

**Employee Free Choice and Top-Down Organizing**  
by  
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The good news is that in 2004 American union membership in the private sector fell from 8.2% in 2003 to 7.9% of the labor force. (In 1900 the figure was 7% without any union-friendly legislation on the books.) Over the same time the market share of government employee unions fell from 37.2% to 36.4%. The percent of unionized workers who are government employees increased from 46.4% to 47.1%, while government sector workers were 16% of the employed labor force in both years. The decline of private sector unions continues, and government sector unionism continues to become the only sort of American unionism of any consequence. The bad news is that the unions have come up with two nefarious schemes to try to arrest their decline in the private sector.

I have often advocated repeal of the National Labor Relations Act (NLRA) which, since its inception in 1935, has imposed involuntary unionism in several private sector industries in the U. S. I now think that growing global competition in both product and labor markets will eventually make the NLRA almost irrelevant. Long before many politicians think seriously of repealing the Act, competition and entrepreneurship will already have done most of the job. The part not done, however, will still be a problem.

Under the NLRA a union gets to be the certified monopoly collective bargaining agent of a group ("bargaining unit") of employees in an enterprise through a secret ballot representation election. A union seeking such monopoly representation privileges must first collect the signatures of at least 30% of the workers in the bargaining unit on "authorization cards." It then must petition the National Labor Relations Board (NLRB) for a secret-ballot election. If a majority of workers vote for the union, then all of the workers in the bargaining unit must accept the representation services of the winning union whether they want them or not. Individuals are even forbidden to represent themselves. In previous columns I have decried this system of forced association in the workplace as an illicit application of mandatory submission to majority rule, which can be appropriate in the government realm, to the private sphere of human action where it is never appropriate. Now the unions, too, are unhappy with winner-take-all majority rule workplace elections, but for an altogether different reason -- they are losing too many of them. Unions can pick and choose the elections they ask the NLRB to conduct, yet recently they have been losing a majority of the elections they pick.

Unions cannot admit to themselves or anyone else that the reason for their private sector decline is that more and more workers prefer to remain union free. Instead, they claim that secret ballot representation elections do not permit workers to express their true preferences. Employers, they allege, by persuasion and intimidation, make it very difficult for employees to exercise their free choice in the voting booth. The NLRA already imposes severe penalties on employers found guilty of interfering with employee free choice in representation elections; but, it seems, that is not enough. The unions now want Congress to abolish secret ballot elections and allow the NLRB to certify unions as monopoly bargaining agents by "card check certification."

In 2004 the unions got two of their mandataries in the U.S. House and Senate to submit an "Employee Free Choice" bill for enactment. The bill acquired 208 cosponsors

in the House and 30 in the Senate. If enacted it would have amended the NLRA to force the NLRB to confer monopoly bargaining privileges on any union that had collected signatures on authorization cards from a majority of workers in a bargaining unit. The bill never made it out of committee in either house, and there is even less chance that it will be heard, much less adopted, in the new 109<sup>th</sup> Congress. Yet, the "Employee Free Choice" bill still has many supporters, and is it almost certain to be revived in any future union-friendly Congress.

A predictable effect of the Employee Free Choice bill is that it would extinguish employee free choice. Unions solicit signatures on authorization cards from workers on a face-to-face basis. Any worker who at first declines to sign is "urged" to reconsider. If he continues to refuse to sign he is likely to be accused of being anti-union -- a person to be ridiculed, ostracized, threatened, and even worse. Union organizers, who have a well earned reputation of being less than peaceful when it comes to getting their way, may know where the worker and his family live, what cars they drive, where they travel. When faced with those, at least implicit, threats, all but the most courageous workers will cave in and sign. Collecting signatures from a majority of workers under such circumstances reveals nothing about the uncoerced free choice of those workers. Under present law if workers are coerced by unions into signing authorization cards, those signatures only lead to a secret ballot election. Workers are able eventually to express their free choices in the voting booth. I don't think the free choices of a majority should bind the minority in such elections, but at least all workers get to express their free choices.

A related part of the unions' new remedy for their private sector decline is their resort to "top-down organizing." First a union attempting to round up new dues payers threatens a corporate employer with a "corporate campaign." This involves the union, together with help from other unions and the usual coterie of benighted civic and religious activists groups, picketing and attempting to get customers, suppliers, lenders and other financial backers to boycott the target corporation. If a damaging corporate campaign threat seems credible or is actually undertaken, the union then offers the corporation a way out of the campaign -- a "neutrality agreement." In any other context this would be called extortion. Under a neutrality agreement, the employer must at least agree not to resist the unionization of its employees in any way whatsoever. Often the employer also agrees affirmatively to help the union organize the target employees. This involves such tactics as holding mandatory meetings wherein the employer actually urges the employees to unionize and providing the union with the home addresses and telephone numbers of the target employees and otherwise assisting the union in contacting them on and off the job.

In many neutrality agreements the employer even agrees to recognize the union as the monopoly bargaining agent for the target employees if the union gets a majority of workers to sign authorization cards. The NLRA allows the NLRB to certify a union as a monopoly bargaining agent on the showing of a majority of signatures, without a certification election, so long as the employer agrees. The "Free Employee Choice" bill would, if enacted, not require the agreement of an employer for such a certification.

The NLRA envisions workers organizing themselves into unions from the bottom up, not employers organizing workers into unions from the top down. Section 8(a) 2 of the NLRA says that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." It seems to me that many neutrality agreements directly violate Section 8(a)2. Until recently the NLRB has acquiesced to such agreements, but on June 7, 2004 it voted 3-2 to reconsider the issue in two cases involving the United Auto Workers (UAW) and two automotive suppliers, Dana Corporation in Ohio and Metaldyne Corporation in Pennsylvania. The complaints were brought by employees of the two firms who argued that, notwithstanding card check neutrality agreements, the UAW did not have actual majority support among employees. The majority explained its decision to reconsider the cases in these words: "the superiority of Board supervised secret ballot elections and the importance of Section 7 rights of employees [to choose to refrain from unionization] are ... factors which warrant a critical look at the issues raised herein." The majority did not cite Section 8(a)2 as a concern, but it may come up as the case is heard.

The decisions of the NLRB depend critically on the political and ideological sympathies of its five members. The current majority was appointed by President Bush, and that majority is likely to be sustained through 2007. I am optimistic about the outcome of these specific cases, but they will not settle the issue. A ruling against card check certification and top-down organizing would likely be reversed by a future Board with a majority appointed by a more union-friendly president. That is why I said above that competition and entrepreneurship would make the NLRA "almost" irrelevant. Only official repeal of the NLRA can permanently free American workers from a politicized NLRB.