take up the issue since the 1930s. It is time for Congress to do so.

There are three options Congress might choose to remedy the current situation:

- Eliminate exclusive representation. Ideally, the current restrictions on the freedom of workers to choose who if anyone represents them should be eliminated. The 1991 New Zealand Employment Contracts Act would be an excellent model to follow. While 85 percent of that country's population opposed that approach before it took effect, 73 percent of employees report that they now are ''very satisfied'' or ''satisfied'' with their working conditions and terms of employment. Still, initially it might be politically difficult to pass a similar act in the United States. Thus, several short-term options are available.
- Adopt a national right-to-work law. Under this 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. This is a poor second best to members-only bargaining.
- Codify the U.S. Supreme Court's decisions in *NLRB v. General Motors* (1963) and *Communications Workers of America v. Beck* (1988). This is a third-best alternative to members-only bargaining.

In *General Motors* the Court declared that the only permissible form of compulsory union membership under the NLRA is the payment of

union dues. Neither unions nor employers are allowed to compel ''full membership in good standing.'' Notwithstanding this decision, the NLRB still allows unions and employers in non-right-to-work states to include union security clauses in collective bargaining contracts that assert that workers must become and remain members of unions in good standing as a condition of continued employment. The NLRB permits what is clearly illegal.

On November 3, 1998, a unanimous Supreme Court, in *Marquez v. Screen Actors Guild,* decided that union security clauses may continue to state that ''membership in good standing'' is required as a condition of employment. It remains true that, in this context, ''membership in good standing'' does not mean what almost everyone thinks it means. It means only that ''members'' must pay some money to the union that represents them in order to keep their jobs. But unions and employers are now free to continue to deceive workers into thinking that ordinary union membership is required as a condition of employment. Only Congress can put this travesty right.

In *Beck* the Court declared that the compulsory dues and fees collected by unions from workers they represent could not be used for purposes not directly related to collective bargaining, principally for political contributions. Many unions have effectively nullified *Beck* by creative bookkeeping. In 1996 the NLRB turned a blind eye to such deceit in its *California Saw and Knife Works* decision. In that case the board accepted the union's own staff accountants' categorization of expenditures on activities related to and not related to collective bargaining. It stated that, under *Beck,* dissenting workers had no right to an independent audit of the union's books. In this regard, 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). Among them is an indisputable right of dissenting government workers to independent audits in all cases involving disputes over union uses of forced dues and fees. The Supreme Court is likely soon to take up the issue of the applicability of *Hudson* to the private sector because of a conflict between two circuit courts of appeal. The D.C. Circuit, in *Ferriso v. NLRB* (1997), ruled that *Hudson* does apply, and the Seventh Circuit, in *Machinists v. NLRB* (1998), ruled that it does not. Again, court decisions do not enforce themselves. Congress must act.

The history of attempts to enforce *Beck* and related cases demonstrates how complicated the issues are and how expensive it is to litigate them.

If Congress repealed exclusive representation, all union security questions would be moot. If Congress passed a national right-to-work law, thus eliminating all forced dues, *General Motors* and *Beck* would be moot. Congress created these problems, and only Congress can eliminate them.

Repeal Section 8(a)2 of the NLRA

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. The Employment Policy Foundation in Washington, D.C., has found that employee involvement plans increase productivity by from 30 percent to over 100 percent. Under existing law union-free firms in America are not allowed to implement such plans unless they agree to take on the yoke of NLRA-style unions, and doing so usually reduces productivity in other ways.

Workers who want to have a voice in company decisionmaking without going through a union should be free to do so. 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 having a voice in decisionmaking. Only 20 percent preferred unions.

In the 1992 *Electromation* case, the 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, who earlier had lost a certification election at the firm, then argued that the only form of labor-management cooperation the government would allow was union-management cooperation. On the basis of that argument, the Teamsters won a slim majority in a second certification election. As a result of the *Electromation* decision, Polaroid Corp. was forced to disband voluntary labor-management cooperation committees that had been in existence for 40 years.

In the 1993 *DuPont* case, 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 is simply to abolish exclusive representation.

The report that was issued by the Dunlop commission on January 9, 1995, recommends ''clarifying'' rather than doing away with sec. 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 state unequivocally 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.

Short of repealing sec. 8(a)2 outright, Congress should amend it to permit labor-management cooperation that is not union-management cooperation.

The Teamwork for Employees and Managers Act (H.R. 473 and S. 295), passed by Congress but vetoed by President Clinton in 1996, is an excellent second-best model. Unions supported Clinton's veto because they do not wish to compete on a level playing field with alternative types of labor-management cooperation.

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.

Overturn the Supreme Court's Ruling in NLRB v. Town & Country Electric *(1995)*

Sec. 8(a)3 of the NLRA makes it an unfair labor practice for an employer to discriminate against a worker on the basis of union membership. According to the Supreme Court, that means that an employer cannot refuse to hire or cannot fire any employee who is a paid union organizer. Unions

send paid organizers (salts) to apply for jobs at union-free firms and, if employed, to foment discontent and promote pro-union sympathies. In the *Town & Country Electric* decision the Court said that employers could not resist that practice by firing or refusing to hire salts. In other words, employers must hire people whose main intent is to subvert their business activities. That is like telling a homeowner that it is illegal to exclude visitors whose principal intent is to burglarize his home. Congress should allow employers to resist this practice. The Truth in Employment Act (H.R. 758), which was quashed by the threat of a filibuster in the 105th Congress, is a good model for the 106th Congress to adopt.

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 abridgment of those workers' freedom of association.

Moreover, in government employment, mandatory bargaining in good faith (a feature of the NLRA incorporated into 31 state collective bargaining statutes) forces governments to share the making of public policy with privileged, unelected private organizations. Ordinary private organizations can lobby government, but only government employee unions have the privilege 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 set unilaterally 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 basic democratic process values. 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 and the 1965 Service Contract Act

The Davis-Bacon Act, passed at the beginning of the Great Depression, had two purposes: to stop prices and wages from falling and to keep blacks from competing for jobs that had previously been done by white unionized labor. Both of its purposes were wrong. Falling wages and prices were precisely what were 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 for anyone who reads the *Congressional Record* of 1931 to see. 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 rarely are awarded Davis-Bacon contracts, and many of them stop even trying for those contracts.

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 Davis-Bacon serves no interest whatsoever other than protecting 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 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 insist that they make wages higher than market-determined wages. Only members of the GOP in thrall to unions' in-kind and financial bribes would support Davis-Bacon. No member of Congress, of either party, who supports the free market can be against repealing Davis-Bacon.

The Service Contract Act does for federal purchases of services what the Davis-Bacon Act does for federally funded construction. It wastes billions of taxpayer dollars for the sole purpose of attempting to price union-free service providers out of the market. Both acts should be placed in the dustbin of history along with the syndicalist sympathies that inspired them.

Conclusion

The more integrated global economy of the coming millennium offers greater opportunities for American enterprises and workers to prosper. Greater productivity worldwide means more wealth for those who can exchange their services with willing customers. But to do so, American workers and the enterprises that employ them must be empowered to act quickly to meet market demands. That means eliminating the laws and regulations that destroy jobs and make workers a burden rather than an asset to employers. The outmoded perceptions of the 1930s should not be allowed to shackle the American economy of the 21st century.

Suggested Readings

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