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Seven Unions Petition NLRB to Mandate Minority Bargaining

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A minority by definition is less than 50 percent of something. But that doesn't mean it can't act like a majority. Certain organized labor officials, at least, take this view. On August 14, the United Steelworkers of America, the United Auto Workers and five other, unnamed unions petitioned the National Labor Relations Board to require private-sector employers to negotiate with union members in cases where the union in question has the support of less than half of all affected employees. The move appears to be an eleventh-hour attempt by Labor to shore up its declining ranks, especially in the context of "card-check" legislation, formally known as the Employee Free Choice Act, being stalled in the Senate. Union officials argue that minority, or "members-only," bargaining is permitted under law, citing substantial legal research. The larger issue, however, is whom a favorable NLRB ruling would benefit aside from unions.

The campaign by labor officials to promote minority bargaining has been in the works for at least a half year. Back in March, Richard Bales, professor of law at Northern Kentucky University, leaked details about the plan on his "Workplace Prof" blogsite. The source material was a letter written by Charles J. Morris and Charles B. Craver, respectively, law professors at Southern Methodist University and George Washington University, and circulated to the NLRB in support of the then-pending petition. Morris is the nation's leading advocate of minority bargaining. His recent book, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Cornell University Press), recounts a relatively unfamiliar story of how unions have used members-only bargaining both before and after enactment of the National Labor Relations Act of 1935; i.e., the Wagner Act. Morris refers to Section 7 of the act, which states, "Employees shall have the right...to bargain collectively through representatives of their own choosing." He and other supporters believe this clause ought to be interpreted as allowing minority bargaining today.

Morris's book forms the main basis for the current petition. The seven unions want the NLRB to adopt the following rule:

> Pursuant to Section 7, 8(a)(1) and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-

> bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for other employees.

Union spokesmen admit that the likelihood of victory, for the time being, is low. But that could change in a hurry. "The feeling here was, legally, we are on solid ground," said Michael Yoffee, chief organizer for the Steelworkers. Even if the five-member NLRB hands down an adverse ruling, Yoffee sees victory not far down the road. "Our hope is that there will be a more pro-worker administration in place when it comes up in the hopper," he remarked. "And if this ends up in litigation, sooner may be better than later, since the courts don't appear to be getting any more worker-friendly."

Employers, by contrast, are up in arms over the possibility of NLRB deciding on behalf of the unions. "The result would be pure chaos," observed Randel Johnson, vice president of labor, immigration and employee benefits for the U.S. Chamber of Commerce. "Employers would be put in an impossible position to have to bargain with possibly numerous different unions governing pockets of employees in the same or similar positions." He and other critics argue that by making this form of bargaining compulsory, the federal government would violate the spirit of the Wagner Act, whose primary intent was to create majority-rule workplace democracy.

Organized labor thinks it has the upper hand, even if its recent test case didn't pan out. That would be a complaint that the Steelworkers filed with the National Labor Relations Board against the Pittsburgh-based retail chain, Dick's Sporting Goods. A little over two years ago, the union helped employees at the company distribution center in Smithton, Pa. (southeast of Pittsburgh) form an employee council. The council charged each worker $4 in monthly dues, and in return offered workers counseling, training and other benefits, plus a promise to bargain on their behalf. Dick's management refused to recognize the council, since it represented only a minority of employees. The Steelworkers responded by filing an unfair labor practice charge with the NLRB regional office on August 12, 2005. The effort eventually failed. Barry Kearney, associate general counsel for the board's division of advice, issued a 17-page memo on June 22, 2006, recommending dismissal of the charge. His opinion read in part: "The Employer in these circumstances had no obligation to recognition and bargain with the Council. This principle is well -settled and not an open issue." The whole idea of majority-representation, he argued, is to provide stability to the bargaining process, so that an employer doesn't have to sit "down at the table with five different minority unions." The charge was dismissed.

Lawyers are squaring off over the new NLRB petition. Douglas Smith, the Pittsburgh lawyer who represented Dick's Sporting Goods, called it a desperate move, "a pitch to get membership." Likewise, Daniel Halem, a lawyer with the New York firm of Proskauer Rose LLP, which has represented many employers, called the union position "radical," in conflict with the Wagner Act's core premise that unions must have majority support. But the Steelworkers' Yoffee thinks this case has far broader applicability. "Our union and other unions are constantly in contact with thousands of groups of workers – representing 20, 30, 40 percent in their workplaces," he said. "These workers often desperately want union representation." But do they want representation in this manner? Even union partisans have their doubts. Richard Hankins, partner in the Labor & Employment Practice Group at the labor-friendly Atlanta law firm of Kilpatrick Stockton, finds worker response thus far to be underwhelming. At his blog, "EFCA Updates," he put it this way:

> It is interesting to note that the labor movement as a whole is apparently not endorsing this effort. The (*New York*) *Times* mentions only the Steelworkers and the UAW and five other

unnamed unions. This is hardly the type of full court press that we saw behind the Employee Free Choice Act. Whether the rest of the movement will sign on now that the petition has been filed is yet to be seen.

Unions appear to be giving at best lukewarm support to mandatory minority bargaining, and then only on a wait-and-see basis.

This complaint should be put in the context of declining union membership. In 2006, reported the Bureau of Labor Statistics, only 12 percent of all employees in this country belonged to a union; within the private sector the figure was a mere 7.4 percent. Fifty years ago, private-sector union membership as a share of all nonfarm employees was more than four times that. Organized labor's campaign to force employer recognition of a union through card checks (whose signatures often are obtained through coercion) appears to have failed for the time being. Membership means more dues collections and political clout. Employer recognition of minority bargaining potentially could be a welcome counterweight to monopoly bargaining clauses in NLRA. But what the unions clearly want is *forced* recognition of such bargaining. It's hard to square that goal away with more worker freedom. (*New York Times*, 8/15/07; blog.nam.org, 8/16/07; efcaupdate.squarespace.com, 8/16/07; lawmemo.com, 8/17/07; *Washington Post*, 9/4/07).

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