

## HOW LABOR CAN WIN IN THE NEW CONGRESS

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A labor victory depends on the definition of what it means to win. Labor's broad agenda in the new congress is passable in almost inverse relationship to that agenda's capacity to strengthen the institutional and political power of trade unionism itself. This has been true for more than 40 years, ever since the mid 1960s when during the second of the two great surges of liberal legislation in the last century – the mid 1930s are the other one – labor saw civil rights, Medicare, immigration reform, aid to education all pass with relative ease, while the repeal of 14b, which allowed southern and western states to pass and maintain “right to work” laws never really had a chance in a Congress dominated by ostensible liberals.

Today's congress is far less liberal than that of 42 years ago, and of course there is a right wing Republican in the White House, but the dynamic is much the same. Those elements of labor's agenda that are the least attached to the institutional needs of trade unionism per se, have the best chance of passage. This is not necessarily a bad thing, and it provides some guidance for labor strategists. A minimum wage law may well pass, likewise some kind of immigration reform, and there will be no further tax cuts for the wealthy, likewise the privatization of social security remains off the table, except among the right wing think tanks.

But even Senator Edward Kennedy and Congressman George Miller, among the most liberal and pro-labor legislators, did not put the Employee Free Choice Act, labor's number one institutional priority, on their 100 hour check list of top legislative priorities. So the problems facing the trade union movement are enormous, especially as it seeks to advance a key piece of legislation like EFCA, which would greatly reduce employer interference during organizing campaigns by making card checks as legally and administratively legitimate as the NLRB election in process in the certification of a trade union. EFCA also provides for first contract mediation and arbitration and puts in place far stiffer penalties for the unfair labor practices that have become part of the routine price of doing business for so many managers determined to maintain or return to a "union-free" workplace.

### **"No Need to Subject the Workers to a Election"**

To see what labor is up against one merely has to open the newspaper – the *Washington Post* or *Los Angeles Times* will do - and read one of the advertisements put together by the shady lobbyist Rick Berman, now working for the mysteriously funded Center for Union Facts.

The ad has three pictures: of Kim Jong Il, identified as the North Korean "leader", of Fidel Castro, also identified as a "leader," and of Bruce Raynor of UNITE-HERE, identified as "American Union Leader." Above their pictures is the a quote "There's no reason to subject the workers to an election," and below the pictures of these three men, the query "Who said it?" It was Raynor, of course, now made to seem clearly in league with the Communist dictators. Says Union Facts: "American workers reject unions in

almost half of all secret ballot elections. Find out how union leaders are forcing people to pay dues by trashing democracy”<sup>1</sup>

Likewise the Human Resource Policy Association sums up employer opposition to the labor-liberal push for card checks and employer neutrality: “The secret ballot election process...guarantees confidentiality and protection against coercion, threats, peer pressure, and improper solicitations and inducements by either the employer or the union.”<sup>2</sup>

Bruce Raynor tells his side of the story in a recent issue of *American Prospect*, where he offered readers a tragic tale of thwarted hopes and smashed solidarity at Goya Foods in Miami, one of the largest Hispanic owned companies in the U.S.

In 1998 workers at Goya voted by overwhelming margins for representation by UNITE, not once but in two separate NLRB election contests. The Board certified the union, but company management stalled negotiations, fired key worker activists, and bribed others. UNITE filed scores of complaints with NLRB after which the General Counsel charged Goya with 23 separate textbook violations of U.S. labor laws, including the usual threats of job loss, plant closings, interrogation, discrimination in work assignments and firing of at least four union supporters.

As is routine, the union and the company appealed to the federal courts, which after a long, frustrating, five year delay, ruled decisively for UNITE in August 2006. Goya was found to have engaged in unlawful threats and interrogations, but the court leveled no monetary fine and imposed no real penalty against the company or its managers, so Goya continues to flaunt NLRB and courts, not to mention the will of its several hundred employees.

Concludes, Raynor, “after seven years, winning does not look all that different from losing” for these Goya workers. And the UNITE-HERE president continues “on election day in 1998 Goya workers celebrated their win only to suffer years of frustration and denial of their legal rights. That is why, indeed, “there’s no reason to subject workers to NLRB elections.”<sup>3</sup>

### **How did we get to this impasse?**

Early 20<sup>th</sup> century reformers and labor partisans wanted to constitutionalize the American work place so as to curb the authority of foreman, boss, and executive. They wanted to institute in the world of work the kind of democratic norms and expectations found in larger civil society.

Democracy at work was found in the collective bargaining process itself, which presupposed the organization of a relevant group of workers into some sort of collective institution, with a capacity for internal debate and external negotiation. “Industrial democracy,” a term in common usage from the Progressive Era through the New Deal, promised to generate the industrial citizenship that would make a generation of immigrants full fledged members of the nation.

It would engender that most precious commodity of the workaday world: informed and willing consent. Thus William Leiserson, a clothing industry arbitrator in the 1920s, later a member of the NLRB in the 1930s and 1940s, saw collective bargaining as but the latest stage in the unfolding of the democratic idea. As early as 1924, Leiserson argued that the “joint meetings of employers and unions representatives, like the parliament of England, are at the same time constitutional conventions and statute

making legislatures.”<sup>4</sup> Leiserson, like every other laborite, from Big Bill Haywood on the left to Samuel Gompers on the right, assumed that in an industrial society the interests of labor and capital were distinct. The employers were already organized: the only issue was the mechanism by which the workers could do likewise.

Thus did the famous Section 7a of the New Deal’s the National Industrial Recovery Administration assert that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”<sup>5</sup>

The representation election arose out of two specific conditions that emerged in the 1930s. First, as David Brody has argued so persuasively, the government had to do something to forestall the growth of company unionism, often called Employee Representation Plans, that flourished during the early 1930s at Bethlehem Steel, Chrysler, Goodyear and other “progressive” companies. A formal election, supervised by the government, would demonstrate the unpopularity and illegitimacy of these ERPs, and for the most part this is precisely what the representation election did when the workers got the chance to make their voice and their vote count.<sup>6</sup>

Second, the unexpected rivalry between the AFL and the CIO required some mechanism for determining which union won certification and for which group of workers. The old AFL idea of “exclusive jurisdiction” asserted that the organization of the working class was something left to the workers and their leaders alone. But now the government would play an unexpected role, to determine for example if a craft union could continue to represent skilled workers in a workplace overwhelmingly industrial and

unskilled in character. Thus as David Brody has put it, by 1940 the associational right of workers, their, “freedom of self-organization” had “fused with a specific state-mandated process for determining and certifying the bargaining agents” of those workers.<sup>7</sup>

The crucial even in the transformation of the representation election, of its movement from a mechanism internal to the life of the unions and into one whereby employers could use it as a device for blocking unionism before it got truly started, came with the development of the employer free speech doctrine, in 1947 codified by the Taft Hartley Act itself. From this point on the Board proceeded to regulate union organizing on the hypothesis that employers and unions would – and should- campaign like political candidates for the support of presumptively undecided voters.

Although the framers of the Wager Act were good liberals, influenced by the American Civil Liberties Union among others, they were also well aware that employer “free speech” was ipso facto coercive. They understood that the enormous inequality of power that existed in the unorganized workplace meant that employer efforts at verbal persuasion could hardly be divorced from the exercise of managerial authority. What an employer says, noted a spokesman for the Twentieth Century Fund, “so easily leads to what is coercion and fear.” All it takes is to “go to a man whose bread and butter is dependent on your pay envelop and suggest to him you think it would be a good thing for him to form a company union.”<sup>8</sup> Or no union...

This is why the Wagner era labor boards sought employer neutrality. Said a Brookings expert at the time: “The election was nothing with which the employer need be concerned. It was a matter in which his employees alone had a stake.” And this is why Wagner and other framers of the early labor law tried to down play the centrality of the

election: it was “nothing but an investigation, a factual determination of who are the representatives of employees.” An election in fact was not mandatory in the Wagner Act; at the discretion of the NLRB, “any other suitable method” would do.

Initially, the NLRB treated antiunion statements unequivocally as unfair labor practices. “In the final analysis, most of this propaganda, even when it contains no direct or even indirect threat, is aimed at the worker’s fear of loss of his job.” Next to actual or threatened dismissals, the NLRB considered such speech “The most common form of interference with self-organization.” Employees got the message. If you want to avoid trouble, a 1940 legal manual for the employers advised, “Stay completely neutral regarding elections.” So in 1938 and 1939 nearly a third of all union certifications occurred without an NLRB election.<sup>9</sup>

Even the Republicans who wrote the Taft-Hartley Act saw a problem in employer coercion. “The expressing of any view, argument or opinion ...shall not constitute or be evidence of an unfair labor practice under any provision of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

Thus in the late 1940s and early 1950s the NLRB tried to mandate something the board called the “laboratory conditions” doctrine. Under this “scientific” approach, the Board viewed the representation election as an “experiment,” invoking its supervisory authority over such elections to identify and cultivate optimal settings for determining the uninhibited preferences of employees.

Unions today consider it a big victory when they extract from employers a promise to be “neutral” in a representation campaign. But as Brody has pointed out, no one seems to remember that employer neutrality was once what the law itself required.

Once free choice came to be synonymous with electoral choice, it followed that employers would be seen as parties to the process, that their “free speech” rights would then prevail, and that we would end up more or less as we have, with employer domination of the representation election.<sup>10</sup>

Today proponents of the representation election analogize it to an election within the larger body politic, as in the Union Facts advertisement attacking UNITE-HERE President Bruce Raynor.

But the analogy is false.

In political life the outcome of an election is accepted by all parties within an hour or two after a decisive majority of all the votes are in hand. I hasten to add here that when this is not the case, as in Florida in 2000, the subsequent crisis is not the kind of normal politics that the U.S. political class, even that of the victors, seek to repeat. But of course, in NLRB elections balloting is often delayed and challenged, and the precise scope and inclusiveness of those eligible to vote is always up for contestation.

Next, the expansive character of the employer free speech doctrine makes certain that the playing field is hardly equal as between union challengers and managerial incumbents. In the light of these conditions, individual employees attending sophisticated captive audience speeches, or participating in one-on-one encounters with their immediate supervisors, may understandably feel intimidated if not coerced by a series of oral, written, or electronic communications linking “union presence” to reductions in force, plant closings, and unpredictable conflict and tension within the workplace.

Unlawful behavior is rife during a NLRB election campaign – here the analogy would be something close to the elections held during the Reconstruction era in the

Southern states or in contemporary Latin American countries on the brink of civil war, but the remedies for this unlawfulness are minuscule. The NLRB sometimes forces outlaw employers to pay back wages to those they have illegally fired, but the deterrent effect is minimal because the stakes are so high that violation of the law is just an expense necessary to the campaign. It is hardly surprising that 40% of all non-union, non-managerial employees believe that their own employer would fire or otherwise mistreat them if they campaigned for a union.

And of course, unlike in a political election, a union certification election is not a precursor to assuming the powers of governance; it is simply a precursor to initiating a collective bargaining process that is itself full of delay, contestation, and employer intransigence.<sup>11</sup>

Finally, those hostile to card check and other forms of “self-organization” are really hostile to the entire idea of the voluntary association, which Alex de Tocqueville, among others, saw the glory and essence of American democratic life. The trouble with authorization cards, says a spokesman for the Labor Policy Association is that they are “signed in the presence of an interested party – a pro-union co-worker or an outside union organizer – with no governmental supervision.” The issue is not that unions coerce workers, that is already prohibited by Taft-Hartley. The issue is that workers talk among themselves and with organizers without “governmental supervision.”<sup>12</sup> That is a Stalinist conception of public life, and it is how far we’ve come from Senator Wagner’s celebration of self-organization.

**What should the new Congress do?**

Barney Frank has one solution. Now the chair of House Financial Services Committee, Frank proposes a grand bargain with corporate America. The Democrats would agree to reduce regulation and support free-trade deals in exchange for business agreeing to greater wage increases and job benefits for workers.

“What I want to do is break that deadlock.” He told reporters right after the 2006 election. A lot of policies that the business community wants us to adopt for growth are now blocked. On the other hand, the business community is successfully blocking the minimum wage increase and has created a very anti union attitude in the Congress.

“What we want to do is to look at public policies that’ll get some bigger share of the increased wealth into wages and in return you’ll see Democrats as internationalists. “

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But this deal will fail because business won’t buy it. Congressman Frank may have the financial services industry on his side – little union threat here – but the Chamber of Commerce and all the labor intensive businesses are adamantly against such a bargain. Historically, corporatism in the US has rarely worked because the business community is too fragmented, and on the trade issues, so too are liberals and labor. Indeed, corporatist schemes are almost always proffered to solve not just a problem of labor or management but one of national concern as well. The classic moment for U.S. corporatism came during the first two years of the Roosevelt Administration when, under the Blue Eagle, anti-trust laws were suspended and labor got Section 7a. Then in World War II labor traded its right to strike for the de facto union shop, which generated a 50percent increase in union membership during that conflict.<sup>14</sup>

But in more recent years business has never thought the crisis, for themselves or the nation, sufficient to precipitate much interest in a corporatist bargain. Who remembers the 1970s construction trade effort to liberalize organizing and forestall an anti-union assault with a prospective bargain that would have traded a limit on building site strikes and wage increases for “Common Situs” legislation and for a grand scheme of economic development, including the unionization of a government funded coal shale industry in the Rocky Mountain West sponsored by the AFL-CIO’s Lane Kirkland and Secretaries of Labor John Dunlop and William Usery. And of more recent vintage, there was the Dunlop Commission which in the early 1990s sought to ratchet up U.S. productivity - then thought to be lagging Japan – by allowing companies to expand on their quality circle and team production initiatives, thereby circumventing labor law prohibitions against company-dominated employee organizations. In return the AFL-CIO would have gotten an easier road to organization and the elimination of some of management’s more egregious practices. But there were no takers, not even in Silicon Valley, so the Dunlop Commission was already history when the Republicans took over Congress in 1994.

### **We Need a New La Follette Committee!**

We need an ideological offensive against the anti-union right, one which puts the idea of a labor movement and workers rights at the center of American liberalism and democracy. We need a Congressional investigation which exposes and interrogates the key personnel and the key practices of the union avoidance law firms, consulting

operations, private security companies, and personnel departments to demonstrate the cynicism and illegality that are rife in this segment of corporate America.

The 110<sup>th</sup> Congress needs to reestablish, in spirit, energy and human resources, the committee once made so famous by Wisconsin Senator Robert La Follette, Jr. That was a subcommittee of the Senate Committee on Education and Labor which for four years, 1936-1940, sought to “drain the industrial swamp” by investigating “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”<sup>15</sup> We should urge Congressman George Miller of California, now chair of the House Committee on Education and Workforce, to open such a set of hearings. They should be bold, intrusive and purposeful, and back stopped by an investigative staff every bit as aggressive and committed as that which poured their energy and ideals into the committee once chaired by Senator La Follette.

And the circumstances, then and now, are not all together different. We forget that from the moment President Roosevelt signed the Wagner Act in June 1935, that law faced fierce and sustained resistance from the DuPont-General Motors-Bethlehem Steel funded and dominated Liberty League, which declared the new labor law “a serious threat to our freedom...whether we stand as employers or as employees.” A lawyer for Weirton Steel, which had already crushed organizing efforts in the 1920s and 1930s, told reporters, “When a lawyer tells a client that a law is unconstitutional it is then a nullity and he need no longer obey that law.” The NLRB chair at this time declared that “this kind of incitation to disobedience” made administration of the Wagner Act “impossible.”

So for nearly two years, the NLRB and the nascent labor movement faced judicial resistance, corporate subterfuge, and even violence, and all this before the great strike victories of Flint and Akron and the other industrial cities of the Midwest. Remember, the Supreme Court was as hostile to New Deal legislation, to mass unionism, and to federalization of labor law in those days as is the Republican-majority NLRB is today. Thus did labor partisans, academics, and journalists prod and prompt sympathetic legislators to expose the defacto negation of the Wagner Act during these early months of its existence. Heber Blankenhorn, a journalist, civil libertarian, and prominent spokesman for the rights of labor during the years after World War II had concluded that “what civil rights were won depended perhaps more on incessant talking about them in the papers than on arguing in court.” Blankenhorn and other like minded people approached several senators, including Robert Wagner and Hugo Black, urging them to open a high profile investigation. They demurred, in part on the grounds that a law had been passed, so the courts and the government would enforce it. But Robert LaFollette, Jr. of the storied, activist Wisconsin political tribe was ready. His Senate Resolution 266, offered in the fall of 1935 proposed “to make an investigation of violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.” The key thing here is a linkage between the rights of labor and the abridgement of free speech and assembly. It was the La Follette *Civil Liberties* Committee

Labor organizers and advocates supplied LaFollette with hundreds of stories and narratives of the illegal and autocratic resistance mounted by the nation’s big corporations to the new labor law and the men and women who sought to use it.

Blankenhorn and Clinton Golden of the new Steel Workers Organizing Committee supplied La Follette with a list of more than 200 espionage and strike breaking agencies whose activities had come to their attention over the previous 20 years. Many had been known to the experts and resented by industrial workers, but as Blankenhorn told the Senator La Follette, “Moral indignation is no good. Mere indignation has expressed itself for many years...Investigation is urgently needed.”<sup>17</sup> Thus did a staff member write a sympathetic congressman, “I really believe that today we are the most powerful agency in this country against Fascism”<sup>18</sup>

Over the last several decades labor and its liberal allies may have grown too cautious about what can be expected from congressional investigations. From era of Joe McCarthy on such probes have more often than not been used to tar and denigrate trade unionism and its proponents, either because they are Communists, mafia-connected, or merely self-interested. The McClellan Committee in 1957-58 was ostensibly about malfeasance in the Teamsters union, but before it was over Senator Barry Goldwater had defined union corruption so broadly that it encompassed the use of dues money in political campaigns, industry-wide collective bargaining, as well as picket line violence and moral suasion. Even clean-as-a whistle Walter Reuther was tarred with this brush.

But today the times are right for something quite different, and to put it frankly, a congressman like George Miller is likely to be a lot more sympathetic to labor’s aspirations than John McClellan of Louisiana or even John F. Kennedy, a fellow member of the McClellan Committee, who then took for granted labor’s power and influence.

A new La Follette Committee would be able to draw on a generation of research and experience by labor activists and their allies in order to put before the Congress and

the American people the obstacles and money and organization that have stymied union organization during the last several decades.

Just as the La Follette Committee of 1936 investigated the strike breaking agencies, the arms suppliers, and the labor spy rackets at General Motors, Republic Steel, and in California agriculture, so too could the Committee on Education and Workforce use its subpoena power to unearth the way that key U.S. companies, Wal-Mart, Smithfield Meatpacking, Fed Ex, and Peabody Coal, first among them, and key law firms, including Jackson Lewis, Seyfarth Shaw, and the Burke Group, have abused and violated the law to deny workers their right to self organization.

Take Wal-Mart for example. There have been numerous studies, using the best available public information, surveying Wal-Mart's wages and health care polices, but what we need is a high profile probe into how and why that company deprives its own workers not only of the right to organize, but of workers compensation benefits, of over time pay, of lunch breaks, and promotion opportunities. A new La Follette committee will have a lot to work with. The Dukes v Wal-Mart gender discrimination suit has already unearthed a wealth of data on the company's employment practices. A Human Rights Watch report on Wal-Mart's abridgement of the labor law, especially that concerning the right to self-organization is due out in February, and there are hundreds of attorneys and thousands of litigants who are either suing the company or who are ready to speak out. In Bentonville, Arkansas, Wal-Mart's home turf, there are scores of former Wal-Mart executives who have quite a bit to say about the corporation's present and past transgressions. Some are illegal, others are not, but even where the company fails to break the law, it relentlessly squeezes workers, suppliers, communities, even state and

federal agencies, so as to externalize so many of its costs of doing business and thwart the New Deal/Great Society laws designed to shield its employees and sustain their dignity.

The La Follette Committee investigations of the late 1930s did not generate any new legislation, but that heroic enterprise did something even better: it helped transform our understanding of the rights held by American workers, of their civil liberties and civil rights, whether they be exercised by individuals or in the collective. A 21<sup>st</sup> century renewal of the spirit that infused that crusading committee could once again demonstrate to the public and to the Congress what constitutes a genuine effort to defend the rights of American workers and what represents a cynical corporate subversion of that union-building liberty. And should such a transformation take place, then the Employee Free Choice Act will be seen by all as but a modest, necessary first step in the reconstitution of freedom and dignity in the American workplace.

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<sup>1</sup> Center for Union Facts, “When Voting Isn’t Private: The Union Campaign Against Secret Ballot Elections,” p. 4, at [www.unionfacts.com](http://www.unionfacts.com).

<sup>2</sup> HR Policy Association, “Mistitled ‘Employ Free Choice Act’ Would Strip Workers of Secret Ballot in Union Representation Elections,” p. 2, at [www.hrpolicy.org/memoranda/2006](http://www.hrpolicy.org/memoranda/2006).

<sup>3</sup> Bruce Raynor, “Losing by Winning: What One NLRB Case the Year Tells Us About Our Broker Collective Bargaining laws,” *The American Prospect On-Line Edition*, December 21, 2006 at [www.prospect.org](http://www.prospect.org)

<sup>4</sup> For a larger discussion of this perspective see Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002), p. 36 where Leiserson is quoted.

<sup>5</sup> As quoted in David Brody, “On the Representation Election,” in Brody, *Labor Embattled: History, Power, Rights* (Urbana: University of Illinois Press, 2005), p. 100.

<sup>6</sup> *Ibid.*, 101-102.

<sup>7</sup> *Ibid.*, 102.

<sup>8</sup> *Ibid.*, 102.

<sup>9</sup> *Ibid.*, 102-103

<sup>10</sup> *Ibid.*, 107-108.

<sup>11</sup> James Brudney, “Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms,” *Iowa Law Review*, vol 90, (2005), 868-873.

<sup>12</sup> Brody, “labor’s Rights: Finding a Way,” in *Labor Embattled*, p. 153.

<sup>13</sup> Michael Kranish and Ross Kerber, “Rep. Frank Offers Business a ‘Grand Bargain,’” *Boston Globe*, November 19, 2006.

<sup>14</sup> For the complex politics of this bargain see Nelson Lichtenstein, *Labor’s War at Home: the CIO in World War II*, (Philadelphia: Temple University Press, 2003).

<sup>15</sup> My discussion of the La Follette Committee relies heavily upon the excellent history, Jerold S. Auerbach, *Labor and Liberty: The La Follette Committee & the New Deal* (Indianapolis: Bobbs-Merrill Company, 1966).

<sup>16</sup> *Ibid.*, 55.

<sup>17</sup> *Ibid.*, 66.

<sup>18</sup> *Ibid.*, 86.