UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SEIU Local 121RN
(Pomona Valley Hospital Medical Center),
(Respondent),

and Case No. 21-CB-14428

Carole Badertscher
(Charging Party).

CHARGING PARTY CAROLE BADERTSCHER'S MOTION TO RECUSE MEMBER CRAIG BECKER

Charging Party Carole Badertscher hereby moves for recusal of Member Craig Becker, since any reasonable person would question his ability to fairly and impartially decide this case, which involves his long-time employer, Service Employees International Union (SEIU) and one of its affiliates. Moreover, any reasonable person would question his ability to fairly and impartially decide this or any case in which a party is being provided free legal aid by the National Right to Work Legal Defense Foundation and is being represented by one of its staff attorneys, as is the case here.

INTRODUCTION: Member Becker is a long-time employee of SEIU, most recently serving as its Associate General Counsel. (See Exhibit 1, an excerpt from SEIU's most recent LM-2 report for 2008. It should also be noted that Member Becker previously served as Associate General Counsel of the AFL-CIO). In that role, he has advised and represented that international union and its local affiliated unions for more

than a decade. Charging Party Carole Badertscher is an individual employee opposing SEIU in both a recent decertification case (No. 21-RD-2840) and in the instant ULP case. Being an individual employee who cannot afford to litigate against a giant like SEIU and/or its wealthy affiliates,[1] Ms. Badertscher turned to the National Right to Work Legal Defense Foundation ("Foundation") to provide her free legal aid. Besides paying for the costs of her litigation, the Foundation provides her with the pro bono services of one of its staff attorneys, Glenn M. Taubman. (Additional facts will be discussed below, where relevant).

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[1] According to its LM-2 reports, SEIU International's annual revenue exceeds $250 million. In Locke v. Karass, 129 S.Ct. 798 (2009), the Supreme Court found that SEIU International "pools" funds from all of its local unions and uses that "pool" to pay for all of the litigation of the locals, thus ensuring that the financial power of the parent union is always available to assist the locals. As noted in a prior case:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 523 (1991). Thus, through its "pooling" device, Member Becker's long-time employer, SEIU, is inextricably intertwined with all litigation involving its local unions.

ARGUMENT

1) Member Becker's recusal is mandated in all cases involving SEIU and/or its affiliates.

The recusal standards for administrative agency officials are analogous to those governing federal judges. 28 U.S.C. § 45[2]; Overnite Transp. Co., 329 NLRB 990, 998 (1999) (Member Liebman agreeing that the same standards apply to NLRB Members); Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 238-39 (3d Cir. 1941); see also Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) (FTC Chairman erred in failing to recuse himself). Whatever standard is used, however, it is axiomatic that a party to a federal adjudicatory proceeding is "entitled as a matter of fundamental due process to a fair hearing." Overnite Transp. Co., 329 NLRB at 998.

The courts have developed a standard for determining whether a federal administrator should recuse himself from quasi-judicial functions because of prior statements and writings. In Cinderella Career & Finishing Schools, Inc., 425 F.2d at 590, the court held that the FTC Chairman should have recused himself because of a speech in

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[2] 28 U.S.C. § 455 states:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter . . . .

which he drew "hypothetical" examples from a pending case. The court asked whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Id. at 591. Other circuits have adopted this "disinterested observer" test. See Sivers v. Pierce, 71 F.3d 732, 741-49 (9th Cir. 1995) (citing Cinderalla Career & Finishing Schools with approval); Antoniu v. SEC, 877 F.2d 721, 725-26 (8th Cir. 1989); American Medical Ass'n v. FTC, 638 F.2d 443, 448-49 (2d Cir. 1980); Staton v. Mayes, 552 F.2d 908, 913-15 (10th Cir. 1977) (recusal required because case "involves statements on the merits by those who must make factual determinations"); cf. American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (6th Cir. 1966) (applying "reasonable suspicion of unfairness" standard). Other federal courts have noted that Cinderella Career & Finishing Schools applies to federal administrators exercising quasi-judicial power. Starr v. FAA, 589 F.2d 307, 315 (7th Cir. 1978); see Trust & Investment Advisers. Inc. v. Hogsett, 43 F.3d 290, 297-98 (7th Cir. 1994) (reinstating due process claim based on "unconstitutional risk of bias" in state administrative adjudication).

Member Becker is a long-time employee of SEIU, most recently serving as its Associate General Counsel. (See Exhibit 1, an excerpt from SEIU's 2008 LM-2 report). In that role, he has advised and represented the international union and its local affiliated unions. Member Becker has for decades (until his recess appointment) litigated many of the most important cases for both SEIU International and its affiliated locals. In Locke v.

Karass, 129 S.Ct. 798 (2009), the Supreme Court found that SEIU International pays for the litigation costs of its local unions through a "pooling of litigation costs" scheme, thereby placing Member Becker in the situation of directly working for not only the SEIU International as its Associate General Counsel but for all of its affiliates as well. As such, Member Becker and the SEIU International are inextricably intertwined with all litigation involving the SEIU's local unions.

For example, a simple Westlaw search reveals that, during his tenure as SEIU Associate General Counsel, Member Becker represented numerous SEIU locals in a wide variety of cases. Guardsmark, LLC v. NLRB, 475 F.3d 369 (D.C. Cir. 2007) (SEIU Local 24/7); NLRB v. Local 32B-32J Service Employees Int'l Union, 353 F.3d 197 (2d Cir. 2003); First Healthcare Corp. v. NLRB, 344 F.3d 523(6th Cir. 2003) (SEIU Local 399); Stanford Hosp. and Clinics v. NLRB, 325 F.3d 334 (D.C. Cir. 2003) (SEIU Local 715); Beverly Health & Rehab. Serv., Inc. v. NLRB, 317 F.3d 316 (D.C. Cir. 2003) (SEIU District 1199P); Beverly Health & Rehab. Serv., Inc. v. NLRB, 297 F.3d 468 (6th Cir. 2002) (SEIU Local 585); NLRB v. DeBartelo, 241 F.3d 207 (2d Cir. 2001) (SEIU Local 32B-32J); General Service Employees Union, Local 73 v. NLRB, 230 F.3d 909 (7th Cir. 2000) (SEIU Local 73); NLRB v. Hilliard Dev. Corp., 187 F.3d 133 (1st Cir. 1999) (SEIU Local 285); Service Employees Int'l Union Local 102 v. County of San Diego, 35 F.3d 483, opinion amended & supplemented, 60 F.3d 1346 (9th Cir. 1994); Beverly Enter., Inc. v. Trump, 1 F. Supp. 2d 489 (W.D. Pa. 1998) (SEIU Local 585).

Undoubtedly, there have been many other examples of his representation of SEIU's affiliates under that union's "pooling of litigation expenses" program. Locke v. Karass, 129 S. Ct. 798 (2009). Thus, the fact that the instant case involves an affiliate of the SEIU, rather than the SEIU International itself, changes nothing.

Importantly, Member Becker's legal employment and executive decision-making links to SEIU and its affiliates are not part of the distant past. Rather, they are recent and on-going, up to the very date of his recess appointment by President Obama on March 27, 2010. In Overnite Transportation Co., 329 NLRB 990 (1999), Member Liebman denied a motion for her recusal in a case involving her former employer, the Teamsters, because her "relationship with the Teamsters terminated over 10 years ago." Id. at 999. In contrast, Member Becker's employment and executive decision making relationship with SEIU and its local unions is current and on-going, at least up to the date his recess appointment took effect.

Moreover, although the public record is unclear, Charging Party also believes that Member Becker has worked closely and directly with the union law firm of Van Bourg, Weinberg, Roger & Rosenfeld or its successors, the same law firm that represents SEIU Local 121RN in this case and has represented many other SEIU unions over the decades. (See www.unioncounsel.net regarding the Van Bourg law firm and its successor). A small sample of the perhaps hundreds of cases in which the Van Bourg law firm represented SEIU and its affiliates – presumably in consultation with Member Becker

when he was a decision-making SEIU official – include: California Pacific Medical Center v. Service Employees Int'l Union, 2008 WL 4867059, 185 L.R.R.M. (BNA) 2326 (9th Cir. 2008) (SEIU's "United Healthcare Workers-West"); Aramark Facility Services v. Service Employees Int'l Union, Local 1877, 530 F.3d 817 (9th Cir. 2008); NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991) (SEIU Local 535); Garcia v. Service Employees Int'l Union, 2009 WL 3561528 (N.D. Cal. 2009) (SEIU Local 1877); SEIU, Local 2028 v. Rady Children's Hospital, 2008 WL 5221060, 185 L.R.R.M. (BNA) 3278 (S.D. Cal. 2008) (SEIU Local 2028); Stanford Hospital & Clinics v. Service Employees Int'l Union, Local 715, 2008 WL 4532557 (N.D. Cal. 2008) (SEIU Local 715); Covenant Aviation Security, 349 NLRB 699 (2007) (deauthorization case against SEIU Local 790); Laramie v. County of Santa Clara, 784 F. Supp. 1492 (N.D. Cal. 1992) (SEIU Local 715).

In short, Member Becker's recent and extensive links to a party in this case, and/or the attorneys for that party, mandate his recusal.

2) Member Becker's recusal is mandated in all cases involving the National Right to Work Legal Foundation or its staff attorneys.

"In determining whether a judge must disqualify himself under 28 U.S.C. § 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased." Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996). The bias or prejudice "must be grounded in some personal animus or malice that the judge harbors . . . of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." Id. The bias, hostility and disdain that Member Becker has shown throughout

his career for the National Right to Work Legal Defenses Foundation meets this standard.

Member Becker has directly represented unions in cases where the dissenting employees opposing the unions were represented by staff attorneys provided through the legal aid program of the National Right to Work Legal Defense Foundation. Gilpin v. American Federation of State, County, and Mun. Employees, 875 F.2d 1310 (7th Cir. 1989); West v. SEIU Local 434B, Case No. 01-10862 CAS (C.D. Cal.). Here, the Charging Party is receiving free legal aid from the very same Foundation and its full-time staff attorneys.

Additionally, Member Becker has made a virtual career of demonstrating rabid hostility to the Foundation, its staff attorneys and the clients they represent. This antipathy to the Foundation and the nonunion employees its staff attorneys represent runs long and deep. In one published diatribe against the Foundation and its staff attorneys, Member Becker states:

> Looking ahead, however, one might reasonably fear that the most radical, partisan attack on workers and their unions is just about to begin. The Board has seemingly embraced a litigation strategy initiated by the National Right to Work Legal Defense Foundation, an organization that purports to represent employees but was founded by employers in the wake of the Taft-Hartley Act and is funded by the most anti-union fringe of the employer community, an organization so ideologically driven that Chief Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit held that its lawyers are "not an adequate litigation representative" of class of a employees represented by a union. In the two sets of pending cases discussed below, many of them instigated by Right to Work, we can anticipate an effort to place union representation effectively beyond the reach of most American workers by distorting or ignoring the fundamental values Congress embraced when it adopted the Act.

Jonathan Hiatt & Craig Becker, At 70, Should the National Labor Relations Act Be Retired?, 26 Berkeley J. Emp. & Lab. L. 293, 298-99 (2005) (footnotes omitted) (copy attached as Exhibit 2). Member Becker's statements are clear proof of his hostility towards the Foundation, its staff attorneys and the clients they represent. But there is more.

Member Becker has prejudged many cases brought on behalf of employees through the Foundation's legal aid program, such as Dana Corporation & UAW, Case No. 7-CA-46905 (JD-24-05, ALJ Kocol, Apr. 11, 2005) (exceptions pending). Foundation staff attorneys represent the individual employees who filed the ULP charges in Dana Corporation. That ground-breaking case addresses whether, under a long line of well-established Board cases,[3] a union's negotiation of a "neutrality and card check" agreement containing terms and conditions of employment for employees the union does not then represent constitutes unlawful pre-recognition bargaining. Member Becker has viciously criticized the Foundation's mere involvement in Dana Corporation, wilfully blinding himself to the independent role of the Board's General Counsel under 29 § U.S.C. 153(d). Member Becker states: "[S]purred by the National Right to Work Foundation, the Board's General Counsel has placed a number of critical questions before the Board concerning exactly when those procedures [pre-recognition bargaining] can begin." Jonathan Hiatt & Craig Becker, At 70, Should the National Labor Relations Act

[3] SMI of Worchester, 271 NLRB 1508 (1984); Majestic Weaving Co., 147 NLRB 859 (1964); International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

Be Retired?, 26 Berkeley J. Emp. & Lab. L. at 301. Surely Member Becker knows that the General Counsel – and not the National Right to Work Legal Defense Foundation – has absolute and independent discretion to bring cases forward to the Board for decision. NLRB v. UFCW Local 23, 484 U.S. 112 (1987). Accordingly, why, other than pure bias and malice, does Member Becker blame the Foundation and its staff attorneys for the NLRB General Counsel's independent and discretionary decision to bring these cases to the Board for its consideration?

Even more telling of his prejudices and hostility, Member Becker opines that if the Board rules in Dana Corporation and similar cases in favor of the "ideologically driven" Foundation-supported employees, then "the free choice guaranteed employees by the Act" will be destroyed. Jonathan Hiatt & Craig Becker, At 70, Should the National Labor Relations Act Be Retired?, 26 Berkeley J. Emp. & Lab. L. at 306. Could any reasonable person think that Member Becker can impartially render decisions in cases filed by or with the assistance of this "ideologically driven" Foundation and the staff attorneys it employs?

Incredibly, Member Becker's hostility to the National Right to Work Legal Defense Foundation morphs into disdain for the United States Supreme Court as well, since he alleges that "at the urging of the [National] Right to Work Committee the Supreme Court has developed a **virtual obsession**" with cases brought by workers

receiving litigation support from the National Right to Work.[4] Craig Becker, Elections Without Democracy: Reconstructing the Right to Organize, New Labor Forum, Fall 1998, Issue 3, p. 97 (emphasis added). (Copy attached as Exhibit 3). "During the last two decades, the Court has accorded workers represented by unions far greater protections against use for political purposes of any portion of the dues or fees deducted from their wages than it has accorded workers against unlawful discharge." Id.

Member Becker's insults to the Supreme Court about its "obsession" with hearing Foundation-assisted claims and protecting individual employee rights presumably refer to the Court's landmark decisions in Foundation-supported cases such as Davenport v. Washington Education Ass'n, 551 U.S. 177 (2007); Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); Abood v. Detroit Board of Education, 431 U.S. 209 (1977), among many others.

Can any reasonable person believe that Member Becker can rule fairly in this or any other Foundation-assisted case when **he** has shown a long and "virtual obsession"

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[4] Perhaps unbeknownst to Member Becker, the National Right to Work Legal Defense Foundation and the National Right to Work Committee are separate and distinct organizations, although their work is complementary and they are often described as "sister organizations." The Foundation, founded in 1968, works solely through the courts to assist employees whose human or civil rights have been violated by abuses of compulsory unionism. The Committee, founded in 1955, is an educational-lobbying organization that opposes and strives to eliminate all forms of forced unionism.

with the Foundation and the clients represented by its staff attorneys? Hook, 89 F.3d at 355 (recusal mandated when the bias or prejudice is "grounded in some personal animus or malice that the judge harbors . . . of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes").

Despite Member Becker's insinuations and documented ideological hostility to the Foundation and the workers that it assists, it is an indisputable fact that the Foundation is a charitable, bona fide, IRS-approved, legal aid organization engaged in legitimate legal aid work. See e.g., United Auto Workers v. National Right To Work Legal Defense Foundation, Inc., 584 F. Supp. 1219, 1223-24 (D.D.C. 1984), aff'd, 781 F.2d 928, 934-35 (D.C. Cir. 1986); see also National Right to Work Legal Defense and Education Foundation, Inc. v. United States, 487 F. Supp. 801, 808 (E.D.N.C. 1979).[5] The purpose of the Foundation includes the assistance of workers in protecting rights guaranteed to them under the Constitution and laws of the United States, without fee or charge to such workers. Id. at 802-03.

As noted above, the Foundation has provided the attorneys in successful landmark

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[5] For more than a decade, ten (10) large unions were given repeated and substantial opportunities to uncover specific facts regarding their distorted view of the Foundation and its litigation program. These unions were unable to establish a single fact that "even remotely suggested that . . . the Foundation . . . cause[d] union members to bring harassing suits against labor organizations or otherwise to disrupt union harmony." UAW v. NRTWLDF, 781 F.2d 928, 935 (D.C. Cir. 1986), affirming, 584 F. Supp. 1219, 1224 (D.D.C. 1984). Thus, the courts have repeatedly held that the Foundation is a legitimate legal aid organization like the NAACP Legal Defense Foundation, the American Civil Liberties Union, and the Legal Aid Society -- to mention a few.

litigation before the United States Supreme Court, a fact Member Becker clearly despises. The Foundation, through its staff attorneys, has also provided the representation of the prevailing non-union employees in hundreds of federal court and NLRB cases, another fact that Member Becker apparently despises. See, e.g., Lucas v. NLRB, 333 F.3d 927 (9th Cir. 2003); Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Production Workers v. NLRB, 161 F.3d 1047 (7th Cir. 1998); Food & Commercial Workers Local 951 v. Mulder, 31 F.3d 365 (6th Cir. 1994); NLRB v. Office Employees Local 2, 902 F.2d 1164 (4th Cir. 1990); Covenant Aviation Security, 349 NLRB No. 67 (2007) (deauthorization case against SEIU); Dana Corp., 351 NLRB 434 (2007); Paperworkers Union (Weyerhaeuser Paper Co.), 320 NLRB 349 (1995); Rochester Mfg. Co., 323 NLRB 260 (1997); California Saw & Knife Works, 320 NLRB 224 (1995); Interstate Bakeries Corp. & Teamsters Local Union 523, 353 NLRB No. 14 (2008), affirmed, 590 F.3d 849 (10th Cir. 2009); Albertson's/Max Food Warehouse, 329 NLRB 410 (1999) (upholding employees' statutory right to conduct a deauthorization election at a time of their choosing).

In contrast to Member Becker's obsessive enmity, one court has described the Foundation's work as:

> beneficial to the community and area. . . . The defense of each citizen's right to work under the First, Fifth and Fourteenth Amendments is a noble objective. The public has a paramount interest in insuring that compulsory union arrangements do not unnecessarily impinge upon each worker's freedom of thought, association or speech. . . . Litigation is an appropriate vehicle for an organization to accomplish that objective.

NRTWLDF, 487 F. Supp. at 807 (citations omitted).

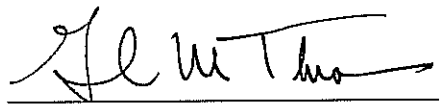
Similarly, in certifying a class of nonunion employees who were represented by a Foundation staff attorney, the United States District Court for the District of Maryland recognized that the Foundation had supported class action cases successfully before the United States Supreme Court, and found no hint of impropriety in the relationship between the Foundation's staff attorneys and their clients. George v. Baltimore City Public Schools, 117 FRD 368, 370-371 (D. Md. 1987).

It is against this background that Member Becker's intemperate attacks against the Foundation, launched over the course of a decade or longer, must be judged. Can any reasonable person look at his record and believe that he can fairly and impartially adjudicate any case directly supported by the Foundation and litigated by its staff attorneys? Can any reasonable person believe that Charging Party Carole Badertscher's case, supported by the Foundation and alleging a series of SEIU lies and coercion, will receive a fair and impartial hearing from Member Becker? The obvious answer to these questions is "no." Member Becker must recuse himself under the standards of the federal cases cited above.

CONCLUSION

For the reasons stated herein, Member Becker must recuse himself from this case.

Respectfully submitted,



Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Attorney for Carole Badertscher

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I hereby certify that a true and correct copy of the foregoing Motion was E-filed with the NLRB Executive Secretary, and was sent as follows:

via E-filing with Region 21 and via e-mail to:

Lisa McNeill, Esq.
National Labor Relations Board Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449
Lisa.McNeill@nlrb.gov

and via e-mail to:

Matthew J. Gauger, Esq.
Weinberg Roger and Rosenfeld
428 J Street, Suite 520
Sacramento, CA 95814
mgauger@unioncounsel.net

this 29th day of March, 2010.

Glenn M. Taubman

Return

U.S. Department of Labor
Employment Standards Administration
Office of Labor-Management Standards
Washington, DC 20210

FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT

MUST BE USED BY LABOR ORGANIZATIONS WITH $250,000 OR MORE IN TOTAL ANNUAL RECEIPTS AND LABOR ORGANIZATIONS IN TRUSTEESHIP

Form Approved
Office of Management and Budget
No. 1215-0188
Expires: 09-11-2011

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT.

For Official Use Only	1. FILE NUMBER	2. PERIOD COVERED	3. (a) AMENDED - Is this an amended report:	No
	000-137	From 1/1/2008 Through 12/31/2008	(b) HARDSHIP - Filed under the hardship procedures:	No
			(c) TERMINAL - This is a terminal report:	No

4. AFFILIATION OR ORGANIZATION NAME		8. MAILING ADDRESS (Type or print in capital letters)	
SERVICE EMPLOYEES		First Name ANNA	Last Name BURGER
5. DESIGNATION (Local, Lodge, etc.) NATIONAL HEADQUARTERS	6. DESIGNATION NBR	P.O Box - Building and Room Number	
7. UNIT NAME (if any)		Number and Street 1800 Massachusetts Avenue	
9. Are your organization's records kept at its mailing address? Yes		City WASHINGTON	
		State DC	ZIP Code + 4 20036

Each of the undersigned, duly authorized officers of the above labor organization, declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned individual's knowledge and belief, true, correct and complete (See Section V on penalties in the instructions.)

26. SIGNED:	Andrew L Stern	PRESIDENT	27. SIGNED:	Anna Burger	TREASURER
Date:	Mar 31, 2009	Contact Info: 1-202-730-7300	Date:	Mar 31, 2009	Contact Info: 1-202-730-7300

Form LM-2 (Revised 2003)

Exhibit 1

A B C	Craig Becker Associate General Counsel None	$136,406		$0		$5,468		$0		$141,874		
I	Schedule 15 Representational Activities	100 %	Schedule 16 Political Activities and Lobbying	0 %	Schedule 17 Contributions	0 %	Schedule 18 General Overhead	0 %	Schedule 19 Administration	0 %		

26 BERKJELL 293
26 Berkeley J. Emp. & Lab. L. 293

Berkeley Journal of Employment and Labor Law
2005

Forum: At 70, Should the National Labor Relations Act Be Retired?

*293 AT AGE 70, SHOULD THE WAGNER ACT BE RETIRED? A RESPONSE TO PROFESSOR DANNIN

Jonathan P. Hiatt, Craig Becker [FNd1]

Reduced to its essence, the message of Professor Ellen Dannin's paper "NLRA Values, Labor Values, American Values" is: don't give up on the Wagner Act. [FN1] Professor Dannin advocates a litigation strategy that is directed at reminding the federal courts and the National Labor Relations Board of the core values embodied in the Act.

I.

Tapping the Core Values of Federal Labor Law

On the surface, it is hard to disagree with either of these suggestions, although on the heels of a rash of anti-worker, anti-union decisions issued by the Board in the past six months, there is a good deal of debate within the union-side bar at present concerning whether unions and employees should make any affirmative use of the Board's processes at this time. Nevertheless, taking a broader view, the labor movement has been pursuing *294 a litigation strategy intended to

Exhibit 2

draw out and animate the Act's fundamental principles for the past 70 years.

In important cases, the AFL-CIO and its affiliated national unions attempt to ensure that factual records are developed at the administrative hearing stage which speak to the Act's core values. For example, in the more than decade-long debate over the supervisory status of nurses, the question has twice reached the Supreme Court [FN2] as a highly abstract one of construction of isolated phrases in the statutory definition of supervisor, making it all too easy for the Court to ignore the actual conditions under which nurses work in today's health care system--conditions Congress surely intended nurses to be able to ameliorate through collective bargaining. In the last round of this debate, when the Board solicited briefs from interested parties in two nurse cases, AFL-CIO affiliates that represent nurses filed a brief that attempted to paint a picture of the hard, dangerous, and emotionally draining work performed by nurses today. [FN3] The AFL-CIO and its affiliated unions also work hard to convince local unions and individual members to settle cases that threaten to establish harmful precedents because they arise out of bad facts. When the Board's members have had long experience with labor relations and draw on that experience rather than ideological predisposition to decide cases, we have vigorously urged judicial deference to the Board.

That said, however, we are also in full agreement with Professor Dannin's central thesis that the construction of the Act has been deformed by the Board's and the courts' lack of fidelity to the values that underlay its enactment and that are embodied in its terms. Moreover, over the 70 years since the passage of the Wagner Act there have been two significant sets of anti-union amendments. [FN4] Thus, our appeal to the original values is complicated by shifting congressional sentiments and scores of Supreme Court and Court of Appeals decisions interpreting the Act, as well as seven decades of NLRB jurisprudence. When union lawyers appear before the Board or a Court of Appeals today, they are a bit like anthropologists, if not *295 paleontologists, having to dig through the layers of sediment and other deposits to reach the original purposes of the Act.

II.

A Dose of Realism: the Bush NLRB

Yet it is not only the passage of time that complicates Professor Dannin's project, its admirable vision must also be tempered with a dose of legal realism. This is true in two respects. First, judges and members of the Board absorb their values from the wider society and those societal values are reflected in their decisions. The revitalization of the Act's animating values must therefore be a broader project, not limited to judicial and administrative forums. The process of education about the importance of unions and collective bargaining must reach out to the public at large, as the AFL-CIO has undertaken to do through its national Voice at Work program.

Second, and perhaps the more bitter dose of legal realism to swallow, the distortion of the NLRA is not only due to a shift in values that are unconsciously brought into courtrooms and into the chambers of the Board, but also to a more self-conscious, unprincipled attack on unions. Raw politics is at issue here. We are afraid that even were we able to bring back Louis Brandeis to write another Brandeis brief to the current NLRB, documenting the exploitation of workers in various sectors of our economy, their expressed desire for union representation, their inability to secure representation through Board supervised elections, and the real economic, social and political benefits of providing representation to these workers, it would still not convince a majority of this Board to take action to alleviate the frustration of these workers with the current legal structure or prevent the majority from continuing a course of action that is effectively placing workplace representation beyond the reach of American workers.

A. The Last Four Years

During the eight years of the Clinton Administration, the Board was balanced with two management lawyers, two union lawyers, and a distinguished neutral as chair, first Professor William Gould of Stanford Law School, and then career NLRB official John Truesdale. President Bush has departed from this tradition and appointed a majority of management partisans with a long-time employer attorney as chair. As a result, increasingly over the past year, this partisan Board has drawn out isolated strands of the political history embodied in the amended National Labor Relations Act--the Labor-Management Relations Act--in an effort to further limit the extent of unionization in this country.

*296 Consider, simply as one example, the current Board's drastic limitation of the coverage of the Act itself. In just over four months, the Board issued decisions reversing existing law and denying employee status, and thus all protections under the Act, to four distinct categories of employees: graduate assistants being paid to teach classes or perform research, [FN5] handicapped individuals working as janitors, [FN6] artists' models who provide their own robes or slippers, [FN7] and, effectively, temporary employees working jointly for a supplier employer and a user client absent consent from both employers. [FN8] Moreover, this contraction of the Act's coverage is unfortunately likely to be multiplied many fold when the Board decides three much-awaited cases applying the supervisory exclusion to a broad array of employees with minor authority over others, such as certain categories of nurses. [FN9]

Note also just a few of this Board's other anti-worker decisions issued over roughly the same time period, limiting employees' section 7 rights, weakening penalties for employers who commit unfair labor practices, and otherwise expanding employer rights. In Holling Press, Inc., [FN10] this Board held that an employee's solicitation of a co-worker to testify before a state agency in support of her sexual harassment complaint was not "for mutual aid or protection" and was thus unprotected against retaliation. In Alexandria Clinic, [FN11] this Board held that 29 nurses were lawfully discharged for starting a strike less than four hours after the time specified in their union's required 10-day notice to the employer. In First Legal Support Services, [FN12] this Board held that special remedies were unwarranted despite egregious employer retaliation during an organizing campaign where workers who tried to form a union were fired, threatened with discharge, made to sign independent contractor agreements, and offered bribes if they would give up their support of the union. In Hialeah Hospital, [FN13] this Board rejected an Administrative Law Judge's recommendation of a Gissel bargaining order in a case where high level officers of the employer embarked on a course of discharge, threats to discharge, surveillance, and other illegal conduct within hours of learning of a union's organizing effort. *297 In Crown Bolt, Inc., [FN14] this Board held that an employer's threats to close a facility if employees voted for a union are not presumed disseminated throughout a bargaining unit. In Bunting Bearings Corp. [FN15] and Midwest Generation, [FN16] this Board found no violation of the Act when employers selectively locked-out only the portions of their workforces that the employers perceived to contain the strongest supporters of the union. Finally, in Borgess Medical Center, [FN17] the Board refused to require an employer that had unlawfully withheld grievance-related information from a union to turn over the information, reasoning that by the time of the Board's decision the grievance had been arbitrated so the traditional remedy was not merited. This onslaught on workers' rights occurred over just a 15 month period, with all but one of the decisions being issued in the four months ending in November 2004.

This extraordinary attack on employee rights cannot be ascribed to the customary swing of the pendulum after a change of administration--a modest jurisprudential "correction" that would be expected as new Board appointees express the policy choices of their administration in those areas where Congress has delegated such authority to the Board. Note, for example, that the Borgess decision reversed a 20 year-old decision in Bloomsburg Craftsmen, Inc., [FN18] written by two Republican Members, Dotson and Johansen, and a Democratic Member, Dennis. Similarly, Crown Bolt overruled General Stencils, Inc., [FN19] a 1972 decision authored by Republican Member Kennedy and Democratic Member Fanning, as well as Coach and Equipment Sales Corp., [FN20] which was joined by Republican Members Murphy, Jenkins

and Walther. Even some of the Clinton Board decisions reversed by the current Board in this recent wave of administrative activism were joined by Republican members. Republican Member Hurtgen, for example, joined New York University, [FN21] which was reversed in Brown University. In Harborside Healthcare, Inc., [FN22] the current Board held that solicitation of authorization cards by supervisors, even where the employer is openly anti-union, is inherently coercive absent mitigating circumstances. The decision reversed a rule set forth in Sutter Roseville Medical Center [FN23] and followed in Millsboro Nursing & Rehabilitation Center, Inc. [FN24] that such *298 solicitation is not objectionable unless it contains the seeds of "potential reprisal, punishment or intimidation." [FN25] The later, 1999 opinion was joined by Republican Member Brame. Finally, in Shaw's Supermarkets, [FN26] the Board granted review of a Regional Director's dismissal of an employer's petition for an election, and in so doing questioned the continued validity of Kroger Co., [FN27] a case decided by two Republican Members, Jacobs and Murphy, and one Democratic Member, Fanning. [FN28]

B. What is to Come

Looking ahead, however, one might reasonably fear that the most radical, partisan attack on workers and their unions is just about to begin. The Board has seemingly embraced a litigation strategy initiated by the National Right to Work Legal Defense Foundation, an organization that purports to represent employees but was founded by employers in the wake of the Taft-Hartley Act and is funded by the most anti-union fringe of the employer community, [FN29] an organization so ideologically driven that Chief Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit held that its lawyers are "not an adequate litigation representative" of class of a employees represented by a union. [FN30] In the two sets of pending cases discussed below, many of them instigated by Right to Work, we can anticipate an effort to place union representation effectively beyond the *299 reach of most American workers by distorting or ignoring the fundamental values Congress embraced when it adopted the Act.

1. Narrowing the Paths to Representation

Professor Dannin describes the democratic values embodied in the NLRA. Senator Wagner drew on those values by inserting the mechanism of the election into the Act, but only as a means of forcing recalcitrant employers to recognize their employees' choice of representative. The election was never meant to be and has never been the exclusive means of obtaining workplace representation. Indeed, the Act both recognizes and grants primacy to voluntary recognition when it provides that employees may petition for an election only when their "employer declines to recognize their representative . . . ." [FN31] For the entire 70 years that the Act has been in effect, there have been two accepted paths to workplace representation—NLRB elections and voluntary recognition grounded on a showing of majority support for a union. Turning the law's entire structure on its head, the current Board is threatening to use the rhetoric of employee free choice and symbolism of elections to effectively prevent workplace representation.

Employer agreements to recognize unions and engage in collective bargaining based on evidence of majority support other than the results of an election have been enforced since before the Wagner Act. From its inception, the Board has held that "[e]mployers and unions do not require Board certifications as a prerequisite to collective bargaining if recognition of a majority representative suffices for their purposes." [FN32] Indeed, in a 1949 dissent, two Board members noted, "There are thousands of employers who have voluntarily recognized and bargained with representatives of their employees." [FN33] In 1970, another Republican administration's Board recognized that "[t]o hold otherwise would be to make a mockery of the Board's orderly election processes—whose essential function is to resolve legitimate disputes concerning the desires of a majority of the employer's employees to be represented by a union . . . . [T]he Board should not permit its election processes to be used as a loophole in the law through which an employer may lawfully delay his

bargaining obligation . . . ." [FN34]

Yet this is exactly what the current Board is threatening to do. In two cases now pending before the Board, it has suggested that it may lower the *300 status and value of voluntary recognition. [FN35] The Board has signaled that it may eliminate the insulated period running for "a reasonable period of time" after voluntary recognition during which the parties are given an opportunity to bargain pursuant to the express wishes of a majority of employees free of the pressure of the threat of withdrawal of recognition or a decertification petition. The Board has even questioned the very legality of voluntary recognition agreements in its recent decision in Shaw's Supermarkets, [FN36] stating, "we have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election." [FN37] This off-hand comment in an interim decision simply granting review of the dismissal of an employer's RM petition and remanding for a hearing, prior to full briefing by the parties, and without the traditional notice and opportunity for comment the Board has provided the broader labor-management community when it is considering a major shift in policy, signals that the Board is prepared to issue what would be the most radical and legally unfounded decision in its history--a signal that has already sent shock waves through the labor-management community.

The promise of representation is already largely a dead letter for the vast majority of workers covered by the Act. They enter unorganized workplaces and never experience any organizing effort. They never vote in any election. They are never confronted by a choice and never get to make a choice. This is because under current law all workplaces are created without representation and remain so until workers or unions change the status quo.

That this lack of actual choice results in 90% of employees being unrepresented is problematic as a matter of public policy because there is a high level of satisfaction within the shrinking sector represented by unions. Richard Freeman and Joel Rogers have found that among those currently represented by unions, nearly 90% say they would vote for the union if an election were held tomorrow while only 8% say they would vote against the union. [FN38] Despite the well-documented flaws in the election system and the tremendous advantages enjoyed by employers opposing unionization, unions consistently win around 50% of those elections that do occur--57.8% in 2003. [FN39] Survey data also suggests that many more employees want representation than are able to obtain it. A February 2005 survey by Hart Research Associates found that 57% of workers stated that they would *301 definitely or probably vote for a union if an election were held tomorrow in their workplace, compared to only 35% who said they would vote no. [FN40]

The current Board appears to be intent on narrowing even further the means through which workers can enter the increasingly distant land of representation. To do so based on an expressed concern for employee free choice would be a dishonest distortion of that statutory policy.

2. Insuring the Union is a Stranger

Professor Dannin also describes the statutory value of peaceful dispute resolution, what she calls "the procedure of friendly adjustment of disputes." [FN41] Again spurred by the National Right to Work Foundation, the Board's General Counsel has placed a number of critical questions before the Board concerning exactly when those procedures can begin. The answers to these questions will also be critical to the nature of the free choice guaranteed employees by the Act.

In these cases, the General Counsel is urging the Board to revive and expand the moribund doctrine of the 1964 decision in Majestic Weaving. [FN42] In that case the Board overruled its prior decision in Julius Resnick, Inc. [FN43] As read by the General Counsel, Majestic Weaving held that it violates section 8(a)(2) of the Act for an employer and union to agree to terms and conditions of employment that will apply after a majority of employees support the union, even if the agreement is conditional on a showing of such support.

The decision rested solely on the Supreme Court's decision in ILGWU v. NLRB (Bernhard-Altmann Texas Corp.). [FN44] Yet the decision in Bernhard-Altmann was clearly not controlling as the Board acknowledged before the Second Circuit. [FN45] In Bernhard-Altmann, the employer granted the union the status of exclusive representative before it obtained majority support. The illegality of the action rested on the fact that it presented the employees with "'a fait accompli depriving the majority of the employees of their guaranteed right to choose their own representative."' [FN46] This action had the *302 effect of "impressing that agent upon the nonconsenting majority." [FN47] In a Majestic Weaving situation, in contrast, there is no such fait accompli because the negotiated contract is conditional on a showing of majority support. The Board's statement in Majestic Weaving that "the fact that [the employer] conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the 'conclusion' of negotiations is immaterial" [FN48] makes no sense.

Moreover, the employer in Bernhard Altman did not simply negotiate a contract with the union but recognized it as the exclusive representative. The Court found that "the violation which the Board found was the grant by the employer of exclusive representation status to a minority union." [FN49] Indeed, the Court itself held "the exclusive representation provision is the vice in the agreement." [FN50] Again, in a Majestic Weaving situation, there is no grant of exclusive status. If another union requests that the employer agree to the same terms also conditional on a showing of majority support, the employer is free to enter into such a parallel agreement. The Board's statement in Majestic Weaving that it could "see no difference between the two [cases] in the effect upon employee rights" [FN51] is simply baseless. In one case, employees have no choice. In the other, they make a clear and informed choice knowing precisely what representation will bring them. It is for these reasons that the General Counsel's reading of Majestic Weaving is misguided.

While virtually no cases have followed Majestic Weaving during the past 40 years, an extensive line of cases has arisen based on the 1975 decision in Kroger Co. [FN52] that is in direct tension with the General Counsel's reading of Majestic Weaving. Under the Kroger line, the Board has enforced agreements arising out of an existing bargaining unit providing that the employer will recognize the union and apply the terms of the existing agreement in additional units upon a showing of majority support in those units. While the Board has never expressly explained why the two lines of cases result in different outcomes or precisely what the critical factual distinctions are between the two types of cases, it appears that the distinction rests on prior recognition of the union in at least one unit in the Kroger line of cases. But this distinction does not justify the different holdings--it has no bearing on the freedom of the choice made by employees in the additional units. In Kroger, the Board not only enforced the "additional store clause[]," it held that "national labor policy favors *303 enforcing their validity." [FN53] The same is true whether or not the union is already recognized in one unit.

It is in all parties' interest to allow bargaining and binding agreements prior to recognition so long as any agreement is conditional on majority support. Such prerecognition bargaining allows an informed choice by both employers and employees and allows for non-conflictual dispute resolution not to be deferred until after a typically bitter campaign over representation has already made it impossible.

For employees, knowledge about what representation would mean is increasingly important as unionized workplaces are increasingly isolated and as fewer and fewer workers have personal knowledge about unions either through their own or family members' experiences in a unionized workplace. In other words, today, workers not only face the well-known difficulties of accessing the Act's system of representation through the electoral mechanism, but find it increasingly difficult to even envision what representation would be like. The law allows employers to make dire predictions of what will happen if employees choose unionization, [FN54] but prevents the parties from reaching an agreement so that employees will actually know what it would be like. [FN55] As Professor Samuel Estreicher has observed:

> Nor does the present regime invariably promote employee free-choice. Workers . . . must decide on union representation against a backdrop of uncertainty. All too often they are voting without an understanding of the union's bargaining objectives and acumen, its effectiveness in contract administration, and its fit with the particular culture of the firm. [FN56] Because "the law conditions bargaining authority on a prior showing of majority support," Estreicher points out, it leads to "workers casting lots with limited information." [FN57]

Indeed, it is precisely the foreignness of representation, the incumbent and dominant status of a lack of representation, that the General Counsel *304 and current Board are attempting to preserve and extend. In explaining why he authorized issuance of a complaint in one case placing Majestic Weaving issues before the Board, the General Counsel made clear what interest will be served by the extension of this misguided rule. Because of the conditional agreements concerning terms and conditions of employment, the General Counsel explained, "the union is no longer 'merely an outsider seeking entrance.'" [FN58] According to the General Counsel, the law may require that unionization be a stranger to employees at the very time they make their "free" choice.

Employers, too, may be forced to make decisions about what position to take on the union question from behind a legally imposed veil of ignorance. Two respected management lawyers asked in 1987:

> But where does this leave an employer who learns that a union is trying to organize its employees? Typically, the employer's response will be to launch an aggressive anti-union campaign. Most often, the employer will respond in this manner without any knowledge of the union's goals and without any attempt to ascertain the union's position. Such a response is understandable, particularly in view of the legal quagmire that an employer may find itself in if it is not aware of the somewhat hazy boundaries of the law. [FN59] But this is bad business. As these management lawyers explain:
>
> [A] relationship with the union is one of the most significant business transactions in which an employer can engage. If that relationship is not successful, the results can [be] disastrous. As in any other potential business relationship, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not . . . .
>
> . . . [B]efore embarking on a course of action--whether pro-union, anti-union or neutrality, employers should have enough information to allow for an intelligent decision . . . .
>
> . . . [T]he value of engaging in preliminary discussions with unions should not be overlooked. Meeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer's *305 operations; and (2) the wisdom of expending company resources to campaign against the union. [FN60]

Thus, these representatives of employers recommend the following sensible steps whose legality the current Board has cast into question:

> First, employers should establish at the outset that they only intend to engage in exploratory discussions, not in collective bargaining. Second, they should make clear that they will not extend recognition to the union unless and until it demonstrates majority support. Third, any understandings reached with the union during preliminary discussions should expressly be contingent on the union's demonstration of majority support. Fourth, all such agreements should unequivocally reaffirm the employees' right freely to select the representative of their choice. [FN61]

The mutual benefit of the type of preliminary and conditional "friendly adjustment of disputes," which the Board is threatening to foreclose, can be illustrated in a number of industries, but here we use just one that is of growing significance in our aging society--nursing homes. In the last several decades the industry has been in chaos. Reports of resident neglect and abuse are common. Wages are low and benefits almost nonexistent leading to chronic turnover and understaffing. Nursing home workers have injury rates two and one-half times the national average and their rate of injury has

risen by over 50% since 1983. [FN62] And owners are also suffering as illustrated by a string of bankruptcies filings. Labor relations in the industry are as sick as each of its constituent parts, as illustrated by the fact that Beverly Enterprises, the nation's largest chain of proprietary homes, was the first employer since the notorious J.P. Stevens to be subject to a nationwide, broad cease and desist order issued by the Board. [FN63] Despite virulent and often unlawful employer opposition, nursing home employees repeatedly vote in favor of union representation. But with insufficient union density, inadequate government reimbursement rates, and the financial woes of the industry, it has been difficult for individual unions to produce significant gains in collective bargaining with single homes. This is an industry badly in need of the "friendly adjustment of disputes" promised by the Act.

*306 We can envision a meeting of employers and unions in the industry in which they agree that they should act cooperatively to increase government funding; to an equitable sharing of the increased revenue among owners and workers; to innovative solutions to increase retention, reduce understaffing, and prevent injuries to residents and workers; and to avoid the waste of scarce resources on bitter election campaigns by permitting employees to decide whether to be represented by a union through a card check, knowing exactly what it will mean if they do, and without employer opposition. We can envision a no-strike guarantee that goes into effect immediately upon the majority choosing to be represented when the terms of the prenegotiated, but conditional contract becomes effective, thereby insuring the continuity of care so critical to elderly consumers, as recognized by Congress when it adopted the healthcare amendments to the Act in 1974. [FN64] We can envision this rational approach to labor-management relations that truly advances the friendly adjustment of disputes, but only if the current Board does not misread and extend Majestic Weaving. [FN65]

Congress had no intention of placing employees and employers behind a veil of ignorance when they make critical decisions about representation. The current Board has the opportunity to eliminate the impediment created by Majestic Weaving to relationships that are beneficial to employees, employers, and unions. However, spurred by the ideologically driven Right to Work Foundation, the Board appears poised to expand Majestic Weaving and even to overrule Kroger despite the fact that there is no coherent explanation of how an expansive construction of Majestic Weaving serves the policies underlying the Act.

III.

Conclusion

Under the guise of preserving the purity of employees' choice, the Board is threatening drastically to restrict the manner in which employees *307 can choose to be represented. And under the guise of preventing employers from influencing employees' choice, the Board is threatening to prevent both employees and employers from knowing what the choice will actually mean. "At Age 70, Should the Wagner Act be Retired?" is the normative question posed by our Symposium. A simple descriptive answer is that, even as we write, the current Board is, in effect, imposing that very retirement on the Act.

[FNd1]. Jonathan P. Hiatt is General Counsel and Craig Becker Associate General Counsel to the AFL-CIO.

[FN1]. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

[FN2]. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001); NLRB v. Health Care & Ret. Corp., 511 U.S. 571

(1994).

[FN3]. Brief for Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and United Steelworkers of America and of Amici American Federation of State, County and Municipal Employees; American Federation of Teachers; Communication Workers of America; International Brotherhood of Teamsters; International Union of Operating Engineers; Laborer International Union of North America; Office and Professional Employees International Union; Service Employees International Union; and United Food and Commercial Workers, Beverly Enters.-Minn., Inc., Nos. 18-RC-16415 & 16416 (Aug. 20, 2002) & Oakwood Healthcare, Inc., No. 7-RC-22141 (Feb. 4, 2002) (on file with authors).

[FN4]. The Labor Management Relations (Taft-Hartley) Act of 1947 and the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 (codified at, and amending 29 U.S.C. §§ 141-144, 167, 172-87 (2000)) are codified together with the original Act at 29 U.S.C. §§ 141-187 (2000).

[FN5]. Brown University, 342 N.L.R.B. No. 42 (July 13, 2004).

[FN6]. Brevard Achievement Ctr., 342 N.L.R.B. No. 101 (Sept. 10, 2004).

[FN7]. Pa. Acad. of Fine Arts, 343 N.L.R.B. No. 93 (Dec. 6, 2004).

[FN8]. Oakwood Care Ctr., 343 N.L.R.B. No. 76 (Nov. 19, 2004).

[FN9]. Oakwood Healthcare, Inc., No. 7-RC-22141 (Feb. 4, 2002); Beverly Enters.-Minn., No. 18-RC-16415 and No. 18-RC-16416 (Aug. 20, 2002); Croft Metals, Inc., No. 15-RC-8393 (Aug. 7, 2002), available at http://www.nlrb.gov/nlrb/about/foia/OakwoodKYRiver/15-RC-8393(SD).pdf.

[FN10]. 343 N.L.R.B. No. 45 (Oct. 15, 2004).

[FN11]. 339 N.L.R.B. No. 162 (Aug. 21, 2003).

[FN12]. 342 N.L.R.B. No. 29 (June 30, 2004).

[FN13]. 343 N.L.R.B. No. 52 (Oct. 29, 2004).

[FN14]. 343 N.L.R.B. No. 86 (Nov. 29, 2004).

[FN15]. 343 N.L.R.B. No. 64 (Oct. 29, 2004).

[FN16]. 343 N.L.R.B. No. 12 (Sept. 30, 2004).

[FN17]. 342 N.L.R.B. No. 109 (Sept. 20, 2004).

[FN18]. 276 N.L.R.B. 400, 400 n.2. 405 (1985).

[FN19]. 195 N.L.R.B. 1109 (1972).

[FN20]. 228 N.L.R.B. 440 (1977).

[FN21]. 332 N.L.R.B. No. 111 (Oct. 31, 2000).

[FN22]. 343 N.L.R.B. No. 100 (Dec. 8, 2004).

[FN23]. 324 N.L.R.B. 218 (1997).

[FN24]. 327 N.L.R.B. 879 (1999).

[FN25]. 324 N.L.R.B. at 219 (quoting NLRB v. San Antonio Portland Cement Co., 611 F.2d 1148, 1151 (5th Cir. 1980)).

[FN26]. 343 N.L.R.B. No. 105 (Dec. 8, 2004); see infra note 36 and accompanying text.

[FN27]. 219 N.L.R.B. 388 (1975); see infra notes 52-53 and accompanying text.

[FN28]. This pattern of partisan decision making extends even to routine procedural rulings. In Dana Corp., 341 N.L.R.B. No. 150 (June 7, 2004), discussed infra note 35, the Board granted review in two cases raising the question of whether an employer's voluntary recognition of a union (after a showing of majority support for the union among employees) must be honored for a reasonable period of time before it can be challenged by a decertification petition. The grant of review placed in question an unbroken line of precedent dating as far back as the 1966 decision in Keller Plastics E., Inc., 157 N.L.R.B. 583 (1966). On June 14, 2004, the Board issued a notice inviting interested parties to file briefs in the case on or before July 15, 2004. The Board's own General Counsel, also appointed by President Bush, requested an extension of the briefing schedule, stating, "the current deadline allows substantially inadequate time to fully analyze and brief the complex issues involved in these matters." Motion of the General Counsel for an Extension of Time at 7, Dana Corp., 341 N.L.R.B. No. 150 (June 7, 2004) (No. 8-RD-1976). The union party in the case, the United Automobile Workers of America, also requested an extension due to the fact that the entire union, including its legal department, was shut-down for two weeks during the auto industry's annual summer shut-down, ending on the day briefs were due. The AFL-CIO as amicus curiae also requested a brief, 14 day extension of time. By a 3-2 vote, along strict partly lines, the Board denied all the requests. Nevertheless, today, after the reelection of President Bush, almost a year after the inflexible deadline for filing briefs, clearly enforced because of the uncertainty created by the then upcoming election, the cases have not been decided.

[FN29]. Fine, Chain, & Gold, Setting the Record Straight: A Report on the National Right to Work Committee and the National Right to Work Legal Defense and Education Foundation, Inc. (1991) (describing formation and funding of Committee and Foundation).

[FN30]. Gilpin v. Am. Fed. Of State, County & Mun. Employees, 875 F.2d 1310, 1313 (7th Cir. 1989).

[FN31]. 29 U.S.C. § 159(c)(1)(A)(i) (2000).

[FN32]. General Box Co., 82 N.L.R.B. 678, 683 (1949).

[FN33]. Monroe Co-operative Oil Co., 86 N.L.R.B. 95, 99 (1949) (Murdock and Gray, Members, dissenting), quoting Advance Pattern Co., 80 N.L.R.B. 29, 40 (1948) (Murdock and Gray, Members, dissenting).

[FN34]. Redmond Plastics, Inc., 187 N.L.R.B. 487, 488-89 (1970) (emphasis added).

[FN35]. Dana Corp., 341 N.L.R.B. No. 150 (June 7, 2004).

[FN36]. 343 N.L.R.B. No. 105, 2004 (Dec. 8, 2004), WL 2899843.

[FN37]. Id. at *2.

[FN38]. Richard B. Freeman & Joel Rogers, What Workers Want 69 (1999).

[FN39]. Trends: Number of Elections Decreased in 2003; Union Win Rate Increases for Seventh Year, Daily Lab. Rep. (BNA), at C-1 (June 8, 2004).

[FN40]. Peter D. Hart Research Associates, The Public View of Unions (2005).

[FN41]. Ellen Dannin, NLRA Values, Labor Values, American Values, 26 Berkeley J. Emp. & Lab. L. 223 (2005).

[FN42]. 147 N.L.R.B. 859 (1964). The General Counsel's argument is made in Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Dana Corp., Cases Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB-14119, 7-CB-14120 (June 5, 2005) (on file with author).

[FN43]. 86 N.L.R.B. 38 (1949).

[FN44]. 366 U.S. 731 (1961).

[FN45]. NLRB v. Majestic Weaving Co., 355 F.2d 854, 859 (2d Cir. 1966).

[FN46]. Bernhard-Altmann, 366 U.S. at 736 (quoting ILGWU v. NLRB (Bernhard-Altmann Tex. Corp.), 280 F.2d 616, 621 (D.C. Cir. 1960)).

[FN47]. Id. at 737.

[FN48]. 147 N.L.R.B. 859, 860 (1964).

[FN49]. 366 U.S. at 736.

[FN50]. Id. at 736-37.

[FN51]. 147 N.L.R.B. at 860.

[FN52]. 219 N.L.R.B. 388 (1975).

[FN53]. Id. at 388-89.

[FN54]. We could cite many examples, but one recent example is Savers, 337 N.L.R.B. 1039 (2002), in which the Board held that a supervisor's statement that "if the union ever did come in, the store wasn't making enough money to ... pay off higher wages, and it would be a possibility that everybody would lose their job" was held to be a permissible prediction of future events. Id. at 1039.

[FN55]. In its decision refusing to enforce Majestic Weaving on procedural grounds, the Second Circuit suggested that the Board's decision could be read to permit pre-recognition bargaining so long as employees are informed of any resulting agreement and that the application of the agreement is wholly conditional on majority support of union representation. "We cannot tell, for example, how far the new rule depends on knowledge of the negotiation by the employees, or whether a full disclosure of the condition to them would save the situation." NLRB v. Majestic Weaving Co., 355 F.2d 854, 862 n.4 (2d Cir. 1966).

[FN56]. Samuel Estreicher, Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added

Unionism, 71 N.Y.U. L. Rev. 827, 835-36 (1996).

[FN57]. Id. at 838.

[FN58]. Press Release, NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments 11 (Nov. 17, 2004) (quoting NLRB v. Golden Age Beverage, 415 F.2d 26, 30 (5th Cir. 1969)), available at http://www.nlrb.gov/nlrb/press/releases/r2544.pdf.

[FN59]. Stanley J. Brown & Henry Morris, Jr., Pre-recognition Discussions with Unions, in U.S. Labor Law and the Future of Labor-Management Cooperation: Second Interim Report--A Working Document 98, 99 (Bureau of Labor-Mgmt. and Cooperative Programs, U.S. Dep't of Labor, 1988).

[FN60]. Id. In another context, the Board has recognized that preliminary discussions between employers and unions further the policies of the Act and that it would be inconsistent with those policies if employers were "compelled to simply deny the union the opportunity to express its objectives, or further still, to avoid altogether any contact with the union." Terracon, Inc., 339 N.L.R.B. No. 35, (June 6, 2003), 2003 WL 21353736, at *6.

[FN61]. Id. at 103.

[FN62]. Occupational Safety & Health Admin., U.S. Dep't of Labor, Nursing Home and Personal Care Facilities: Possible Hazards and Solutions, http:// www.osha.gov/SLTC/nursinghome/solutions.html (last visited Apr. 7, 2005); United Food & Commercial Workers, Nursing Homes: Danger in the Workplace, http://www.ufcw.org/workplace_connections/health_care/safety_health_news_and_ facts/nursing_homes.cfm (last visited Apr. 7, 2005).

[FN63]. See Beverly Cal. Corp. v. NLRB, 227 F.3d 817 (7th Cir. 2000).

[FN64]. See Pub. L. 93-360, 88 Stat. 395 (1974), and, in particular, the section codified at 29 U.S.C. § 158(g) requiring ten-days written notice of a strike at a healthcare facility.

[FN65]. Apart from the fact that Majestic Weaving, properly understood, involved actual recognition of the union prior to its obtaining majority support, see supra text accompanying notes 44-51, the case involved four other critical facts: (1) agreement on a complete contract, (2) at a time when the union did not represent any employees of the employer and (3) a rival union had substantial support in the unit and, finally, (4) the commission of other, independent violations of section 8(a)(2). Not only do some of the cases in which complaints have issued raise the question of whether the Majestic Weaving doctrine should apply when there is no recognition and the application of a contract and grant of recognition is expressly conditioned on majority support, others could result in an expansion of the doctrine to apply despite the absence of each of the facts present in the original case. Such cases question, for example, whether a union and employer may ever lawfully agree (still on a conditional basis, of course) that a no-strike commitment will apply during the post-recognition negotiation process, or that interest arbitration procedures will be used in the event the parties are not able to amicably reach a first collective bargaining agreement.
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A JOURNAL OF IDEAS, ANALYSIS AND DEBATE
newLaborForum

ELECTIONS WITHOUT DEMOCRACY: RECONSTRUCTING THE RIGHT TO ORGANIZE

Becker, Craig. New Labor Forum. New York: Fall 1998. , Iss. 3; pg. 97

Abstract (Summary)

The last key difference between union elections and political elections is the long lag in closure of the former. After a union election either the union or the employer can file objections to the conduct of the election. The results of the election are not certified--in other words, they do not become final -- until the Board rules on these objections, often after an evidentiary hearing. Furthermore, if an employer is not satisfied with the Board's ruling, it is effectively entitled to appeal, whereas a union is not. Employers accomplish this simply by refusing to bargain with the union even after the Board rejects the employer's objections and certifies the union as the employees' representative. When the Board cites the employer for refusing to bargain, the employer can seek review in a court of appeals. Only after a ruling in the court of appeals -- usually years after the election -- does the employer have a legally enforceable obligation to bargain with the workers' chosen representative. There is no parallel in the political system; when workers elect union representation it is often years until their vote is recognized by the employer.

Paradoxically, nonboard strategies face one further obstacle. In circumventing an election, unions push against the popular perception that the franchise is necessarily the most appropriate instrument for measuring popular will. Indeed, in 1935, advocates of the NLRA deftly played on the ideological significance of the electoral paradigm to offset traditional common-law principles hostile to concerted labor activity and collective bargaining. Ironically, the electoral ideal is now cynically exploited by employers who otherwise accord little weight to the principle of majority rule in the workplace, but who, when confronted by a union recognition demand, profess to protect employees' democratic right to vote on the question. For example, Somers Building Maintenance distributed flyers to its janitorial workforce in Sacramento, California, enumerating the benefits of working for Somers while warning, "Don't be suckered in by SEIU Local 1877 lies" and asking, "If they have such a great program why wouldn't they let you vote on it?" Somers alleged that SEIU "Doesn't allow members to vote," whereas the company claimed to have "Respect for employees right to vote in a union election." In manipulating the symbol of elections, employers like Somers legitimate their refusal to recognize the will of the majority of their employees.

Unions, meanwhile, have been experimenting with efforts to create and maintain a role in workplaces where they do not occupy the position of workers' collective bargaining agent. In 1985 the AFL-CIO's Committee on the Evolution of Work issued a report entitled The Changing Situation of Workers and Their Unions that urged unions to establish "new categories of membership" outside established bargaining units as well as to provide "services and benefits" beyond those available through collective bargaining. Since then many unions have devised associate member programs for workers outside organized units. Simultaneously, unions have moved beyond their traditional role as bargaining agents to enforce an array of employment laws enacted since the NLRA, from the 1938 Fair Labor Standards Act to the 1993 Family and Medical Leave Act. In the face of widespread noncompliance and systematic underenforcement of the legislation by the government and by individual workers, unions have had some notable successes with this strategy. The United Food and Commercial Workers, for example, has systematically helped employees of nonunion grocery chains and other retailers to enforce their rights under the Fair Labor Standards Act and Title VII of the 1964 Civil Rights Act, resulting in several large recoveries, including an $81.5 million recovery in a sex discrimination case against Publix, a Florida-based grocery chain. But unions have yet to construct a compelling public case for representation of workers outside collective bargaining, let alone develop a sustainable model for such representation or integrate it with organizing and collective bargaining. Employers have exploited this disjunction, for example, by arguing that union lawyers representing individual employees of an unorganized employer should be disqualified because there is a conflict of interest between a union seeking to organize the employees and the employee-plaintiffs seeking simply to maximize their recovery in the litigation.

Exhibit 3

Full Text (6358 words)

FEDERAL LABOR LAW GUARANTEES PRIVATE-SECTOR WORKERS "THE RIGHT TO SELF-ORGANIZATION, to form, join or assist labor organizations" and "to bargain collectively through representatives of their own choosing." So declares the National Labor Relations Act (NLRA) enacted by Congress in 1935. In upholding the NLRA in 1937, the United States Supreme Court termed the right to organize unions and bargain collectively "a fundamental right." The NLRA constituted a guarantee to American workers that the federal government would protect them if they joined a union and require their employer to engage in meaningful collective bargaining with the union. That guarantee has been nullified. Under current law, the right to organize is illusory.

This is hardly a revelation, at least to those who have been seeking to arrest the decline of the American labor movement during the past half century. Federal labor law is a "dead letter" Lane Kirkland, then President of the AFL-CIO, declared in 1984. This has also been the finding of legislators. A 1984 report issued by a subcommittee of the US House of Representatives Committee on Education and Labor bears the title, "The Failure of Labor Law -- A Betrayal of American Workers." Over the last decade, the sense that workers have no effective right to organize has only deepened. What is new, however, is labor's focus on developing methods of organizing that escape the limits of National Labor Relations Board (NLRB) elections and the recognition that profound labor law reform is both essential and improbable at present.

THE OLD DEAL

TO UNDERSTAND WHY THE PROMISE OF American labor law remains unfulfilled, it is important to identify the two fundamental processes of worker representation within the current statutory framework: union organizing and collective bargaining. Current law still guarantees workers a right to organize unions, which serve as their representatives -- a model drawn from the world of democratic electoral politics. But the procedures built into the system of union representation since the NLRA's enactment are not only inconsistent with basic principles of democratic government, they also allow employers to thwart workers' aspirations to representation. Furthermore, even if workers overcome these obstacles and obtain certification from the federal government designating a union as their representative for purposes of collective bargaining, they often find that the employer's legal duty to bargain in good faith with the union is not only without substance, but is easily evaded. In many cases the union and employer never reach an agreement. In these cases, workers' elected representatives play no role in determining the law of the workplace.

UNDEMOCRATIC ELECTIONS

UNDER THE CURRENT LAW, ELECTIONS ARE the only mechanism through which workers can oblige their employer to recognize their chosen representative. Employees may be able to prove beyond doubt that their employer knew they wished to be represented by a union, but such proof is unavailing. The Supreme Court held in 1969 that an employer "may demand an election with a simple `no comment' to the union." Similarly, the workers may be able to present a petition to the NLRB signed by every worker in a plant expressing a desire to be represented by a union, but this proof will be rejected. This is significant because representation elections are profoundly undemocratic as currently conducted in the workplace. Indeed, despite the tributes to industrial democracy that attended the NLRA's enactment, union elections today bear scant resemblance to political elections at any level of government.

The most fundamental difference between union and political elections concerns the stakes of the elections. Political elections determine not if there will be a system of representative governance, but simply who the representatives will be. By contrast, union elections determine if workers will have any representation at all. The United States Constitution guarantees that there will be an elected president and elected members of Congress. But while federal labor law formally entitles private-sector employees to workplace representation, nearly 90 percent of such workers lack representation because the law does not mandate a system of democratic workplace governance. Instead, it simply enables workers to create this system through an obligatory electoral process.

The stark distinction between union elections and political elections was captured by the General Counsel of the AFL, who explained in Congress in 1939,

The peculiar part about this law as distinguished from ordinary legislative procedure in Government, which requires the President of the United States to be elected...[and] the Congressmen from a district to be elected, is that it does not require employees in a plant to select a bargaining agent, if they do not want to...Under the National Labor

Relations Act they can vote 'No.' They can vote 'We do not want a Congressman, we do not want a Representative.'

Thus, unlike citizens in a democratic state and unlike employees in other industrial countries where workplace representation is mandatory (for example, Germany), American workers must first petition the NLRB and then cast an affirmative vote simply to establish a representative process in the workplace.

At first blush it might seem fair to give workers the choice to remain unrepresented. But, in providing workers this option, US labor law grants employers a powerful incentive to campaign for a vote of no representation. A leading labor law scholar, Paul Weiler of Harvard Law School, uses the analogy of authoritarian states to explain why the right to no representation encourages employers to campaign for that outcome with all the means at their disposal:

Imagine a group of countries in Central America with traditional authoritarian regimes. Under pressures from a variety of sources, these countries periodically conduct referenda about whether their citizens will be given a guaranteed voice in national affairs and, if so, who is to be their representative in dealing with the authorities. Naturally unhappy about this threat to their own prerogatives, the rulers are wont to campaign vigorously against such a major step by the polity. 1

In order to preserve their workplace authority, most private sector employers do campaign vigorously for a vote of no representation.

A second significant difference between union elections and political elections lies in the influence employers exert on union elections. Because union elections decide whether workers will be represented, and, if so, by which union, employers cannot cast ballots and are not candidates. Yet the procedures used in union elections allow employers to influence the timing of the election and the composition of the voting unit as well as to campaign for a "no" vote.

This was not always the case. Soon after the enactment of the NLRA, the NLRB held that employers had no business interfering in union elections. In a 1942 decision the Board reasoned,

An election is not a contest between a labor organization and the employer of the employees being polled, and participation by the employer in a pre-election campaign as if he were a contestant is an interference with the employees' rights to bargain collectively through representatives 'of their own choosing.'

According to Paul Weiler, the relation of an employer to a union election parallels that of a nation to its neighbor's elections; it is as improper for an employer to intervene in the union election process, he concludes, as it is for one nation, however keenly interested in the international implications, to campaign in the political elections of another.

Nonetheless, employers now exert substantial influence on union elections, even though they are recognized neither as candidates nor as voters under current law. In part, this is because union elections are not held periodically in predetermined districts, as are congressional elections, but only after employees file a petition seeking an election and the NLRB decides that the requested voting unit is an appropriate one. Since the Taft-Hartley Act amended the NLRA in 1947, federal law has required that a hearing take place (which ordinarily centers on unit determination) subsequent to the filing of a petition and before the election. This is akin to requiring a trial prior to every congressional election, at which a candidate can contest the boundaries of the district as well as the eligibility of individual voters. Notably, the board has defined employers as parties to pre-election hearings, thereby enabling employers to influence both the composition of the voting unit and the timing of the election. By choosing to litigate every possible issue, employers can also use the hearing to delay elections for many months or to pressure unions to concede to a disadvantageous voting unit or election date in order to avoid delay. Meanwhile, employers can campaign for a "no" vote.

In union election campaigns, employers have overwhelming advantages over unions. These stem from employers' control over the workplace as well as over workers. It is lawful for employers to campaign in the workplace -- the only place where all voters gather--while barring union organizers from the premises. 2 Thus, for example, a union attempting to organize janitors who work at night in a high-rise office building with controlled access is limited to offering flyers to the workers from a public sidewalk as they drive into an underground parking garage, while the employer can traverse the building urging workers on the job to vote against the union. To extend Weiler's analogy, suppose federal election law entitled political incumbents to campaign throughout the United States while relegating challengers to the Canadian border, to hand out flyers as cars speed by.

The unequal access to voters persists up through election day itself, for NLRB procedures provide that elections should ordinarily be held at the workplace. Thus employers can continue campaigning up until workers enter the polls

to cast their ballots, but union organizers cannot. In controlling the workplace, which is also the polling place, employers always have the last word.

The employer's authority extends beyond the workplace to workers themselves. This is true in two respects: not only do employers control access to the identity of the workforce, they also exercise control over the workers during the workday. While unions must obtain signatures from 30 percent of the workers in a unit simply to initiate the representation process, it is often the case that unions cannot discover who the workers are or how to track them down, for increasingly workers do not work at a common worksite. This is the case, for example, in the fastest growing segment of the labor force – home health care. And under the current law, an employer need not provide the union with a list of its workers until seven days after the post-hearing decision directing that an election be held.3 Under current practice, this is ordinarily only three weeks before the election. Thus, in many instances, unions must blindly gather signatures to petition for an election and mount a campaign up to the very eve of the election, without even knowing who the voters are or where to find them.

Employers' control over worker-voters in union elections is still more profound owing to employers' authority over workers on the job. That authority includes directing workers to sit and listen to a campaign speech intended to persuade them to vote against representation. In other words, an employee can be fired for respectfully declining to listen to an anti-union speech and instead returning to work. With respect to such captive audience meetings, the Board has held that workers have "no statutorily protected right to leave a meeting which the employees were required by management to attend...to listen to management's noncoercive antiunion speech." An employee can even be fired for persisting in an attempt to ask questions or express a contrary view after an employer has informed the captive audience of workers that there will be no questions. This is a power unimaginable in political elections, but one commonly exercised in union elections. It is inconceivable that a political incumbent could require all voters to listen to his or her campaign addresses or be deported. According to a 1990 study, however, employers made speeches to such captive audiences prior to almost 70 percent of union elections.

The outcome of the unequal access to and control over voters in union elections is clear-cut: employers convey their message while unions do not. In one of the most comprehensive empirical studies of union election campaigns to date, Julius Getman of the University of Texas and Stephen Goldberg of Northwestern University found that while 83 percent of employees attended at least one employer-sponsored meeting, only 36 percent attended a union meeting. More important, employers are able to reach undecided voters while unions usually reach only the converted. According to Getman and Goldberg, the unequal ability to communicate with the voters means that workers vote against representation because they have never heard the union's arguments.

The balance is also tipped in favor of employer speech because of the underlying economic power exercised by employers over workers. Employers can lawfully fire the vast majority of unrepresented workers at will – for no reason at all. This power lurks behind every statement of opinion voiced by employers concerning union elections. As early as 1940 the NLRB informed Congress that behind what an employer says "lies the full weight of his economic position, based upon his control over the livelihood of his employees." The same year the Supreme Court noted that "[s]light suggestions" of employer preference have a "telling effect among men who know the consequences of incurring that employer's strong displeasure."

It is precisely because employers are not candidates in union elections that the implicit threat in all employer campaign speech is highly potent. For, whether or not the union wins the election, the employer will continue to govern the workplace. Threats directed to a workforce by a union would be counterproductive because they would simply prompt employees to vote against representation, thereby leaving the union with no legal standing and causing it in most cases to disappear from the workplace. By contrast, a pro-union vote leaves the employer in full possession of the means to carry out its threat. Although, in the Board's words, economic power gives employer speech "a force stronger than...that of persuasion," since 1947 federal law has guaranteed employers' right to speak freely in union election campaigns.

The free speech proviso does not allow threats or acts of retaliation; nonetheless, employers often conclude that it is in their interest to violate the law. Federal law bars firing workers for supporting a union; still, according to Paul Weiler, one out of every 20 union supporters is fired during the course of an election campaign. Though Weiler's statistics have been questioned, even his harshest critics, Professors Bernard Meltzer and Robert LaLonde of the University of Chicago, find that employers unlawfully fire union supporters during 20 percent of all campaigns.

Employers are encouraged to move from persuasion to coercion by the paltry remedies available to workers and unions under existing law. In firing key union supporters, employers often break an organizing drive. However, even if the fired employees succeed, after prolonged litigation, in proving that their employer was unlawfully motivated by anti-union animus, they will collect merely back pay minus any interim earnings. In 1980 the average back pay awarded in discriminatory discharge cases was $2,000, and employers could delay entry of an enforceable order an

average of over four years from the filing of a complaint simply by exhausting the appeal process. Employers pay nothing for the damage their actions cause either to other employees whose exercise of their right to support a union is chilled by illegal firings, or to the union whose organizing drive is unlawfully thwarted. To many employers, the price of breaking a union drive apparently appears quite cheap.

The last key difference between union elections and political elections is the long lag in closure of the former. After a union election either the union or the employer can file objections to the conduct of the election. The results of the election are not certified--in other words, they do not become final -- until the Board rules on these objections, often after an evidentiary hearing. Furthermore, if an employer is not satisfied with the Board's ruling, it is effectively entitled to appeal, whereas a union is not. Employers accomplish this simply by refusing to bargain with the union even after the Board rejects the employer's objections and certifies the union as the employees' representative. When the Board cites the employer for refusing to bargain, the employer can seek review in a court of appeals. Only after a ruling in the court of appeals -- usually years after the election -- does the employer have a legally enforceable obligation to bargain with the workers' chosen representative. There is no parallel in the political system; when workers elect union representation it is often years until their vote is recognized by the employer.

Thus, elections that are profoundly undemocratic constitute the only means by which workers can oblige employers to bargain with their chosen representative. Notably, even when election results become final, union representatives have no governance authority in the workplace similar to that of elected officials in the polity.

REPRESENTATION WITHOUT AUTHORITY

THE ROLE DEFINED BY LAW FOR UNIONS IS merely to represent workers in collective bargaining with their employer. Though chosen through an election and designated as workers' representatives, unions do not govern the workplace. Federal law has never entitled them either to cast a vote on workplace rules or to veto proposed rules.

The primary obligation imposed on employers by a union election victory is to recognize the workers' chosen representative and to engage in bargaining over the terms and conditions of employment. Indeed, the law specifies that employers are bound neither to reach agreement with unions nor even to make any concession to a union in collective bargaining. The employer's obligation is simply a formal one--to appear at the bargaining table. If, upon bargaining, the parties reach no agreement, the employer is entitled unilaterally to establish the law of the workplace.

Even the formal legal duty to bargain in good faith carries little force. For failing to bargain employers may be charged with committing an unfair labor practice. The sole remedy for such a violation of federal law, however, is an order that the employer desist from the unlawful behavior. The Board cannot impose an agreement, nor is a monetary remedy available either to punish the employer or to compensate employees denied better wages, benefits, or working conditions by the employer's unlawful actions.

The theory underlying the original NLRA was that employers would seek to reach agreement with unions, not because of legal sanctions, but because of the threat that workers would otherwise exercise the newfound right to strike, also guaranteed by the NLRA. Congress intended protection of the right to strike to create a balance of power between workers and employers. In theory, workers would exercise the right sparingly, as a strike deprives workers of wages, but the right to strike would convince employers to accommodate workers' most pressing demands. As Justice William O. Douglas wrote in 1949,

In all of labor's history, no 'concerted activity' has been more conspicuous and important than the strike; and none was thought to be more essential to recognition of the right to collective bargaining.

The right to strike, which is the axis of the process of collective bargaining, is protected against employer interference, restraint, and coercion by the literal terms of federal law, but the protections enacted by Congress were undercut by a Supreme Court ruling almost as soon as they were signed into law. The Court held in 1938, in NLRB v. Mackay Radio & Telegraph Co., that although employers could not lawfully fire workers for striking, they could permanently replace them. The difference is a subtle one, understandably obscure to the average worker. Employees who exercise their federal right to strike risk losing their job to a permanent replacement, while retaining only a right to be recalled should a position open. This prospect has made it nearly impossible for most workers to mount a credible strike threat in order to convince their employer to come to terms on a collective bargaining agreement.

Workers employed by an employer are also restricted in their right to issue peaceful appeals both to employees of other employers and to the public for support in contract negotiations. These restrictions on secondary activity make it unlawful for workers seeking a contract with one employer to ask employees of another employer doing business with the primary employer to strike in support of the primary employees' efforts. It is also unlawful for workers to carry

picket signs on public sidewalks surrounding a firm that does business with their employer, even if the picketing is peaceful and does not block access, and the picket signs merely request that consumers not patronize the firm.

For engaging in such unlawful, peaceful, communicative activity, unions face sanctions more severe and more swiftly delivered than those faced by employers who deploy illegal labor policies. While workers are restricted to seeking relief from the slow-moving NLRB when employers violate their rights, employers alleging injury due to unlawful "secondary" pressure can file both a charge with the Board and a lawsuit in federal court. Moreover, the Board is required by law to give priority to such employer charges, and, if it finds probable cause to believe they have merit, the Board is required to seek preliminary injunctive relief against the union in court. Conversely, if an employer fires union supporters, no such requirement is imposed on the Board.

Workers are thus effectively denied a form of protest available to all other citizens. In upholding restrictions on secondary activity, the Supreme Court has sanctioned limits on unions' right of free speech. The Court has held that consumer picketing is protected by the First Amendment when engaged in by civil rights advocates, but it has denied such protection when the picketing is sponsored by a labor union.

Consequently, workers often elect a representative unable to secure an agreement with their employer. One study found that one-third of newly elected unions were unable to obtain a first contract; another one-quarter failed to obtain a successor agreement. Five years after they had voted for union representation, over one-half of all workers were not covered by collective bargaining agreements -- their chosen representatives had no voice in the adoption of the law of the workplace.

RENEGOTIATING THE DEAL

EMBEDDED IN CURRENT LABOR LAW IS A historical compromise--a compromise devised by the architects of the New Deal state, who sought to channel the intensifying labor-management conflict of the 1930s into structured procedures of union representation elections and collective bargaining. According to the framers of the NLRA, labor peace was to be won by according workers the right to organize and engage in collective bargaining. Today, the new organizing strategies being developed in many unions represent efforts to renegotiate that compromise. Though these strategies are diverse, they share aspects directly responsive to flaws in the current legal framework.

Above all, the new organizing strategies aim to bypass the union election and to gain union recognition outside the NLRB-supervised electoral process. This is typically accomplished through a recognition agreement between the employer and union. The Board has held that employers have no legal obligation to recognize a union that has not won a Boardsupervised election. Nevertheless, such recognition is lawful so long as the union has presented proof of its majority support, and federal courts have enforced agreements in which employers promise to grant recognition. Unions seek three central provisions in these agreements: employer neutrality, union access to employees, and employer agreement to recognize the union based on signatures on authorization cards or other evidence of majority support such as petitions. These provisions are designed to prevent employers from influencing workers' decision whether to be represented or not.

Prominent employers in a range of industries have entered into recognition agreements including some of these key provisions, for example, AT&T, Marriott, the Las Vegas Hilton, New York Community Hospital of Brooklyn, Levi Strauss, TJ Maxx, USX, NYNEX, Bell Atlantic, Horizon Healthcare, Grancare Nursing Homes, American Building Maintenance, and International Service Systems. The New York Times recently termed the deployment of recognition agreements by the Culinary Workers in Las Vegas "a national model."

In seeking recognition without a boardsupervised election, unions collapse the distinction between organizing and collective bargaining. This strategy departs from current law, which contemplates two distinct processes, organizing followed by bargaining. Under current law, it is union certification subsequent to an election that obligates the employer to bargain with the union, even though the employer does not consent to bargain. However, in practice, collective bargaining can succeed only with employer consent, and the law makes explicit that the employer is not bound to consent, which effectively strips the employer's duty to bargain of any substance.

Nonboard recognition strategies hinge on securing genuine employer consent, thereby making recognition more meaningful in practice. The organizing tactics are aimed not simply at securing a majority vote, but also at convincing the employer of the rationality of recognizing and reaching agreement with the union. Paradoxically, these tactics imply a critique of employers' role in NLRB elections and seek to minimize employer influence on employees' choice of whether to be represented through recognition agreements, but at the same time they acknowledge that securing the employer's substantive consent to deal with a union is crucial if organizing is to achieve anything more lasting than the fleeting exhilaration of an election victory.

Deploying nonboard strategies is complicated by the Board's 1964 decision in Majestic Weaving Co. That decision prevents the utter fusion of the processes of organizing and bargaining, for the Board held that an employer cannot enter into an agreement with a union setting forth the terms and conditions of employment that would prevail should the union obtain majority support. Even though conditioned on proof of majority support, such agreements constitute unlawful employer assistance of the union, according to the Board. The rule announced in Majestic Weaving has been limited to cases where the union does not represent any of the employer's employees at the time the parties negotiate the conditional contract; therefore, it does not preclude so-called "after acquired store clauses," providing for the extension of an existing collective bargaining agreement to a new store or similar facility upon proof of majority support. The rule is bottomed on a fear of sweetheart deals between employers and unscrupulous unions, but as such it is grossly overbroad. As it currently stands, the rule prevents most employers from doing a precise calculation of the cost of collective bargaining prior to entering into a recognition agreement, and thus makes the negotiation of such agreements more difficult.

Because nonboard strategies envision not only recognition, but also meaningful collective bargaining, they operate on a scale far more extensive than the small, individual employer units at issue in NLRB elections. Under current law elections may occur only among the employees of a single employer. Moreover, in fiscal year 1996, over half of all NLRB elections occurred in units of less than 30 employees. Nonboard strategies, in contrast, are premised on the fact that both employer recognition and meaningful collective bargaining depend on achieving significant union density in particular markets. Accordingly, nonboard strategies often focus on markets rather than individual employers, choosing as their initial target the largest nonunion employer around. The successful Justice for Janitors campaign of the Service Employees International Union (SEIU) in cities from Los Angeles to Washington, DC, systematically targeted the largest nonunion cleaning contractor in the geographic markets and reached agreement with it, then targeted the next largest employer.

Because nonboard strategies depend on employer consent, but also must sidestep the Majestic Weaving rule, they have been most successful in markets already structured by significant union density. For example, the Justice for Janitors campaign aimed to restore union density in major metropolitan areas where it had been eroded, but hardly eliminated. The Culinary Workers effort in Las Vegas also seeks to build upon the large union share of the entertainment market existing there. A significant union share of a market lessens the resistance of employers to union recognition while allowing them to gauge the competitive consequences of recognition by evaluating both the union's existing contracts and the position of the unionized employers in the market.

Devising successful nonboard strategies in largely unorganized markets therefore remains a daunting task. A union must not only organize workers to obtain majority support, but also mobilize them to press for employer recognition at a time when, without Board certification, the union lacks legal standing to give it either stature in the eyes of workers or rights such as access to information about the identity of the workforce and the terms and conditions of employment. Moreover, if the object is solely recognition, the union is barred from using its traditional tactic of picketing, since picketing for over 30 days without filing an election petition is not allowed. Finally, even initiating a discussion with responsible company officials often proves difficult because employers have absolutely no legal obligation to respond to the union's plea.

Paradoxically, nonboard strategies face one further obstacle. In circumventing an election, unions push against the popular perception that the franchise is necessarily the most appropriate instrument for measuring popular will. Indeed, in 1935, advocates of the NLRA deftly played on the ideological significance of the electoral paradigm to offset traditional common-law principles hostile to concerted labor activity and collective bargaining. Ironically, the electoral ideal is now cynically exploited by employers who otherwise accord little weight to the principle of majority rule in the workplace, but who, when confronted by a union recognition demand, profess to protect employees' democratic right to vote on the question. For example, Somers Building Maintenance distributed flyers to its janitorial workforce in Sacramento, California, enumerating the benefits of working for Somers while warning, "Don't be suckered in by SEIU Local 1877 lies" and asking, "If they have such a great program why wouldn't they let you vote on it?" Somers alleged that SEIU "Doesn't allow members to vote," whereas the company claimed to have "Respect for employees right to vote in a union election." In manipulating the symbol of elections, employers like Somers legitimate their refusal to recognize the will of the majority of their employees.

IMAGINING A NEW DEAL

PERHAPS NOWHERE IS THE TRUISM THAT necessity inspires invention more apt than in contemporary labor organizing, where ingenious and sometimes successful nonboard strategies are the fruit of labor's limited options. Nevertheless, the host of legal, economic, and ideological constraints on such strategies suggest that they will not suffice to counter labor's decline in recent decades. That will require nothing short of a new deal among workers, employers, and the state.

Imagining a new deal for labor requires rethinking the role of unions in the American political economy, as well as the mechanisms through which they assume that role. Under current law, collective bargaining and adjusting grievances are the designated roles of unions. When initially enacted, federal labor legislation was justified in Congress in multiple ways--as a guarantor of industrial peace, a Keynesian stimulant for the economy, and a keystone of industrial democracy. In the last two decades, a case has also been made for the microeconomic benefits of union representation, most importantly in the 1984 study, What Do Unions Do?, by Richard Freeman and J. Medoff. Most recently, the decline of unions has been linked to growing income inequality. Yet, today most Americans are scarcely troubled by the increasing numbers of workers lacking union representation.

Unions, meanwhile, have been experimenting with efforts to create and maintain a role in workplaces where they do not occupy the position of workers' collective bargaining agent. In 1985 the AFL-CIO's Committee on the Evolution of Work issued a report entitled The Changing Situation of Workers and Their Unions that urged unions to establish "new categories of membership" outside established bargaining units as well as to provide "services and benefits" beyond those available through collective bargaining. Since then many unions have devised associate member programs for workers outside organized units. Simultaneously, unions have moved beyond their traditional role as bargaining agents to enforce an array of employment laws enacted since the NLRA, from the 1938 Fair Labor Standards Act to the 1993 Family and Medical Leave Act. In the face of widespread noncompliance and systematic underenforcement of the legislation by the government and by individual workers, unions have had some notable successes with this strategy. The United Food and Commercial Workers, for example, has systematically helped employees of nonunion grocery chains and other retailers to enforce their rights under the Fair Labor Standards Act and Title VII of the 1964 Civil Rights Act, resulting in several large recoveries, including an $81.5 million recovery in a sex discrimination case against Publix, a Florida-based grocery chain. But unions have yet to construct a compelling public case for representation of workers outside collective bargaining, let alone develop a sustainable model for such representation or integrate it with organizing and collective bargaining. Employers have exploited this disjunction, for example, by arguing that union lawyers representing individual employees of an unorganized employer should be disqualified because there is a conflict of interest between a union seeking to organize the employees and the employee-plaintiffs seeking simply to maximize their recovery in the litigation.

Finally, since John Sweeney took office as president of the AFL-CIO in 1995, unions have aggressively asserted their role as labor's advocate in the political arena. This stands as an important element of safeguarding a "mixed society," in which government imposes some limits on the operation of the market. When American corporations already outspend labor by a ratio of 11 to 1 in election campaigns, any further erosion of union membership threatens the balance implicit in the term "democratic capitalism," not to mention the two-party system.

Still, employers and their political allies, above all the National Right to Work Committee, have continued to bind unions in the ambiguous relationship between workplace representation and political action. At the urging of the Right to Work Committee, the Supreme Court has developed a virtual obsession with this subject at a time when the Court's labor docket otherwise has been steadily diminishing. During the last two decades, the Court has accorded workers represented by unions far greater protection against use for political purposes of any portion of the dues or fees deducted from their wages than it has accorded workers against unlawful discharge, even though in the former case only a small portion of union dues (which are often as low as $13 per month) is at stake, while in the latter case a worker's entire wage is at stake. The recent rash of ballot and state as well as federal legislative initiatives seeking to grant workers "paycheck protection"--that is, to place constraints on unions' ability to use funds voluntarily deducted from workers' wages for political ends--as in Proposition 226 recently defeated in California -- further testifies to the need not only to articulate the critical role of unions in the political process but to link that role to the processes of workplace representation. Only as these multiple roles of unions are clearly formulated and coherently interconnected can new mechanisms of implementation be conceptualized and enacted into law.

Judiciously, the labor movement today is not pursuing comprehensive labor law reform, for it would make little headway in the current political climate. Indeed, Congress has not passed comprehensive legislation supportive of union organizing since 1935. 4 Since then only three major legislative efforts have even been mounted. In 1975 both houses of Congress passed a bill granting relief from the Taft-Hartley Act's restrictions on secondary pressure in the context of a common work site (for example, a construction site), only to confront a presidential veto by Gerald Ford. In 1979, when the Democratic Party controlled both houses of Congress as well as the presidency, a comprehensive labor law reform bill was introduced in Congress, but died in the face of a 19-day filibuster and a record six failed cloture votes in the Senate. Finally, in 1991 a ban on permanent replacement of strikers passed the House of Representatives, but efforts to secure passage in the Senate ended in the face of a threatened filibuster in 1994, as the Republican Party gained control of the Senate in the fall elections. A renewed focus on state labor law initiatives, which were long thought to be preempted by federal law, has produced only isolated results, largely at the local level. For example, San Francisco recently enacted an ordinance requiring employers involved in hotel and restaurant projects in which the City has a proprietary interest to agree to recognize a requesting union based on authorization cards signed by a majority of employees. But the ordinance is extremely limited in scope and has already been challenged on preemption and other grounds in federal court.

Thus, an additional burden rests on unions developing nonboard organizing strategies. These strategies cannot simply aim to strike deals with individual employers, even if they continue to prove successful in halting the decline in union membership. Rather, the task of nonboard organizing must also be to dramatize workers' need for union representation as well as the inequity of the current legal mechanisms for securing such representation. Such strategies serve as the crucible for expressing and implementing labor's aspiration for representation. In renegotiating deals with individual employers, unions also must take on the job of articulating a vision of a genuinely new deal.

Notes

1. Paul C. Weiler, Hard Times for Unions: Challenging Times for Scholars, University of Chicago Law Review 58, 1015, 1025 (199)

2. Only in the most remote work sites, such as logging camps, mines, and mountain resort hotels, must employers grant access to union representatives.

3. The Board's General Counsel has recently authorized the issuance of two complaints in order to give the Board the opportunity to consider whether in some exceptional cases, such as the case of home care workers with no common workplace, an employer's refusal to provide a list of employees prior to the filing of a petition violates the law.

4. In 1974, Congress did extend the NLRA's protections, with some modifications, to the employees of proprietary hospitals.

Indexing (document details)

Subjects:	Civil rights, Elections, Employment, Labor force, Labor law, Labor relations, Labor unions, Law, Workers
Author(s):	Becker, Craig
Document types:	Feature
Publication title:	New Labor Forum. New York: Fall 1998. , Iss. 3; pg. 97
Source type:	Periodical
ISSN:	10957960
ProQuest document ID:	507642721
Text Word Count	6358
Document URL:	http://0-proquest.umi.com.gull.georgetown.edu/pqdlink?did=507642721&sid=1&Fmt=3&clientId=2817&RQT=309&VName=PQD