

Liberating Teachers Toward Market Competition in Teacher Representation

by Myron Lieberman

Executive Summary

Since the emergence of teacher unionization in the 1960s, the National Education Association and the American Federation of Teachers have monopolized the market for teacher representation services. In the 34 states that require school boards to bargain collectively, the NEA and AFT share almost 100 percent of the market for teacher representation services. Inasmuch as the two unions operate under a noncompete agreement, there is virtually no competition for the right to serve as the exclusive representative of teachers at the local level.

As is the case with monopolies generally, the NEA/AFT monopoly over teacher representation services has resulted in excessive costs and producer domination of services affecting millions of teachers and support personnel. In 2001, active teacher membership in the two unions was about 2.7 million out of a total membership of about 3.7 million. Their combined revenues (local, state, and national) probably exceeded \$1.5 billion, not including their political action committees, foundations, and special purpose organizations.

Although teachers would be the primary direct beneficiaries of competition against NEA/AFT, the school choice movement would be a major, indirect beneficiary. NEA and AFT are the primary opponents of school choice. Were it not for their all-out opposi-

tion, our educational system would include many options that are not yet available to K-12 students.

The argument in this analysis is that for-profit and nonprofit entities of all types should be authorized to compete with membership organizations—that is, unions—for the right to serve as the exclusive representative of teachers in collective bargaining. Such reform would open up competition to non-membership organizations, solo entrepreneurs, negotiators, lawyers, and collective bargaining companies. Teachers would retain the right to go without an exclusive representative, and each representation option would compete against all the others. Teacher representation in the bargaining-law states would not be limited to unions as it is now. Teachers could change their choice of representative periodically, perhaps every two or three years, or at the expiration of their collective agreements.

The best way to end the NEA/AFT monopoly is for states to enact legislation that (1) reduces the minimum required showing of interest from 30 to 10 percent of the bargaining unit, (2) explicitly allows individuals, nonprofit and for-profit organizations, and membership organizations to compete for the right to represent teachers, and (3) enables all members in bargaining units to vote on the key decisions affecting their terms and conditions of employment.

The message is clear enough: the state teacher bargaining laws have resulted in a monopoly in teacher representation services.

Introduction

Teacher unions are providers of teacher representation services and teachers are consumers of them. In the 34 states that require school boards to bargain collectively, the National Education Association and American Federation of Teachers share almost 100 percent of the market for teacher representation services. Inasmuch as the two unions have merged in Minnesota, Montana, and Florida, and operate under a non-compete agreement in other states, there is virtually no competition for the right to serve as an exclusive representative of teachers at the local level. In addition, NEA and AFT affiliates bargain collectively in many school districts in seven states in which teacher collective bargaining is allowed but not required.¹

In contrast, in nine states that have not enacted teacher bargaining laws, there is real competition to represent teachers. For example, in three states without bargaining laws (Georgia, Missouri, Texas), independent teacher organizations enroll more members than NEA or AFT affiliates.² The message is clear enough: the state teacher bargaining laws have resulted in a monopoly in teacher representation services. As will be evident, this monopoly has had the same outcome as monopolies have generally: excessive costs for services geared to the welfare of the producers.

What must be done to introduce competition to represent teachers in states that require school boards to bargain collectively with teacher unions? The solution proposed herein is to allow for-profit and nonprofit entities of all types to compete with unions for the right to serve as exclusive representatives of teachers in collective bargaining. This reform would open competition to non-membership organizations, solo entrepreneurs, negotiators, lawyers, and collective bargaining companies, to cite just a few. Teachers would retain the right to go without an exclusive representative, and each representation option would compete against all the others. Teacher representation in the 34 bargaining law states would not be limit-

ed to unions as it is now. Teachers could change their choice of representative periodically, perhaps every two or three years or at the expiration of a collective agreement.³

NEA and AFT assert that their tenure as exclusive representatives demonstrates teacher satisfaction with their services. As we shall see, however, it demonstrates only the enormous legal and practical obstacles facing teachers who prefer a different exclusive representative or none at all.

Basic Concepts

The proposed reforms require an understanding of two basic terms of art in U.S. labor law: "exclusive representation" and "bargaining unit."

Under "exclusive representation," the certified representative—that is, the union—has the exclusive right to bargain on terms and conditions of employment for all of the employees in the bargaining unit. Individual employees or groups of employees in the bargaining unit do not have the right to represent themselves or to negotiate their own terms and conditions of employment.

The "bargaining unit" consists of the positions that are grouped together for bargaining purposes. The union bargains for teachers who hold those positions, which may or may not include part-time teachers, substitute teachers, teachers on leave, or librarians. The scope of the bargaining unit determines which positions are covered by the contract negotiated between the exclusive representative and the school board.

Freedom of Choice in Representation

A large body of scholarship demonstrates that consumers are generally better served by competitive industries than by noncompetitive ones. For this reason, the burden of proof should be on the defenders of the status quo to explain why teacher representation should

be limited to unions. Nonetheless, teacher representation by unions is widely taken for granted in the United States, except by parties opposed to collective representation per se.

Most people assume that teachers already have freedom of choice in representational matters because they can choose a different union or no union if that is their preference. As a practical matter, however, real choice rarely exists. Defending the status quo are the NEA and AFT, with about \$1.5 billion in revenues from unified membership dues, more than 6,000 full-time staff, the capacity to reach all teachers repeatedly in school or at home, and strong incentives to avoid competition.⁴ Thus, teachers who wish to change their exclusive representative face a virtually insuperable problem. First, they must finance the campaign for an alternative to NEA/AFT representation from their personal resources, while most of the benefits go to teachers who have spent nothing to oust the incumbent union. If necessary, the NEA/AFT locals can call upon their state or national affiliates for media assistance or litigation that the challengers cannot afford to fight. Moreover, as will be evident, existing union contracts often prohibit other teacher organizations from utilizing district facilities, such as meeting rooms or the district mail system. These prohibitions preclude a serious challenge to NEA/AFT representation.

Introducing Competition

Suppose for a moment that, with outside help, challengers to NEA/AFT representation were able to install their organization as the exclusive representative in a local area. The victory would not be likely to trigger uprisings elsewhere without additional infusions of external support. Even where the decertification effort was successful, survival is problematic because the NEA/AFT will spare no expense to reverse the outcome as soon as possible.

In short, the argument that NEA/AFT affiliates must be doing a good job because teachers have not exercised their right to decertify them is simply not tenable. The NEA/AFT

argument that teachers are free to choose a different exclusive representative ignores the daunting legal and financial obstacles and huge funding disparities facing challengers to incumbent NEA/AFT affiliates.

Three reforms would remedy these disparities and replace the status quo with a genuinely competitive market for teacher representation. First, state bargaining statutes need to be altered to eliminate or dramatically reduce the minimum showing of interest required to trigger an election, thus making it much less expensive to mount a challenge to the incumbent. The “showing of interest” refers to the percentage of teachers who designate a different union to serve as their representative; 30 percent is the usual minimal requirement.⁵ Second, individuals, partnerships, for-profit, and nonprofit organizations must be eligible to serve as exclusive representatives; they could provide sources of funding that could enable dissatisfied teachers to compete effectively against NEA/AFT affiliates.

The third reform would be to allow all members of the bargaining unit, not just union members, the right to vote by secret ballot on the following critical issues:

- (1) initial authorization of an exclusive bargaining representative
- (2) reauthorization of an exclusive representative at two- or three-year intervals
- (3) an employer’s final contract offer
- (4) strike authorization, if strikes are permitted
- (5) contract ratification
- (6) dues and fees for representational services⁶

In other words, the state bargaining statutes must separate membership in an organization from the right to vote on the key decisions affecting employment. The reasons for the separation of union membership from eligibility to vote on key bargaining issues can be summarized as follows:

- All teachers should have the right to vote on the key bargaining decisions,

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including the type of representation they prefer.

- Unions are not participatory democracies, never have been, and are not going to be in the future. Except for issues that directly affect their employment, most union members are not interested in union activities, despite the common view among academics that they ought to be.
- If all teachers in the bargaining unit have the right to resolve critical employment issues, the identity of their representative would become much less important.
- Instead of the present system, in which it is practically impossible to oust an incumbent union, teachers will be better served by a system in which it is much easier to become an exclusive representative and much easier for teachers to choose a different one. Exclusive representatives can be expected to be very responsive to teachers if they can be easily removed.
- Incumbent teacher unions would be one of the options open to teachers, and these unions would continue to serve as exclusive representatives as long as teachers were willing to utilize their services as exclusive representatives.
- Unions currently lack sufficient incentive to operate economically. They cannot invest any surplus in profit-generating activities, hence their tendency is to spend it on excessive salaries, generous fringe benefits, first class airfares, liberal car allowances, and upscale hotel accommodations, to cite just a few.⁷

Making it Easier to Change an Exclusive Representative

For competition to be introduced into teacher representation, reforms must make it easier to initiate representation elections. This can be done by lowering the required showing of interest from 30 percent to 10 percent or fewer teachers in the bargaining unit. The 30 percent threshold has a stifling effect on the ability of dissatisfied teachers to initiate an

election, especially when it must be met within a relatively brief period near the expiration of existing contracts.

In public education, the difficulties of initiating changes in representation are exacerbated by the fact that existing contracts often provide incumbent unions with critical advantages in representation elections. This incumbent advantage is particularly evident when teacher contracts include clauses that render it practically impossible to decertify an incumbent exclusive representative. For example, the contract between the Leon County (Tallahassee) School Board and the Leon Classroom Teachers Association, an AFT affiliate, includes the following:

The rights granted herein to the LCTA shall not be granted or extended to any other organization claiming to, or attempting to represent the members of the bargaining unit except as provided by law.⁸

The above exclusivity clause means that no organization trying to replace the LCTA as the bargaining agent has the right to meet in school facilities, place materials in teachers' mailboxes, utilize the district mail system, post its notices on school bulletin boards, utilize payroll deduction of dues, or take time off with pay to conduct organization business.

Many school boards do not understand or do not care about the implications of such exclusivity clauses. Actually, none of the listed exclusive rights is necessary to maintain the LCTA's status as exclusive representative. Even if the LCTA were deprived of exclusivity with respect to all of the rights listed above, it would still have the exclusive right to represent the Leon County teachers on terms and conditions of teacher employment. The exclusivity provisions serve only one purpose—to undermine any effort to dislodge the LCTA as the exclusive representative. Unfortunately, many school boards do not object to the exclusivity clauses. The unions are very eager to include them in the contract, yet they are with-

out cost to the school district, which can accept them for union concessions sought by the school board. Also, school boards are fearful that competition for bargaining rights will be very disruptive, hence something to be avoided if at all possible.

Even the fact that the exclusivity provisions may be illegal does not necessarily make it easier to decertify an incumbent union. Very few teachers or citizens are aware of the exclusivity provisions unless or until they seek to use district facilities in some way. If dissident teachers are told that the contract prohibits their meeting in district facilities, they are unlikely to be aware that the prohibition may be illegal under state or federal law.⁹

And if they are aware, from what source will they get the funding to sue the district and/or the union for denying their rights? Dissident teachers would need to file an unfair labor practice charge against the union and the school board, and possibly appeal adverse decisions from the state labor board to a state district court and eventually to the state supreme court. Needless to say, teachers can rarely afford protracted litigation against unions with deep pockets and strong incentives to litigate the issues to the end of the road.

NEA and AFT are aware of the dangers posed by a successful challenge to their monopoly, and they will stonewall any threat to it for as long as possible. Inasmuch as the legal challenges may drag out for years, it will be extremely difficult to keep the supporters of a rival exclusive representative together for as long as it takes to get a final decision. A host of factors—family responsibilities, relocation, outside interests, retirements, promotions out of the bargaining unit—will erode the support for a new exclusive representative. Meanwhile, the incumbent union will assert that most teachers support it because it would otherwise have been decertified. That indefensible assertion seems eminently plausible to parties who do not understand the obstacles to ousting an incumbent teacher union.

For a short time after states enact the pro-

posed changes, incumbent exclusive representatives would probably retain their status. Soon, however, the competition would begin in earnest, and we would start to see some answers to longstanding questions about membership in the NEA/AFT. Do teachers join these unions mainly for the liability insurance they provide? How many teachers are concerned about the leftward drift of NEA/AFT political support? How widespread is antipathy to affiliation with the AFL-CIO among teachers? Can a low-cost bargaining alternative dislodge a high-cost incumbent union? These are the kinds of questions that cannot be answered unless and until teachers have real freedom of choice in choosing their representatives.

Agency Fees

There is no question that competition to represent teachers would result in better representation at a much lower cost. One reason for this conclusion relates to the payment of “agency fees” by nonmembers. Agency fees are the fees that nonmembers of the teacher unions must pay to the unions for the union’s services in collective bargaining, grievance processing, and contract administration (hereinafter referred to as “collective bargaining”). The fees are allowed or required in 21 states, including California, New York, Pennsylvania, and other bargaining law states with large populations. Agency fees are supposed to remedy the “free rider” problem, that is, the problem arising out of the fact that some teachers represented by the union refuse to pay union dues.¹⁰ These “free riders” allegedly receive the benefits of union representation without sharing the cost of achieving them.¹¹

Except in the states in which agency fees are mandated by statute, agency fees are imposed, if at all, by the contracts between school boards and teacher unions. As a result of U.S. Supreme Court decisions, agency fees are limited to the unit members’ pro rata share of the costs of collective bargaining.¹²

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Over time, however, the NEA/AFT have increased the amounts that nonmembers are required to pay to local, state, and national union affiliates by grossly inflating the amounts allegedly spent on collective bargaining. The percentage of union expenditures that nonmembers are required to pay varies between and among local, state, and national levels of the NEA/AFT, but 80 percent of the combined local, state, and national union dues is the author's estimate of the amount charged to teachers who are required to pay agency fees.¹³

The legality and amount of agency fees has been one of the most litigated issues in American education—an indication of the huge stakes involved. The unions' success in maintaining fees that are close to the dues required of union members has led many fee payers to avoid the hassle associated with non-membership by becoming members of the union. Clearly, a significant number of all regular NEA/AFT members are agency fee payers who finally concluded that the small difference between union dues and agency fees was not worth the trouble associated with not being a member. The percentage is much higher, of course, in states such as California and New York, in which nonmembers are required by statute to pay agency fees.

To understand the ramifications of agency fees, consider a teacher bargaining unit consisting of 900 union members and 100 agency fee payers, with local, state, and national dues totaling \$600. Union revenues would be $\$600 \times 900 + \480 (\$480 is 80% of \$600) $\times 100$, or \$588,000 annually, and \$1,764,000 over three years, the common duration of contracts. It would be ridiculous to argue that \$1,764,000 is required to provide bargaining services over a three-year period for 1,000 teachers, but that would be the union's legal position if the issue arose today under the assumptions in the example. These assumptions are very reasonable in the bargaining law states. In several, teacher union dues and the percentage of expenditures claimed for bargaining are higher than in the example.

Of course, bargaining will sometimes involve protracted impasse procedures and/or raise legal issues that must eventually be appealed to state and federal courts. The risk that such assistance will be needed could be easily resolved with a negotiated fee-for-service provision. Suppose, for example, that a labor law firm offers to negotiate for teachers, including grievance representation, for \$50,000 annually. A small additional fee or a cost-sharing arrangement in specified contingencies could cover the risk of protracted bargaining or extensive legal costs.

Would the NEA/AFT affiliate in the example still maintain that \$1,764,000 is required over a three-year period to represent 1,000 teachers in collective bargaining? Not even the most gullible teachers are likely to regard this amount as reasonable. If the union dues were not much higher than the competing bids, the teachers would probably opt for union representation, but the differences are likely to be very substantial. In fact, if union negotiators decided to become bargaining entrepreneurs themselves, a possibility that has already occurred to some, teachers could get the same quality services as they do now for a small fraction of the current cost of union representation.

The NEA's national budget provides further evidence of union deception on agency fees. In 1999–2000, the NEA (national unit only) spent about \$221 million, asserting that 62 to 65 percent of this figure was spent on collective bargaining.¹⁴ However, the NEA concedes that it did not bargain for state and local affiliates. Instead, the NEA's expenditures for collective bargaining were spent for support services, such as legal assistance. According to Robert H. Chanin, NEA's general counsel: "Affiliation is essentially a prepaid delivery service by which larger parent organizations help its local affiliate organizations to carry out their representational responsibilities. . . . It is to provide them with resources and services in the collective bargaining area on an as-needed basis."¹⁵

For the sake of discussion, suppose that Chanin's argument is valid. In that case, how-

ever, the NEA must answer this question: How often and for what purpose did local and state NEA affiliates request assistance on collective bargaining from the NEA? No doubt the number of times and kinds of help requested vary from year to year. But since NEA affiliates have been bargaining since the late 1960s, there should be a solid evidentiary base to support the NEA's claims that 62 to 65 percent of its expenditures were devoted to assisting local and state affiliates on collective bargaining matters. (The state and local affiliate percentages allegedly devoted to collective bargaining are much higher.) So how often does the need for help arise? Chanin has never said, publicly at least, even though he has been in an excellent position to know how often and for what purpose local and state NEA affiliates have requested and received help from NEA.

According to Chanin, NEA capability is like insurance—it's there when you need it. In the insurance field, however, providers are constantly revising the cost of insurance according to the frequency of claims. For example, insurance companies raised their rates on disaster insurance after September 11, 2001, as a result of the changes in their payout experience. At the same time, competition between insurance companies prevents the costs of insurance from getting out of hand.

In public education, however, there is no competition to provide the back-up bargaining services that the NEA and its state affiliates allegedly provide. The data on the issue would weaken the NEA's claim that a substantial majority of NEA's expenditures go for assistance to affiliates on collective bargaining matters.¹⁶ The claim that the NEA national office spent about \$137,000,000 in 1999-2000 on collective bargaining services for state and local affiliates is simply preposterous.¹⁷ With even less justification, the NEA's state affiliates in the bargaining law states claim to spend a higher percentage of their dues income for collective bargaining services to their local affiliate.

Conservatively speaking, the NEA/AFT and their state affiliates receive tens of mil-

lions of dollars annually to which they are not entitled. With competition to provide representation services, the flagrant NEA/AFT exaggeration of the costs of bargaining would be exposed promptly. The NEA and AFT (whose claims are even more exaggerated than the NEA's) would be forced either to drastically reduce their dues, thereby implicitly conceding that they had exaggerated the cost of bargaining for decades, or compete against service providers who provide the same or better service for a fraction of the amount charged by NEA/AFT.

The Reforms in Operation

The proposed reforms would maximize teachers' ability to make informed decisions about representation. Parties interested in serving as exclusive representatives would inform bargaining unit members of the services offered, fees, and any other helpful information. All members of the bargaining unit would receive these materials and have opportunities to hear the candidates and vote for their choice of representative. Obviously, the members of the bargaining unit would need a neutral way of organizing the meetings and elections to choose a bargaining agent. That might (but would not necessarily) require an organization to negotiate with the service providers.

Estreicher argues that the state labor agencies should supervise the meetings at which unit members make the six critical decisions listed earlier. In practice, government supervision of all of them might not be necessary. The problem is that government regulations and decisions will often be decisive, but the supervising agency is likely to become highly politicized for that reason. This point was dramatically illustrated by California's 1976 Agricultural Labor Relations Act. The act included a provision requiring the Agricultural Labor Relations Board to follow NLRA precedent when applicable. In every case in which NLRA precedent was deemed applicable, the ALRB held

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for the United Farm Workers, and in every case in which NLRA precedent would have supported the employer position, the ALRB ruled that the precedent was not applicable.¹⁸

During representation elections, there is a clear agenda and a narrow range of choices; the role of the state agencies conducting the elections is clear-cut and seldom challenged. Furthermore, extensive state and federal experience in conducting representation elections has resulted in a large body of rules and regulations that are accepted by the contending parties. Consequently, government supervision of representation elections may be justified. Nonetheless, unit members can make the remaining critical decisions without government supervision.

Those decisions would raise a host of issues for which no clear-cut answer may be available. For instance, there may be several positions on what to do about the employer's final contract offer.

1. Accept it.
2. Reject it.
3. Delay the decision.
4. Accept the offer with conditions.
5. Accept the offer if a strike vote fails.
6. Strike.

In many instances, no one position would command a majority. Requiring teachers to choose between the two positions with the most votes could lead to the adoption of positions that do not command majority support in the bargaining unit. For these reasons, state agencies should not be involved in the process by which unit members make decisions on some of the critical issues discussed earlier. Impartial regulation of the procedures by which unit members make these decisions is essential, but government agencies need not be in charge of the process.

For instance, members of the American Arbitration Association could chair meetings and conduct elections if the state labor boards do not. The candidate receiving a majority, possibly after a runoff election, would be the exclusive representative, and

payroll deduction to defray the fee schedule would go into effect upon acceptance by a majority of the bargaining unit of a proposal to serve as exclusive representative. Once adopted, the fee schedule could be changed, if at all, only pursuant to the collective agreement between the members of the bargaining unit and the service provider.

In such a system, there would be no need to monitor the funds paid to an exclusive representative, just as there is no state monitoring of how doctors, lawyers, dentists, shoe-shine workers, or dry cleaners spend the payments for their services. To be sure, provisions to protect the unit members from inadequate service would be essential, but those provisions would be included in contracts between the unit members collectively and the providers of representation services. An exclusive representative hired this way would have to be recertified when the contract expired, thus making it easier for unit members to choose a new exclusive representative if they wished to do so.

How Do We Get There from Here?

Acceptance of the proposal depends in the first instance on the ability of nonunion providers of representation services to offer better service at much less than the cost of union dues. Actually, this proposition can be tested under the existing structure of educational labor relations. NEA/AFT local affiliates could vote to disaffiliate and then employ a provider of representation services at a much lower cost than union dues. This does not happen now because (1) local teacher leaders are still thinking inside the box, (2) implementing the idea would use the organizational structure controlled by the teacher unions to put those very unions out of business, and (3) there has not been a strong effort to create a competitive market for teacher representation services. Nevertheless, demonstration of the viability of the idea would require only a few highly publicized examples and a few potential producers seeking to capitalize on the possibilities.

At least one such example has emerged in the Fort Worth, Texas, area. The United Educators Association, a for-profit company, represents 11,000 teachers. In the Fort Worth area, returning teacher members pay \$174 in dues, and first-year members pay \$119. Elsewhere in the region, the dues are \$149 for returning members and \$104 for first-year members. Meanwhile, the NEA and state dues in the Texas State Teachers Association (the state NEA affiliate in Texas) are \$356 plus local dues that vary from \$21 to \$70 in the UEA region. Support personnel, who comprise about 20 percent of UEA members, pay \$119 in the Fort Worth area and \$104 elsewhere in the UEA area.¹⁹ UEA rebates \$10 per member to its local affiliates, who can spend the amounts received from UEA in any way they wish. Larry Shaw, the founder and executive director of UEA, has asserted that teachers do not care about the fact that UEA is a for-profit corporation in which Shaw owns all the stock.²⁰ His reason for adopting the unusual organizational structure was to avoid litigation against a board of directors established under a conventional corporate structure.

Inasmuch as teacher bargaining is regulated by the states, state legislatures and executives would have to pass legislation that would reduce the minimum showing of interest, permit other types of organizations, as well as individuals, to represent teachers, and enable all members of the bargaining unit to vote on the critical employment issues noted above. The teacher unions will adamantly oppose these proposals even more than they oppose decertification efforts in individual school districts. Being decertified in one school district is not likely to be a catastrophic defeat for the teacher unions, but the prospect of having to compete against a variety of contenders for the bargaining rights and revenues they already enjoy statewide and nationally would be a catastrophe for them. Enactment of the proposal in one state would trigger consideration of the proposal in other states. Rank-and-file teachers have every reason to support legislation that would expand their choice of exclusive representative.

In every bargaining law state—an important qualification—the state teacher unions are highly influential lobbies in the legislatures, but this is not a reason to believe that the proposal is hopeless. To illustrate, Florida is a bargaining law state, but Republicans occupy the governor's office and hold majorities in both houses of the state legislature. It is also a state in which the state teacher unions in transition to a merged state organization are committed to an all-out effort to defeat Republican governor Jeb Bush and various Republican members of the legislature in the 2002 elections. Obviously, the Republican majorities in the state legislature have strong partisan as well as public policy reasons to terminate the teacher union monopoly on teacher representation.

It is difficult to see how NEA/AFT could successfully persuade most teachers that legislation that expands their choice of exclusive representative is harmful to teachers. This will not deter the teacher unions from attacking the legislation as “anti-union” but it is indisputable that the interests of teachers often diverge from the interests of the teacher unions. Every experienced labor negotiator in public education can attest to the accuracy of this statement. As we have seen, union proposals to deny union critics access to teachers are routine, even though it is in the interests of teachers to know what union critics have to say. When unions win representation elections by a narrow margin, they often seek long-term contracts that are not good for teachers but preclude challenges to the winning union for several years. By the time the contract is about to expire, the opposition to the union is marginalized or has disappeared due to inability to maintain an organization that does not enjoy payroll deduction of dues and access to teachers on district facilities.

As matters stand, there is no competition between the NEA and AFT nor is there likely to be any as long as their leadership works closely together to merge the two unions. Furthermore, in states and school districts

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where NEA and AFT affiliates have merged, the merged organizations are affiliated with the AFL-CIO. AFL-CIO policies prohibit its affiliates from trying to organize workers who are already represented by an AFL-CIO affiliate, or who are in the process of being organized by an AFL-CIO affiliate. After all their rhetoric about the need to merge to ward off the evils of school choice, it would be difficult for NEA/AFT leaders to justify a raid on the other union, even where the other union has not performed adequately. Parenthetically, the AFT has wasted substantial amounts of dues revenues in organizing efforts that were held to violate the AFL-CIO prohibitions against raiding other AFL-CIO affiliates.²¹ Not surprisingly, the AFT rank and file is not informed about the costs of these violations of AFL-CIO policy.

There are independent teacher organizations that seek to represent teachers in the bargaining law states, but they are opposed to collective bargaining and do not have an alternative to it. As long as this continues to be the case, these organizations have no chance of ousting NEA/AFT affiliates as the exclusive representative; in fact, they are typically hard-pressed to retain their membership because they oppose collective bargaining but do not propose an alternative system of teacher representation. Some of these organizations would adopt a pro-bargaining position if the proposal at hand were enacted, but even then they might face credibility and competence problems unless they could demonstrate immediate access to competent collective bargaining assistance.

School management will split on proposals to introduce competition in teacher representation. Many school boards and administrators will prefer the devil they don't know to the one they do know. Others will fear that organizational rivalry will disrupt the school system, especially if the organizations compete on the basis of which one can squeeze the most out of the school board. The selection of negotiators may split school faculties and lead to long-term conflict that adversely affects the work the teachers are paid to do. When this

happens, however, it is likely to be short-term because competition should weed out the less efficient exclusive representatives.

For those and other reasons, competition to NEA/AFT affiliates may emerge first from labor law attorneys and law firms, for-profit entrepreneurs, and collective bargaining organizations. A large number of lawyers already work full-time or on retainer for the teacher unions, and it would be surprising if some did not prefer to represent teachers under the arrangements outlined in the foregoing proposal. School boards frequently employ chief negotiators who represent several school boards, and there is no reason why teachers cannot employ negotiators who represent teachers in several school districts.²² Multiple clients would make it possible to take advantage of several economies of scale. For example, the cost of legal research that affects several school districts could be shared and would, therefore, be much less per teacher than the amount that would be paid for the research by teachers in a single district.

A massive ouster of NEA/AFT affiliates as exclusive representatives would not be likely to happen immediately, because only about one-third of the teacher union contracts expire in any given year, and it will take some time for potential competitors to prepare to challenge NEA/AFT affiliates in representation elections. Nonetheless, even a relatively small number of immediate defections might lead to significant changes in the NEA/AFT. To forestall massive defections, the NEA/AFT might have to lower their dues, move away from their close ties to the Democratic party, moderate their hard-core left agenda, and reduce their contributions and commitments to organizations that promote it. These projections are admittedly speculative; perhaps neutrality about the effects makes more sense, but it is difficult to see how competition could fail to have some of those effects.

Significantly, one of the reasons for worker reluctance to join unions in the private sector is their fear of being subject to union discipline. That issue is a quandary for the NEA

and AFT. On the one hand, unions are concerned about the widespread view that they are the major obstacles to terminating incompetent teachers. On the other hand, if they reduce their opposition to teacher termination, union membership will likely be seen as providing less protection against abuse of administrative discretion in dismissals. Of course, the unions will continue to recruit some teachers who are afraid that nonmembership will cause the union to be less resolute in support of their grievances, especially challenges to dismissals. There is often a drop in union membership among teachers who have just achieved tenure.

The Prospects for Enactment

Although representation by membership organizations is taken for granted in public education, requiring service consumers to be represented solely by membership organizations is the exception, not the rule, with respect to professional services. The vast majority of the American people do not require their professional service providers to be membership organizations. In cases where the law does impose this requirement, membership-based service providers themselves promoted the restriction because they wanted protection from competition. The restriction is always characterized, of course, as protection for consumers.

For constitutional reasons, federal labor law does not apply to state and local public employment. As a result, the bargaining laws covering public school teachers are state statutes that frequently incorporate language from the NLRA. In that connection, it should be noted that the NLRA authorizes individuals to be designated as exclusive representatives. Section 2(4) of the act states that "The term 'representative' includes any individual or labor organization."²³ True, individuals have seldom been designated as the exclusive representative in private sector labor relations, but there is reason to believe that the enabling legislation could materialize in some states.

One reason is that the political dynamics of the proposed legislation would be very different from the dynamics of efforts to decertify an incumbent NEA/AFT affiliate as the bargaining agent. The dynamics of decertification involve only teachers, which means that the superior resources of the NEA/AFT will be decisive in all but a few isolated cases. The recommendations in this analysis, however, have the potential to weaken this advantage. The interest groups that are concerned about NEA/AFT support for a hardcore left agenda cannot participate effectively in district-by-district efforts to decertify NEA/AFT affiliates, but they can support legislation that would render it easier for teachers to decertify NEA/AFT affiliates everywhere in a state. Consequently, the proposal should receive the support of a variety of interest groups and organizations that are bystanders on teacher representation issues at the present time.

Of course, the NEA/AFT may be as successful in persuading teachers that real teacher choice of representation is bad for teachers; after all, the unions have persuaded many parents that real parental choice of schools is undesirable. Perhaps they would be successful in making such an argument, but the proposal provides the independent teacher organizations in the bargaining law states a platform on which they could become a much more serious threat to the NEA/AFT. Opening teacher representation to competition would enable the independent teacher organizations to maintain their emphasis on professionalism while turning the representation issue to their advantage. Actually, even under the existing statutes, the independent teacher organizations could initiate a representation election armed with three or four proposals from parties seeking to represent teachers at a small fraction of the amount that teachers pay in dues and agency fees to their incumbent exclusive representatives. The independent organizations could combine those proposals with the commitment to allow everyone in the bargaining unit the right to vote on the selection of the negotiators, their fee schedules, and

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contract ratification. In doing so, the independent organizations could credibly argue that not only will teachers receive better bargaining services at a lower cost, but their organization will be free to focus on professional development and better service. The independent organizations would require dues to be viable, but their dues plus any fees for representation services would still be much lower than teacher union dues.

One additional point on teacher support for the proposal merits notice. For more than half a century, union ideologues have visualized unions as participatory democracies that generate worker support for a host of noble causes with only tenuous connections, if any, to workplace issues. Although teachers would remain free to support unions that embrace these ideals, most teachers, like most union members generally, do not regard unions as instruments of social change. The less relevant a union activity is to the material interests of union members, the less member interest and participation in union affairs. This is not a criticism of union members or an assertion of their lack of interest in broad policy issues. Most union members simply do not regard their union as the organization or institution best able to deal with their non-job-related concerns. A reform that is based on a more realistic view of the union role might achieve a surprising level of support from teachers who are reluctant to publicize their position on the issue.

Conclusion

Teachers would benefit significantly from competition in collective bargaining representation. These benefits include lower dues, better service, increased choice, and more input in the key decisions affecting their employment. Allowing non-membership organizations, solo entrepreneurs, negotiators, lawyers, and collective bargaining companies to compete with the NEA/AFT for teacher representation would create a more powerful consumer role for teachers wishing to purchase those ser-

vices. Introducing competition into teacher representation is the best way to ensure that unions work for the benefit of teachers.

Also, considering that the two largest teacher unions are the major opponents of school choice, diminishing the role and influence of the NEA/AFT would contribute to a more positive climate for the school choice movement. Without unions' opposition to school choice, many more options would be available to parents of K-12 children. Parents and their children, therefore, would become secondary beneficiaries of increased competition for teacher representation.

In Economics 101, we are told that ease of entry is the most important requirement for a competitive market to emerge. Perhaps if we can demonstrate the benefits of competition to teachers in their consumer role, they will recognize its value to consumers of teacher services. Paradoxically, the most effective way to achieve school choice for students may turn out to be to provide choice of representative for teachers. Most teachers aren't likely to become advocates of a competitive education industry, but their unions may no longer be able to prevent it from materializing.

Notes

1. "Teacher Collective Bargaining and Union Security Table," (Vienna, Virginia: Public Service Research Council, undated).

2. Figures for NEA membership were taken from *NEA Handbook, 2001-2002*, p. 189. Figures for independent associations in Georgia, Missouri, and Texas provided by Concerned Educators Against Forced Unionism, a project of the National Right to Work Committee. The organizations involved do not use the same categories of membership, but K-12 regular teachers are by far the largest component in both the NEA affiliates and the independent teacher organizations. Also see *Education Intelligence Agency Report*, June 27, 2001, pp. 1-2

3. Although I have expressed some of the ideas in this article previously, the proposal to separate representation from union membership is adapted from Samuel Estreicher, "Deregulating Union Democracy," in Samuel Estreicher, Harry C. Katz,

and Bruce E. Kaufman, *The Internal Governance and Organizational Effectiveness of Labor Unions* (New York: Kluwer Law International, 2001), pp. 435–453. Whereas Estreicher's analysis focused on labor unions in the private sector under the National Labor Relations Act, this article extends Estreicher's analysis to public education. Although my analysis refers to "teachers," most of the points made are applicable to state and local public employees generally. Feedback is invited and should be sent to the author at lieberman@educationpolicy.org. It should also be noted that Milton Chappell, staff attorney for the Right to Work Legal Defense Foundation, proposed that unit members instead of union members make the critical decisions in collective bargaining in June 1995 and that elections for recertification be held at least once every three years without a showing of interest requirement. Chappell opposed exclusive representation and was not as explicit as Estreicher in spelling out the issues that should be resolved by unit members; also, Estreicher's article was specifically devoted to private sector labor relations whereas Chappell's analysis focused on public education. See also Milton Chappell, "Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model That Will Enhance the Viability of Independent Teacher Associations," *Government Union Review*, Summer 1995, pp. 1–28.

4. Lieberman, Myron, *The Teacher Unions* (New York: Free Press, 1997).

5. Lieberman, Myron, *The Teacher Unions*, (San Francisco, 2000), p. 273. The 2000 paperback edition is a revised and updated version of the 1997 hardcover edition.

6. These issues are taken almost verbatim from Estreicher, pp. 436–37. However, in most states, teacher strikes are prohibited, another reason why Estreicher's proposal is not completely applicable to public education.

7. For a list of benefits for the staff of NEA's state affiliates, see Lieberman, *The Teacher Unions*.

8. 2000–2002 Collective Bargaining Contract between the Leon County School Board and the Leon Classroom Teachers Association (F.E.A.), Article III, par. 5, p. 11. Tallahassee, Florida, 2000.

9. See *Public Employees v. School Board of Lee County*, *American Federation of Teachers-Hillsborough v. School Board of Hillsborough County*, and *Public Employees Relations Commission*, 584 So 2d 62 (Fla. Appeal 1 Dist. 1991, and *Relations Commission*, 513 Southern Reporter, 2d Series, 1286. In *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), a 5–4 decision of the U.S. Supreme Court held that the Perry,

Indiana, school board did not violate the U.S. Constitution in denying a competing organization access to the school district mail system. The closeness of the vote, and the fact that the decision overruled the decision of the Seventh Circuit Court of Appeals, and that the Leon County contract carried exclusivity far beyond the circumstances in the *Perry* case, suggest that the sweeping exclusivity in the Leon County contract would not withstand a Supreme Court challenge. Furthermore, states are free to limit exclusivity to representation on terms and conditions of employment if they wish to do so.

10. For a critique of the arguments for and against agency fees, see Lieberman, *The Teacher Unions*, Chapter 10.

11. For a criticism of the free rider rationale for agency fees, see Lieberman, *The Teacher Unions*, Chapter 10, pp. 180–199.

12. See *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks et. al.*, 466 U.S. 435 (1984), and *Lehnert v. Ferris Faculty Association*, 111 S.Ct. 1950 (1991).

13. The agency fees for the state and local unions vary with each other and from year to year. Even the fee for the NEA varies in different states at the same time because the fiscal years for the states and locals vary by state. Furthermore, in many school districts, the NEA and AFT collect full dues from agency fee payers. The National Right to Work Legal Defense Fund estimates that 20–25 percent of NEA membership is due to agency fees.

14. For 2001–2002, the NEA reports using 63.87 percent of dues on collective bargaining. This figure can be modified slightly by the state associations. See NEA Supplemental Schedule of Chargeable and Non-chargeable Expenditures, Year Ending Aug 31, 2000, p. 8, available from the National Education Association, 1201 16th Street, N.W., Washington, D.C. 20036.

15. Official Transcript, "Proceedings before the Supreme Court of the United States" in *Lehnert v. Ferris Faculty Association*, Case No. 89-1217, p. 25.

16. According to one of its attorneys who has litigated several agency fee cases against the NEA, the National Right to Work Legal Defense Foundation has tried to raise the issue of the frequency and nature of local and state affiliate requests for assistance, but the U.S. Supreme Court showed no interest in pursuing the issue. From oral communication to Myron Lieberman, May 2002.

17. In agency fee litigation, the NEA asserts that 62 to 65 percent of its expenditures are for collec-

tive bargaining. The variations are due to the fact that the NEA's fiscal year differs from the fiscal year of some of its state and local affiliates. For the year ending August 31, 2000, the NEA spent approximately \$221,000,000; thus 62 percent, or \$137,000,000 went for collective bargaining expenses. "Financial Reports, A Report from NEA Secretary-Treasurer, Dennis Van Roekel," National Education Association, Washington, 2000, p. 35.

18. Myron Lieberman, *NLRA Precedent in ALRB Decisions* (Long Beach, California: State University Research Foundation, 1982).

19. Larry Shaw, e-mail to Myron Lieberman, May 12, 2002. According to Shaw, UEA enrolls 75 percent of the market in large locals and 60 percent

in the others.

20. Larry Shaw. Telephone interview with the author, May 3, 2002.

21. Article 20, *AFL-CIO Constitution* available from AFL-CIO, 815 16th Street, N.W., Washington, D.C. 20006.

22. The author once represented 11 school districts at the same time. This was possible only because their existing contracts expired at different times over a three-year period, but it is not at all unusual for individual negotiators to represent a number of school districts whose contracts expire at the same time.

23. National Labor Relations Act, 49 stat. 44 (1935) as amended 1947, 1951, 1958, 1959, 1974.

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