

Employee Free Choice Act...or...Global Outsourcing Act?

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In 1953, “organized labor” (“Labor”) represented 35.7 percent of the private sector U.S. workforce. Labor’s downhill slide to its current density of 7.4 percent did not occur this year, last year, or even with the onset of the current administration. Failure is due to many factors – a changing workplace, new technologies, different work, generational changes, and a host of events, involving human and institutional failures – corruption, politics, ignorance, and more.

But to hear Labor tell it, Labor’s demise is due to a rash of *recent* problems – employer intimidation, employer harassment, employer coercion, and remediless law. The solution, according to Labor and to Labor’s political Party, is to level the playing field to preserve, protect, and defend the “middle class” from all workplace afflictions (ignoring, as usual, the economic realities of free markets) by a three-part cure-all – (1) eliminate the secret-ballot, (2) impose civil penalties on employers only, and (3) absent a quickie labor agreement, impose one with specific terms to be determined by a disinterested (often market ignorant?) “arbitrator” through procedures yet to be determined (by a Labor sensitive, near moribund agency).

Facts, not assertions, and certainly not results-driven research from Labor supported institutions and “professor” advocates must surface. And, don’t restrict the fact-gathering process to a one-off hearing with three witnesses for the majority party and one for the minority party. Rather, gather facts, disparate as they may be, and study the issues to support legitimate legislation. For example, consider the following, sundry facts:

- In 1935, the newly enacted National Labor Relations Act provided for certification of a union’s majority status by secret-ballot or by “any other suitable method.” Yet, only four years later, in 1939, the National Labor Relations Board (“Labor Board”) acknowledged the inherent, qualitative differences between registering choice by secret-ballot as opposed to “other” methods and restricted certification to Labor Board conducted, secret-ballot elections.
- In Fiscal Year 2005, unions won 60.4 percent of “RC” and “RM” elections conducted by the Labor Board.
- Over the past decade, the union dense auto, steel, and airline industries have been hit hard, in large part, by their respective collective bargaining contracts’ high costs and inflexibilities and the various parties’ refusal over decades to just say “NO” to costly contract demands.
- Federal labor law requires union officers to be elected by secret-ballot.
- In 2001, the AFL-CIO argued for and got the Labor Board to effectively require secret-ballot elections to decertify (get rid of) a union representative.
- Some former corporate executives are in prison; so too are some former union leaders.
- Some union defined-benefit pension plans are grossly under-funded and some are not; the same for some company plans.

- Mr. Sweeny touts the superiority of union benefits yet pushes his Party for tax-payer funded health care.
- In 2001, Congressman George Miller pressured Mexico to require the secret-ballot for union elections “to ensure that workers are not intimidated into voting for a union they might not otherwise choose.” The same George Miller, who this year sponsored the insidiously named “Employee Free Choice Act” in the House of Representatives, received a reported 63.7 percent of his PAC money from Labor. Last July, in apparent concert with the AFL-CIO, the same Congressman George Miller pejoratively described U.S. labor law and the Labor Board using war rhetoric.
- Senator Edward Kennedy, who is sponsoring the same oxymoronically named bill in the Senate, recently complimented the Labor Board at a ceremonial function for having conducted thousands of secret-ballot elections.

There’s lots of facts out there – its important to hear the *full* story.

Organized Labor’s Party identifies various problems with U.S. labor law (last revised in 1959) – administrative delay, unit gerrymandering, weak or non-existent remedies, inadequate access to employees, and more. But these issues, whether real or rhetorical, have *nothing to do with* the mechanism of registering choice – the secret-ballot. What Labor and its Party are attempting to do is prevent employees from hearing “the rest of the story” by silencing employers – and its gone on since 1935. We’ve heard their pleas and specious arguments over and over and over.

Yes, a union representation campaign is not the same as a political campaign. The Labor Board’s secret-ballot reads: “Do you wish to be represented for purposes of collective bargaining by [name of union] YES [or] NO.” The choice is simply whether or not the voting employee wishes to have a representative at the workplace. Federal law does not permit the employer/company to be an alternative candidate.

If the employer is not a candidate and Labor (along with its Party and its Faculty) would silence the employer, who or what entity will be available and will step forward to be a resource to provide employees with the “rest of the story”? (Perhaps this is why federal labor law and the First Amendment of the U.S. Constitution protects employer speech).

To make a “free” “choice”, you must be (1) informed to enable a choice *and* (2) you must be able to register that choice free of any pressure. Labor’s bill – the so-called “Employee Free Choice Act” – eliminates *both* critical elements. Card-check campaigns are, more often than not, conducted by stealth for the purpose of not attracting attention that would prompt counter-information. Labor’s card-check is not like a Labor Board secret-ballot – the union card-check solicits a “YES” only decision. And, signing a card in front of a union organizer where the only choice is “YES”, even without overt inducements, threats, or coercion, is not without peer pressure.

Labor’s and its Party’s “Employee Free Choice Act” requires *no* notice of the inception of a card campaign. Labor’s bill provides *no* limit on the length of a union’s card campaign. With a stealth card campaign, the only information to come forward, to help educate the employee whether to sign the card comes from Labor. Like any membership or purchase, a rational individual wants (and needs) to know how much it costs, what are the comparative advantages/disadvantages, how/when can one cancel, opt-out, or resign, and so forth.

Labor and its Party also claim that the Labor Board has failed to uphold its revered “laboratory conditions” standard for ensuring fair and free elections. If this is so, fix it. But for Labor and its Party to push their bill for “lavatory” conditions is unacceptable.

Let's start over. Let the Congressional Research Service or a bipartisan commission study the alleged shortcomings. Hold hearings to afford a variety of witness testimony. Hold hearings outside-the-beltway too, where real "workers" work. In the end, fix what is broken. It just might be that Labor's message is stale or that something new is required. Or it may be that Labor's demands for guarantees against job loss or restrictions on a company's operating flexibilities are economically inviable. But trashing the mechanism of recording one's choice - the secret-ballot, the voting booth, and the ballot box - when the real intention is to deprive the employee/fellow citizen of all the facts and then pressure the individual is wrong.

Labor and its Party also seek stronger penalties but only against employers (of course). Interestingly, civil fines, treble backpay, and mandatory injunctions are directed not against employer statutory violations generally, but only as related to the union card signing campaign period (which is often by stealth and unknown to the employer) *and* to the contract negotiation/interest arbitration period. Little more need be said about this incredible one-sidedness. Members of Labor's Party should be embarrassed (defeated?).

Has no one heard or read about Labor's violations during these same organizing and contract negotiations periods? Have Congressmen Miller and Kennedy and their fellow supporters not read about Labor's corporate campaigns? As an example, the Labor Board recently required a union to post a single-spaced, four page "Notice to Employees and Members" regarding its corporate campaign (organizing and bargaining) activities, the first paragraph of which reads:

WE WILL NOT brandish or carry any weapon of any kind, including, but not limited to, guns, knives, slingshots, rocks, ball bearings, liquid-filled balloons or other projectiles, sledge hammers, bricks, sticks, or two by fours at or near any picket line, handbilling effort, rally or in any vehicle engaged in ambulatory picketing...or following the private vehicle of any...employee.

The ninth paragraph of the same Notice is instructive too:

WE WILL NOT threaten to kill or inflict bodily harm, make throat slashing motions, make gun pointing motions, challenge or threaten to fight or assault employees, threaten to sexually assault non-striking employees or their family members, threaten to follow non-striking employees to their homes, use racial epithets or obscene gestures at non-striking employees....

There are also cases where unions induce workers to sign cards by promising to waive a large dollar union initiation fee and, at the same time, coercing the same workers to sign the cards by noting that if they refuse, they will be required to pay the fee to continue to work should the union achieve majority status. To see elected representatives endorse one-sided sanctions is incredible.

Certainly the most economically devastating piece of Labor's dream-bill is the mandate guaranteeing (and by force) an initial or first contract. Under Labor's and its Party's "Free Choice" bill, a quickie card-check majority creates a binding obligation on the employer to commence contract negotiations with the union. If a contract is not reached within ninety days, the Federal Mediation and Conciliation Service ("Labor Service") may be brought in at the union's (or employer's) request to assist the parties. But, if no contract is reached within thirty days, an arbitration board (pursuant to procedures not articulated in the bill but to be determined by the Labor Service) will decide the contract's terms which will bind the parties for two years. By guaranteeing a contract, the union's institutional presence (hold?) over *all* the employees is

assured. With a government guaranteed first contract, there is now a baseline upon which Labor can bargain subsequent contracts. And remember, thanks to Labor, getting rid of (decertifying) the union by the same card-check procedure is not available.

Labor's and its Party's bill is radical. For seventy-two years our federal labor law has sought only "to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement....Congress intended that the parties should have wide latitude in their negotiations, *unrestricted by any governmental power* to regulate the substantive solution of their differences." [Emphasis added]. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960). The U.S. Supreme Court opined at length on "collective bargaining":

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth – or even with what might be thought to be the ideal of one. The parties – even granting the modification of views that may come from a realization of economic interdependence – still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors – necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms – exist side by side....Our labor policy is not presently erected on a foundation of government control of the results of negotiations.... "When the employees have chosen their organization, when they have selected their representatives, all the [law requires] is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.".... *Id.*

Current federal labor law is clear – the obligation for the parties to bargain collectively and in good-faith "does not compel either party to agree to a proposal or require the making of a concession...." See 29 U.S.C. 158(d). To force a contract on the parties – union or management – by substantive determinations of a third-party arbitrator or arbitration panel is a *radical* change indeed!

Interest arbitration is used sparingly in this country, principally in the public sector where there is no right to strike, thus no economic leverage. Arbitrators have no inside information and, usually, no systemic familiarity with the industry. Arbitrators certainly are not familiar with the company's bottom line financials and competitiveness in the industry. Arbitrators are not market economists. Moreover, the "Free Choice" ("Such a Deal"?) bill is silent as to how arbitration would work – work issue by issue or select one party's entire contract proposal. With either approach, Labor will be emboldened to make extreme demands – terms and conditions it gets only when it has captured representation of the entire company's operations or when it has reached a significant, controlling density in the industry, removing labor costs from competition. Why? Because cram-down arbitration will pick. Thus, the chances are far better than with good-faith bargaining under current law to get terms and conditions like those in union dense industry contracts:

- Union representatives on the Company's Board of Directors
- Veto power over any sale, merger, or acquisition
- Successorship restrictions on sale or acquisition
- Interest arbitration during contract term
- Participation in union benefit and multi-employer pension plans
- Guarantees against lay-off
- Prohibition on striker-replacements
- Enhanced premium pay, restrictions on hours worked
- Mutual agreement to effect change in job duties or introducing new equipment or systems
- Protective provisions for retirees
- Union access
- Paid-time for attendance at union and/or union-management committee meetings

To suggest that the so-called "Free Choice" bill is really a government mandated, global outsourcing initiative is not rhetorical. Except for physically delivered services, what industry, and the companies within, will not move outside our borders when the economic bottom-line hits home...and hard.
