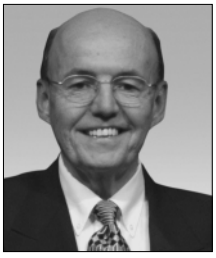
Employee Free Choice and Top-Down Organizing



BY CHARLES W. BAIRD

The good news is that American union membership in the private sector fell from 8.2 percent in 2003 to 7.9 percent of the labor force in 2004. (In 1900 the figure was 7 percent 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 percent. The percentage of unionized workers who are government employees increased from 46.4 to 47.1, while government-sector workers were 16 percent 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 United States. 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 election. A union seeking such privileges must first collect the signatures of at least 30 percent 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 workers in the bargaining unit must accept the representation of the winning union whether they want to or not. Individuals are even forbidden to represent themselves.

In previous columns I have decried this system of forced association 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 choose the elections they ask the NLRB to conduct, yet recently they have been losing most of them.

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 the secret ballot does not permit workers to express their true preferences. Employers, they allege, by persuasion and intimidation, make it 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 by "card check certification."

In 2004 the unions got two of their mandataries in the House and Senate to introduce an "Employee Free Choice" bill. It acquired 208 cosponsors in the House and 30 in the Senate. The bill 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 current Congress. Yet it still has many supporters and is almost certain to be revived in any future union-friendly Congress.

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A predictable effect of the bill is that it would extinguish free choice. Unions solicit signatures on authorization cards face to face. Any worker who declines to sign is "urged" to reconsider. If he continues to refuse he is likely to be accused of being anti-union—he becomes a person to be ridiculed, ostracized, threatened, and even worse. Union organizers, who have a well-earned reputation for 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 under such circumstances reveals nothing about the uncoerced free choice of those workers.

Under present law, signatures only lead to a secret-ballot election, in which workers can freely express their preferences. 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 preferences freely.

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 campaign": It, together with other unions and the usual coterie of civic and religious activists groups, picket and attempt to get customers, suppliers, lenders, and other financial backers to boycott the target corporation. If a corporate-campaign threat seems credible or is actually undertaken, the union then offers the corporation a way out—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 unionization. Often the employer also agrees to help the union by such tactics as holding mandatory meetings where he urges employees to unionize and providing their addresses and telephone numbers.

Recognizes the Monopoly

In many neutrality agreements the employer even agrees to recognize the union as the monopoly bargaining agent if a majority of workers signs cards. The NLRB can legally certify a union under these circumstances. The "Free Employee Choice" bill would not require an employer's agreement for certification.

The NLRA envisions workers organizing themselves into unions from the bottom up, not employers organizing workers from the top down. Section 8(a) 2 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 that section. Until recently the NLRB had acquiesced in such agreements, but a year ago 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 bought by employees of the firms who argued that, notwithstanding card-check neutrality agreements, the UAW did not have majority support among employees. The three NLRB members explained their decision to reconsider the cases in these words: "[T]he 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." They 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 it 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 say that competition and entrepreneurship will make the NLRA "almost" irrelevant. Only official repeal of the NLRA can permanently free American workers from a politicized NLRB.