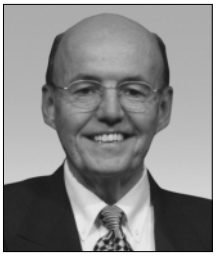
The Government-Created Right-to-Work Issue



BY CHARLES W. BAIRD

The principles involved in right-to-work laws are identical with those involved in [workplace antidiscrimination laws.] Both interfere with the freedom of the employment contract, in the one case by specifying that a particular color or religion cannot be made a condition of employment; in the other that membership in a union cannot be.

—MILTON FRIEDMAN, 1962

Since Friedman penned those words in *Capitalism & Freedom* (p. 115), union apologists have claimed him as an ally in their campaign to ban right-to-work (RTW) laws in the United States. Section 14(b) of the National Labor Relations Act (NLRA) permits states to pass RTW laws, which prohibit employers and unions from agreeing to include union-security clauses in their collective-bargaining agreements. A union-security clause forces all workers represented by a union to pay fees (dues) for its services. Unions have attempted unsuccessfully to repeal Section 14(b) since its enactment in 1947. Now the National Right to Work Committee is attempting to get Congress to enact a National Right to Work Act. Are RTW laws consistent with the freedom philosophy?

If unions were voluntary associations that represented only their voluntary members, and if bargaining were wholly voluntary, there could be no classical-liberal objection to a union agreeing with a willing employer to adopt a union-security clause. The employer and the union would be free to choose whether to bargain over and to consent to such an arrangement, and workers would be free to choose, on an individual basis, whether to accept employment on such terms. Such is the common law of contracts. Under these circumstances a classical liberal should oppose RTW laws.

However, under Section 9(a) of the NLRA, American unions are not organizations that represent only their voluntary members. If they are certified by majority vote among workers in a bargaining unit they become the exclusive (monopoly) bargaining agents of all workers in the unit, whether individuals agree or not. Individuals are even forbidden to represent themselves. This is usually justified on grounds of "workplace democracy." As F. A. Hayek wrote in 1949 ("The Intellectuals and Socialism"), this is an example of "making shibboleths out of abstractions." The First Amendment forbids deciding which church to attend on the basis of a majority vote enforced by government. Likewise, the First Amendment's principle of freedom of association forbids deciding which representative will represent all workers on the basis of a majority vote enforced by government. Democracy is a form of government. Government cannot rightly impose democracy on private decision-making. In the private sphere of human action, an individual's associations should not be subject to majority vote. Exclusive representation should be repealed.

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Correctly understood freedom of association in private affairs has two parts: First, any person has a fundamental right to associate with any other *willing* person or persons for any purpose that does not trespass against the fundamental rights of third parties. This is often called the positive right of freedom of association. Second, any person has a fundamental right to *refrain* from

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association with any other person or persons no matter how fervently these others may desire such association. This is often called the negative right of freedom of association. Logically, without a negative freedom of association, the positive freedom of association is meaningless. If A cannot refuse to associate with B, A does not have the (positive) freedom to choose with whom to associate. Freedom of association is irreconcilable with coerced association.

Economists define a free rider as one who receives net benefits from a collective action and can avoid paying for them due to the inherent nonexcludability of some goods. Unions and their apologists use the free-rider problem to justify union security. They argue that since a certified union is forced by law to represent all workers in a bargaining unit whether they approve of the union or not, all such workers must be forced to pay the union. Otherwise, they would get the benefits of union representation for free, and that would be unfair to those workers who willingly pay union dues.

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However, there is nothing inherent in any employment relationship that gives rise to a free-rider problem. It is an artifact of the NLRA. Congress created the free-rider problem in labor relations through exclusive representation. If a union bargained only for its voluntary members, only they would benefit. Other workers would be free to designate some other willing third party to represent them or to choose to represent themselves. If unions want to eliminate the possibility of any worker being a free rider, they should advocate repeal of exclusive representation. Without exclusive representation there would be no need for a National Right to Work Act because the question of union security would be moot.

The unions' free-rider argument amounts to saying that since Congress has violated individual workers' freedom of association with exclusive representation, Congress must also override individual workers' freedom of association regarding support of unions that represent them. According to union apologists, one violation of freedom of association compels another violation of freedom of association. I argue that, given the first trespass against freedom of association, a National Right to Work Act is a proper way to avoid the second trespass.

Forced Support Justified?

Many argue that exclusive representation is a fact of life that we all must accept. Therefore, forcing workers to support unions is justified. However, even with exclusive representation, it can never be proven that any worker free-rides on any collective-bargaining agreement. A forced rider is one who suffers net harms from some collective action and who is compelled to pay for them. Even if one grants that unions can raise the wages and salaries that are paid to some workers, it does not follow that even those workers, on a net basis, gain from union actions. Costs and benefits are inherently subjective. Suppose a worker gets a $10 wage increase due to a union's representation. No third party can prove that this benefits the worker more than, less than, or the same as the cost imposed by, for example, the disutility the worker suffers from being forced to associate with the union. Any worker accused by a union of being a free rider can argue, with just as much rigor, that he or she is a forced rider. It is a conceit to argue that Congress or any other third party can make that determination for any worker.

In sum we live a second-best world. If there were no NLRA classical liberals should oppose right-to-work. The ideal policy prescription from a classical-liberal perspective is to repeal the NLRA. Until that happens, in my view a classical liberal is justified in supporting RTW laws.