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Is the NLRA Still Working for Workers?

Testimony of

**Professor William T. Dickens before the 1988
Sub-committee on Labor of the Senate
Labor and Human Resources Committee**

Professor Dickens: Mr. Chairman, it is the intent of the National Labor Relations Act to protect employees' rights to organize to bargain collectively with their employers. For its first twenty years it did this successfully and the institution of collective bargaining flourished. However, increasingly over the last two or three decades firms have devoted substantial resources to resisting employees' efforts to organize. This is the conclusion of several studies of corporate personnel policies and can be seen in the phenomenal increases in the systematic use of both legal and illegal practices to prevent unionization. Given these changes in management's ability and will to resist, the NLRA no longer does the job it was designed to do.

Today I would like to discuss three reasons why the act is no longer effective in protecting the employee's right to organize.

First, the law gives firms unequal access to workers during organizing drives. Representatives of the firm speak with employees throughout the working day. Supporters of the union must make their case before or after work or during breaks. Union supporters are limited as to when and where they can circulate written material. The company is not. Perhaps most important, companies hold captive audience meetings which all workers must attend. Union organizing meetings can only be held after work, often far from people's homes. This unequal ac-

cess makes it hard for union supporters to make their case and counter company claims. In some elections, many workers will have almost no exposure to arguments for unionization.

The importance of this in shifting the balance in the companies' favor is illustrated by my study that found the fraction of elections in which employee organizing could be expected to succeed was reduced by 40 to 50 percentage points when companies made full use of their advantage. Many other studies corroborate this finding.

Employees depend on their firms for the food on their tables and the roof over their heads. If they believe that supporting a union may cause them to lose their job, or just make it difficult for them to obtain a desirable work assignment, they can be discouraged from supporting the union. If they doubt the union's ability to protect them from company retaliation, they will often feel forced to vote against unionization.

This is a second way in which the NLRA fails to protect employees' right to organize. *A firm can find a way to let employees know that their jobs may be in jeopardy.* Workers testifying here today have provided graphic examples of management threats, made both to individuals and in meetings, to shut down plants, relocate production, layoff employees and take away insurance benefits should the union be voted in. Some of these implied threats can be made legally, but many are illegal. By definition it is difficult to identify and quantify cases of implicit threats and intimidation. But one study addressing the importance of these considerations found that employees attempting to organize clerical workers were 15-60% less likely to succeed when it would be easy for the employer to relocate their jobs if the union won.

The law fails to protect workers against implied threats. *The law also is ineffective in protecting them against direct threats or intimidation.* This is the third problem I wish to discuss. Threatening workers, promising benefits if they don't organize, firing union supporters--all these practices are illegal. Still, they have been occurring with a greatly increasing frequency. Between 1960 and 1980, NLRB findings of unfair labor practices rose 400%. Reinstatements of illegally fired workers rose 500%. These unfair labor practices have increased because they are effective in blocking organizing and because penalties are inadequate. Such practices occur *more* frequently when a firm has the assistance of an attorney or anti-union consultant. My own estimates suggest that organizing efforts are 20-30% less likely to

succeed on average when a company makes full use of these illegal tactics.

Senator Metzenbaum: Are there some attorneys and consultants who specialize in "breaking" union organizing activities?

Professor Dickens: Yes, there are.

Senator Metzenbaum: And they travel around the country, making their services available?

Professor Dickens: They do indeed. In studying election campaigns in different parts of the country I will see the exact same handout with a different company letterhead at the top of it. Obviously, the firm that is consulting with the company in creating its anti-union campaign has boilerplate material that they run off in each campaign.

Senator Metzenbaum: Professor Dickens, has the ability of employees to choose a union gone down in converse proportion to the right of the employer to make his or her statement to the employees and to use such tactics as you have described? As those activities were permitted to increase by the National Labor Relations board, the effectiveness of organizing campaigns declined?

That is certainly the conclusion of several studies of the phenomenon. How much is the result of the increase in the rights of employers, or the increase in the will of employers and their understanding of how to apply certain techniques, as well as the Board's willingness to let them use them, is hard to say. But a number of studies indicate that as management has become more

sophisticated in its resistance of unionization, the success of union organizing drives has fallen off.

Senator Metzenbaum: Do you feel that management and labor are presently on a fair playing field in connection with the right to organize and to choose a representative on a free and open basis?

Professor Dickens: If I had to summarize my comments in one sentence this morning, I would say "No" to exactly that question.

Senator Metzenbaum: You may proceed.

Professor Dickens: What is the overall significance of this increase in management resistance? In the early 1950s, about 35% of the private non-agricultural workforce were members of unions. Today less than 15% are. Certainly management resistance isn't the only cause of this decline but it is an important one. I do not have time today to summarize the many studies of union decline to describe how I reach this conclusion, but two pieces of evidence are telling: while U.S. private sector unionism has been declining, public sector unionism has been booming. Despite sharing similar economic conditions with the U.S., Canada's private sector unions have grown. Nearly every explanation of the decline in U.S. unionism is inconsistent with these facts, except the one that says U.S. private sector employers have successfully resisted unions while public sector and Canadian employers have not because of their different legal and political environments.

Senator Metzenbaum: Thank you. Your testimony is very helpful.