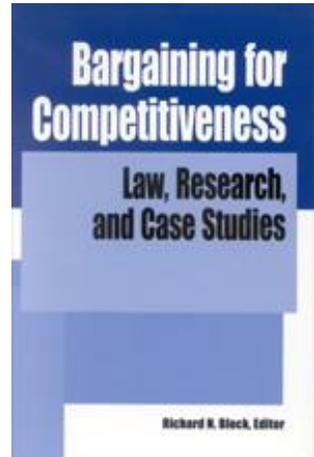

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Richard N. Block
Michigan State University



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2

Competitiveness and Employment Protection and Creation

An Overview of Collective Bargaining in the United States

Richard N. Block
Michigan State University

A discussion of the relationship between collective bargaining, competitiveness, and employment protection and creation in the United States can be undertaken only in the context of a thorough understanding of the institutions governing and affecting the collective bargaining in the United States. There is no actor, institution, or subsystem in the United States that encourages the collective bargaining system to be used for those—or any—purposes. Public policy in the United States neither encourages nor discourages collective bargaining as a method of establishing terms and conditions of employment. Rather, public policy is designed to protect the choice of employees as to whether they wish to be represented by a union or labor organization for the purposes of collective bargaining.¹

When employees are represented for collective bargaining purposes by a union, there is no government involvement in establishing the outcomes of bargaining. As a result, the major characteristic of the U.S. collective bargaining system is variation. From the viewpoint of firms, competitiveness can be obtained through collective bargaining or through other mechanisms. Put differently, there may be multiple paths to competitiveness for a firm, and the collective bargaining system is but one of those paths.

The main purpose of this overview is to explore the nature of the collective bargaining environment in the United States as it relates to the use of the collective bargaining system for encouraging competitiveness and employment protection/creation. To that end, the next sec-

tion will explore that environment. The third section will present a brief overview of some of the literature on the incidence of the use of the collective bargaining system in the United States as a vehicle for competitiveness and employment protection/creation. The final section will present a summary and conclusions.

THE ENVIRONMENT FOR COLLECTIVE BARGAINING, COMPETITIVENESS, AND EMPLOYMENT PROTECTION/CREATION

Collective bargaining by individual firms and unions, which affects competitiveness and employment protection/creation, is heavily influenced by the environments in which the labor relations system must exist. Indeed, there are several environments that exert an impact on the relationship between collective bargaining for competitiveness and employment protection/creation. These environments associated with collective bargaining include the legal, political, institutional, and economic. Each of these will be examined.

The Legal Environment

By far the most important influence on the collective bargaining system in the United States is the law; in this case, the National Labor Relations Act (NLRA) as amended in 1947 and then again in 1959. The law establishes the overall framework for the collective bargaining system in the United States. The influence and reach of the law derives from the fact that it is accessible, covers almost all firms in the private sector outside of the railroad and airline industries, and is public. The law's accessibility means that all have access to its process. Its broad coverage results in a broad application, and its public nature means that the decisions that emanate from it are known by the labor relations community and can be used to influence other decisions and shape new legal arguments. Therefore, parties acting through their attorneys have a common information base on what is illegal, what is legal, and what is debatable.

The law establishes the basic structure for collective bargaining, the procedural obligations of parties to negotiate, and the matters about which they must negotiate. Equally important, it establishes the parameters within which government may intercede in the bargaining process to encourage the parties to negotiate substantive terms or conditions of employment, such as those that influence competitiveness and employment protection/creation.

Historical Overview of Labor Law in the United States

The basic legislation governing labor relations in the United States, the NLRA, was enacted in 1935. Although the purposes of the act have been the subject of much debate (Keyserling 1945; Millis and Brown 1950; Block 1995, 1997), one obvious reason for the passage of the law was to create an orderly process for determining whether a group of employees wished to be represented by a union for collective purposes.

An important assumption underlying the U.S. industrial relations system was reflected in this basic purpose. Employees would only be represented by a union if they wished to be so represented. Collective bargaining and union representation were not presumed to be the method by which terms and conditions of employment were normally established. Rather, such terms and conditions of employment were normally established by the employer unilaterally or by individual employer negotiation with employees.

The 1935 act also established the concept of a *bargaining unit*. The National Labor Relations Board (NLRB), the agency established to administer the NLRA, was given the responsibility to determine if any unit (such as a group of employees) was appropriate for bargaining, and if so, whether the employees in that unit desire representation. A bargaining unit could only be an “employer unit, craft unit, plant unit, or subdivision thereof” (NLRA, Sec. 9(a)). In order to be considered appropriate, the employees being considered for union representation were required to have a “community of interest,” common employment interests such as similar wage structure, similar tasks, and similar supervision.

In its early years, the NLRB used card checks to determine if the employees in an appropriate bargaining unit desired union representation. The board agent would match signed union cards to a list of

employees provided by the employer. By the early 1940s, the board had established the representation election as the preferred method of determining representation (Millis and Brown 1950). Thus, by the early 1940s, the bargaining unit could accurately be labeled an *election unit*, which would be a bargaining unit only if the employees in that unit chose a union to represent them for collective purposes.

Union representation would exist only if a majority of the employees desired to be so represented. Moreover, as the law would later evolve, it would also be determined that the desire for unionization must be continuing. Thus, if a majority of the employees in a bargaining unit at some point decided that they no longer wished union representation, such representation would be ended.

The result is that the legal structure in the United States creates a unit-by-unit, workplace-by-workplace process for unionization and, as will be seen, for bargaining. Moreover, once union representation is established in a unit, the employer has an obligation to bargain only with the union representing the employees in that unit. There is no obligation to bargain with any other union or labor organization for employees not in that unit, and the union or labor organization may not negotiate for employees who are outside that unit unless those other employees are represented by a union and agree to so negotiate, the employees are added (accreted) to the existing bargaining unit through a legal proceeding, or the employer agrees to negotiate with an existing union for those employees and, if challenged, all legal standards for unit accretion are met.

The NLRA was extensively amended in 1947 via the Taft-Hartley Act. For the purpose of this study, the 1947 amendments changed the 1935 law in three key ways. First, the 1947 amendments established the representation election as the preferred method of determining whether a unit of employees wished to be represented by a union. Consistent with this preference, card checks would only be used under extraordinary circumstances, such as when a fair election was impossible due to the employer's extensive unfair labor practices (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 [1969]). Second, the 1947 amendments gave employers rights of free speech. Thereafter, employer expressions of sentiment against unionization would not be viewed as unlawful unless accompanied by a direct or implied threat of job loss or promise of benefit. Third, the Taft-Hartley amendments refined the

obligation of the employer to bargain with the union by providing that the parties were required to meet at reasonable times and to discuss matters related to terms and conditions of employment. On the other hand, the amendment provided that neither party had an obligation to agree to any proposal. As will be discussed below, these three changes would have an impact on bargaining for competitiveness and employment protection/creation (Millis and Brown 1950; Block, Beck, and Kruger 1996).

Lesser amendments to the NLRA were enacted in 1958 and 1974. The 1958 amendments are relevant to this study only to the extent that they placed some limitations on the rights of unions to engage in recognized organizational picketing. The 1974 amendments brought employees of nonprofit, private health care institutions under the NLRA.²

Law and Bargaining Structure

One result of the system of establishing union representation on a unit-by-unit basis is the absence of an overarching structure for collective bargaining. Because the legal bargaining units are the basic building blocks of the collective bargaining system, the result has been the creation of a highly decentralized system of collective bargaining in the United States based on the plant-by-plant, unit-by-unit certification process. Each legal bargaining unit negotiates terms and conditions of employment only for those employees in the bargaining unit unless all affected parties explicitly and unambiguously agree to a more inclusive bargaining structure. Even when such an inclusive bargaining structure exists, any or all parties can leave the multiemployer or multiunion structure at the termination of the collective agreement (Evening News Association 1965; Detroit Newspaper Agency 1998).

This unit-by-unit system of establishing bargaining is important to the relationship between collective bargaining, competitiveness, and employment protection/creation because it creates a system under which employers have substantial flexibility and discretion in making decisions regarding competitiveness. The unit-by-unit representation system and the default system of “no union” means that there is no necessary relationship between unionization in the facilities of a firm. The mere fact that one facility of an employer is unionized does not mean that other facilities of the employer are unionized. This occurs because

in most cases, the bargaining or election unit is the plant/facility or subdivision thereof. Many firms have both unionized and nonunion facilities, and some firms have facilities represented by different unions. On occasion, more than one union may represent different classifications of employees in one facility.

This system gives many employers competitiveness options away from the union in addition to negotiating with the union. Alternatively, multiple unions within a firm raise the possibility of employer use of coercive comparisons, comparing the willingness of one union or local to compromise with the willingness of other unions or locals to compromise. These options can provide employers with a disincentive to compromise with unions during negotiations on matters that might be thought to enhance competitiveness and employment protection. In the alternative, these options can provide employers with leverage during negotiations. Such leverage makes it less likely than otherwise that direct employment protection or creation that would normally benefit unions will be incorporated into collective agreements. At the same time, such a situation can also provide unions with leverage over employers where the union has organized a key facility.

In general, however, cooperation occurs only if both parties are interested in cooperation. On the other hand, if one party is uninterested in cooperation, the legal system will not encourage it—in fact, it will resist it.

Law and the Bargaining Process

A central premise of collective bargaining law in the United States is government noninterference in the bargaining process. The law does require both parties to bargain in “good faith.” But, as amended in 1947, the NLRA explicitly states that the obligation to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession” (NLRA as amended, Section 8(d)). As the U.S. Supreme Court noted in a key 1960 decision, commenting on the 1947 debate around legislation that would clarify the obligation to bargain in the 1935 law:

the nature of the duty to bargain in good faith thus imposed upon employers . . . was not sweepingly conceived. The Chairman of the Senate Committee declared: “When the employees have chosen their organization, when they have selected their representa-

tives, all the bill proposes to do is to escort them to the door of their employer and say, ‘Here they are, the legal representatives of your employees.’ What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.”

The limitation implied by the last sentence has not been in practice maintained – practically, it could hardly have been – but the underlying purpose of the remark has remained the most basic purpose of the statutory provision . . . Congress was generally not concerned with the substantive terms on which the parties contracted. (*NLRB v. Insurance Agents International Union*, 361 U.S. 477 [1960, 484–487])

Legislation passed in 1947 is equally clear regarding what the parties are obligated to do in bargaining, and what they are not obligated to do.

To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. (NLRA, Section 8d)

United States labor law does not require either party to agree to any proposal made by the other party, including any matter regarding competitiveness and employment protection/creation. Labor law only requires each party to negotiate in good faith over matters involving terms and conditions of employment, so that parties must discuss employment protection and competitiveness, at least to the extent that competitiveness is germane to terms and conditions of employment.

Thus, labor law in the United States enables the parties to use collective bargaining to agree on issues relating to competitiveness and employment protection/creation, but only if both wish to do so. Equally important, it also enables either party not to address these issues, if that party believes that it will be better off by declining to agree, provided that the party negotiates in good faith. The NLRA is indifferent to the bargaining outcomes on matters of employment pro-

tection and competitiveness, just as it is indifferent to the outcomes on any other specific issue.

In addition to this laissez-faire approach to the subjects of bargaining, labor law provides parties a wide range of weapons to pursue their self-interest. As the Supreme Court noted:

(I) It must be realized that collective bargaining, under a system where the government does not attempt to control the results of negotiations . . . The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft–Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms—exist side by side. (*NLRB v. Insurance Agents International Union*, 361 U.S. [1960, 488–489])

This panoply of economic weapons includes strikes by unions, and lockouts and the use permanent replacements by employers (*NLRB v. MacKay Radio and Telegraph Co.*, 304 U.S. 477 [1938]; *American Shipbuilding v. NLRB*, 380 U.S. 300 [1965]; *TWA v. Independent Federation of Flight Attendants*, 489 U.S. 426 [1989]). Unions can only obtain employment protection when employers see it as in their interest to grant it, or when they are able to extract it by force. Thus, if one party wishes to resist the use of the collective bargaining process to encourage competitiveness and employment protection/creation, the law permits that party to use the weapons to do so.

Law and the Obligation to Bargain over Substantive Matters

The NLRA as amended requires employers and unions to bargain in good faith over matters involving wages, hours, and other terms and conditions of employment. In 1958, the U.S. Supreme Court decided that neither party had an obligation to bargain over matters not relating to terms or conditions of employment (*NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 [1958]). In this case, the Court created implicitly three categories of subjects: mandatory, permissive, and unlawful. Mandatory subjects were those relating to terms and conditions of employment that the parties were required to discuss, although there was no obligation to agree. Permissive subjects were those that the parties could discuss if both parties so desired; however, neither party was under an obligation to discuss them. Unlawful subjects were not permitted to be discussed or incorporated into a collective agreement. A later decision by a lower court, permitted to stand by the Supreme Court, reinforced the distinction between mandatory and permissive subjects of bargaining by holding that one party could not force another party to negotiate over a nonmandatory item by withholding agreement on a mandatory item subject to agreement on the nonmandatory item. (*International Union of Marine Workers v. NLRB*, 320 F.2d 615, 3rd cir.; [1963])

The importance of these decisions soon became clear. Employers need only bargain over matters involving terms and conditions of employment, which, in turn, meant that they could act unilaterally in matters not involving terms and conditions of employment. There ensued extensive litigation over the type of decisions that would be considered terms and conditions of employment (*NLRB v. Adams Dairy, Inc.* 350 F.2d 108 [CA 8; 1965]; *NLRB v. Royal Plating and Polishing Co.* 350 F.2d 191 [CA 3; 1965]; *First National Maintenance Corp. v. NLRB* 452 U.S. 668 [1981]). To the extent that employers were able to use the legal system to remove matters from the category “terms and conditions of employment,” their flexibility would be substantially enhanced, and they could make decisions without negotiating with a union about those decisions. On the other hand, if a matter was determined to be a “term or condition of employment,” employers were required to negotiate with the union over decisions involving those matters.

The most heated legal battles were fought over decisions that were traditionally considered in the United States to be the prerogative of management, but that also had an effect on employment. In the first key post-*Borg-Warner* case, *Fibreboard v. NLRB*, 379 U.S. 203 (1964), the Supreme Court determined that the employer's decision to contract out its maintenance work that had previously been done by bargaining unit employees was a mandatory subject of bargaining. In this case, the firm had replaced its unionized employees with those of a contractor. The company had determined that it cost less to have the maintenance work done by a contractor than the bargaining unit employees, and the employer believed that the union would not agree to a contract that resulted in reduced cost.

The Court agreed with the board that this subcontracting was merely the replacement of one group of employees with another based solely on labor cost. Both groups of employees would be doing precisely the same work, under the same conditions, with the same tools. It was a mere replacement of one group of employees for another. In deciding this case, however, the Court also observed:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. (379 U.S. 203, 210)

This last sentence seemed to suggest that any employer decision that resulted in the termination of employment was a mandatory subject of bargaining. On the other hand, the facts of *Fibreboard* were sufficiently narrow as to generate legal doubt regarding whether that last statement applied to any employer decision, or only to contracting out decisions similar to that taken in *Fibreboard*, the mere replacement of one group of employees with another group, with the decision to replace based solely on labor costs.

Seventeen years later, the Supreme Court appeared to adopt a position opposite to *Fibreboard* in *First National Maintenance Corporation v. NLRB*. In that case, the employer, who provided cleaning and

maintenance services for commercial customers, refused to bargain with its unionized employees about a decision to withdraw from a contract at Greenpark, a nursing home. The dispute with Greenpark was solely over the size of the fee that First National Maintenance would receive. In deciding that the employer had no obligation to bargain over the decision to withdraw from its Greenpark contract, the Court observed:

In establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place: . . .

(The Employer) contends it had no duty to bargain about its decision to terminate its operations at Greenpark. This contention requires that we determine whether the decision itself should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment. The aim of . . . labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace," . . . The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole . . . This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process . . . to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the

continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business. (452 U.S. 666, 674–679)

In other words, if the employer believed that its competitive interests, the conduct of business, would be impaired by a requirement that it must bargain with the union over the decision, and it prevailed in the legal system, there would be no bargaining obligation. In the *First National Maintenance* view of bargaining, collective bargaining is not necessarily a vehicle that can be used by a firm to attain competitiveness. Bargaining is just as frequently a barrier to firm competitiveness. In this view, competitiveness is solely a management interest, rather than a joint interest of management and the union.

In deciding *First National Maintenance*, the Court determined that all management decisions could be characterized as one of three types with respect to bargaining: type I, decisions that had a substantial effect on the employer but only a minimal effect or indirect effect on the employment interests of employees (e.g., pricing, financing, advertising); type II, decisions that affected solely employment (e.g., wages, working hours, benefits); and type III, decisions that had a substantial effect on employment and on the employer (e.g., investment, production process, work location, product elimination). Type I decisions were part of the inherent freedom on the part of management to manage its affairs unrelated to employment, and there was no obligation on the part of the management to bargain over these decisions; type II decisions carried a bargaining obligation; and type III decisions were the difficult ones. Those were the ones in which the board would be required to determine whether the benefits from bargaining outweighed the costs the bargaining obligation placed on management in the conduct of its business (*First National Maintenance v. NLRB*). These decisions would also be the ones that would most likely directly affect competitiveness and employment protection/creation.

Like *Fibreboard*, *First National Maintenance* was a case involving a narrow set of facts wrapped in broad language. In *Fibreboard*, the Court found that the employer's decision to subcontract the work done by the unionized employees was based solely on labor costs, and found that the employer was obligated to bargain over the decision. On the other hand, in *First National Maintenance*, the Court found that the

employer's decision to terminate its maintenance and cleaning contract with the nursing home had nothing to do with labor costs; therefore, the employer was not obligated to bargain with the union over the decision.

The question then became one of interpretation. Under what circumstances would the benefits to collective bargaining outweigh the burdens placed on the conduct of business so that bargaining would be required? Did the circumstances of a particular case bring it closer to *Fibreboard*, with its bargaining requirement, or to *First National Maintenance*, with no bargaining requirement? Ten years after *First National Maintenance*, the NLRB answered this question in *Dubuque Packing Company*, 303 NLRB No. 66, 1991 (enf 'd 143 LRRM 301 [DC Cir., 1993]). In this case, the employer, a meatpacking firm, moved its hog kill operation from a location in Iowa to a location in Illinois. The question in the case was whether the employer had an obligation to bargain over this change. The Court distinguished between an employer decision that resulted in a basic change in the nature of the business, and one that did not result in such a change. The former decision would not trigger a bargaining obligation, but the latter would.

The Court decided that the employer decision in *Dubuque* was not a basic change in the nature of the business because it was a decision to relocate existing work rather than a change in the nature of the work the firm was doing. It was a decision regarding *where* the firm should be in a business (in this case, hog killing), not whether it *should* be in a business. It was not new work that the firm was undertaking, nor was the work being done in a new and different way. Moreover, the Court found that labor costs were a factor in the decision to move; therefore, bargaining could possibly have influenced the company's decision to relocate the work.

The foregoing discussion indicates that changes in capital structure or product mix of the firm that were made for the purpose of increasing firm competitiveness were generally not considered to be negotiable items with the union, even if such changes resulted in employment reductions. In such circumstances, the law permitted a decoupling of employer concerns with competitiveness and union concerns with job protection and creation. The law regarding the obligation to bargain permits employers who so choose to avoid discussions with a union

representing their employees by stating that the decisions are type I decisions or type III decisions, which are basic changes in the nature of the business. Disagreements are resolved before the NLRB, resulting in litigation rather than negotiation.

The result of all this is that the law in the United States does not encourage companies and unions to negotiate over matters relating to competitiveness and job protection/creation. The focus of the law is not on problem solving or on linking the issues of competitiveness and job security. Rather, the focus is on the individual employer decision and whether or not the employer has the right to make that decision without negotiating with the union about it. Bargaining over competitiveness and employment protection/creation does occur, but not because the law encourages it—it occurs because both parties want it to, or because the employer believes that it cannot make a sufficiently strong case before the NLRB and the courts to avoid bargaining with the union.

The Political Environment

There is little government involvement in the bargaining process, which is indicated by the language quoted earlier from the insurance agents case. The Taft-Hartley Act (1947) has created the Federal Mediation and Conciliation Service (FMCS), and most states have created comparable agencies. Among the missions of the FMCS and the state agencies is the encouragement of labor and management to resolve their disputes. In addition, the FMCS provides training and other expert support for parties that wish to move toward a cooperative relationship (Block, Beck, and Kruger 1996). There is also a legal requirement in the NLRA that the FMCS and the state agency be notified if there is a labor dispute that has not resulted in an agreement. Although the FMCS and/or the state agency may contact the parties and offer their services, there is no legal requirement that the parties avail themselves of these services; they are completely voluntary. Indeed, if only one party declines to use the services, then the FMCS/state agency has no role.

This minimalist government involvement in bargaining in the United States may be contrasted with the situation in Canada, its largest trading partner. While Canadian provinces have extensive requirements for governmental mediation and conciliation before a work

stoppage may be commenced, the United States has no requirements (outside railroads and airlines) for prestrike or prelockout governmental intervention in the absence of a national emergency. Thus, there is no requirement for a neutral, ameliorative influence in negotiations that may encourage otherwise recalcitrant parties to consider jointly addressing competitiveness and employment protection/creation (Block 1997).

The Institutional Environment

Just as there is no centralized corporatist structure in the United States to encourage the use of the collective bargaining systems for competitiveness and employment protection and creation, there is nothing in the institutional environment that encourages such a result. The two major actors, employers and unions, operate within decentralized internal systems. Each of the actors addresses its own internal interests in collective bargaining. The result is additional impetus for decentralization and variation in collective bargaining outcomes.

Employer Institutions

In the United States, there are no overarching employer institutions that can implement or encourage on a broad-based scale the use of collective bargaining for encouraging competitiveness and employment protection/creation. Consistent with the principle of decentralized collective bargaining, and in contrast to some other industrialized countries (Sisson 1987; Pellegrini 1998; Furstenberg 1998; Hammerstrom and Nilsson 1998), employers in the United States generally do not form coalitions or work collectively to bargain with unions at all, much less to encourage the use of the collective bargaining system as a vehicle for competitiveness and employment protection/creation. The structure of the system is that each employer makes a decision on the matter that it believes is in its best interest.³ Employers in the United States are competitive firms first and employers second. They often use their labor relations systems as a vehicle for competitive advantage vis-à-vis other firms. Thus, if they believe that collective bargaining can be used to enhance competitiveness, they will so use it. On the other hand, if employers believe that collective bargaining makes it more difficult than otherwise to be competitive, they will resist collective bargaining.

Similarly, there is no employer institution that encourages the use of collective bargaining for employment protection.

The employer institutions that do exist, such as the Labor Policy Association, are primarily political lobbying organizations that disseminate information to the public and policymakers and support a point of view on labor and employment policy issues. The Labor Policy Association describes itself as “the nation’s leading public policy association of senior human resource executives, representing more than 250 major corporations doing business in the United States.” Among the items on its agenda is “to encourage legislative and regulatory bodies to improve labor and employment policies in order to enhance the competitiveness of companies doing business in the United States and enable employee friendly workplace practices” (Labor Policy Association 2001). Other organizations aim to keep labor relations and human resources management practitioners up to date. The Employment Policy Foundation, for example, is a “research and education foundation that promotes sound employment policy.” It is supported by over 130 leading companies. Similarly, the Society for Human Resource Management is an information and educational organization.

Union Structures

Just as there is decentralization among employers, there is also decentralization among unions. The American Federation of Labor (AFL), established in 1881 as Federation of Unions, was established on the principle of international union autonomy in collective bargaining (Brooks 1971). Although the Congress of Industrial Organizations (CIO), established in 1938, was generally more centralized than the rival AFL, it too left collective bargaining to the affiliate organizations (Bernstein 1969). This principle was maintained when the two organizations merged in 1955 to form the AFL-CIO, and it continues in existence today. Thus, just as there is no centralized system or structure to encourage employers to move toward, there is no structure to encourage unions to consider the use of collective bargaining for competitiveness.

The level of the national (or international)⁴ union in the United States represents a mixture of union structures and centralization and decentralization. The structural characteristic common to almost all unions in the United States is a local union chartered by the national

union. Thus, at first blush, one might think that the local union is under the control of the national union, which could be a force for encouraging locals to use collective bargaining as a vehicle for competitiveness.

On the other hand, it is also true that there is wide variation in the nature of the relationship between local unions and the parent national, and the amount of autonomy the local has in collective bargaining. In general, when the negotiations of one local of a national union appear to affect the interests of another local of a national union, the national union will attempt to exert some control over the local collective bargaining activities. In addition, most national unions retain the right in their constitutions to approve collective agreements negotiated by their local unions. This provides the national with some ultimate control over the outcomes of bargaining (Fiorito, Gramm, and Hendricks 1991).

Thus, locals that negotiate for only one employer may have an interest in negotiating for increased competitiveness for that employer. Such impetus, however, must come from the local itself. The national union is not likely to encourage it. Whether the national union discourages it depends on whether the national perceives that a contract places other locals at a disadvantage.

Where multiple locals of the same union negotiate with the same employer, the national union will normally create a structure to develop common bargaining proposals. Such a structure can facilitate the use of collective bargaining to the extent the locals have an interest in doing so. Such a structure usually results in a multiplant, multilocal agreement covering wages, hours, and terms and conditions of employment. It may also create structures that encourage competitiveness, such as in the GM-UAW national agreement. Similarly, in the Alcoa case, we see the national union agreeing with corporate leadership on a partnership agreement.

Such bargaining structures must be implemented at the plant and local level. This may be done through a separate plant agreement, as in the GM-UAW case, or by administration of the master agreement, as in the Alcoa-Steelworkers case. The major concern of the international is that the local does not gain work at the expense of the other locals by a reduction of standards. In the absence of such a concern, the national union will generally provide the locals with autonomy.

Joint and Governmental Structures

There is only one formal overarching joint or governmental structure that encourages the parties to use collective bargaining to encourage competitiveness and employment protection/creation. The Collective Bargaining Forum was established in 1984 by a group of corporate chief executive officers and presidents of international unions under the auspices of the United States Department of Labor. Its purpose was to “address the role of collective bargaining in helping the United States maintain a rising standard of living in an increasingly competitive world economy” (Collective Bargaining Forum 1988). In April 1999, the forum issued a report entitled *Principles for New Employment Relationships*, which continued the theme of the importance of collective bargaining and mutual respect between employers and unions. Among the principles to which the report urged adherence were:

acceptance in practice by union leaders and members of their responsibility to work with management to improve the economic performance of their enterprises in ways that serve the interests of workers, consumers, shareholders, and society and acceptance by corporations of employment security, the continuity of employment for its workforce, as a major policy objective that will figure as importantly in the planning process as product development, marketing, and capital requirements. (Collective Bargaining Forum 1999)

This report was announced by the vice president of the United States at a White House ceremony. It is noteworthy, however, that the president of the National Association of Manufacturers (NAM), a member of the forum, did not sign the report (Collective Bargaining Forum 1999).

This discussion indicates the extent of decentralization in the U.S. industrial relations system, both among the actors and between the actors and government (Collective Bargaining Forum 1999). That the NAM president chose not to sign the report, although his management colleagues were willing to do so, suggests that while executives of individual firms were willing to sign, the representative of a broad cross-section of industry was unwilling to agree to such principles on behalf of his constituency. This was the case even with the prestige of a

vice-presidential announcement. Again, this reinforces the principle that such overarching structures can do nothing more in the United States than publicize the view that companies and unions should use the collective bargaining process to enhance competitiveness and employment protection/creation.

The Economic Environment

Economic policy in the United States over the last 20 years has generally taken a *laissez-faire* approach to employment and competitiveness. There has been little direct intervention in the marketplace to affect either of these. Rather, U.S. economic policy has been based on the principle that markets should be permitted to work, and that firms in general should be unconstrained in their options to allocate resources to their most productive uses, with a corresponding maximization of shareholder wealth.

Monetary policy has been based on limiting inflation, enhancing the operation of the market by reducing an important source of uncertainty. Concerns about job security have helped to restrain wage increases and, therefore, inflation (Board of Governors of the Federal Reserve System 1997).

Fiscal policy has been generally non-existent. For much of the last 20 years, taxes and government spending have been part of an ideological and political debate rather than an economic debate. This ideological/political debate is an aspect of a broader debate in the United States over the wisdom of government involvement in the economy.

Trade policy has advocated open markets and the reduction of barriers in the United States and among its trading partners (U.S. Trade Representative, Office of, 1999). It is true that the U.S. government will act, at times, to support domestic industries, such as the steel industry, that can persuade policymakers that it may be the victim of unfair trade practices by foreign competitors. Thus, the government has on occasion advocated for protection based on the position that an industry has been victimized by unfair trade practices (Lucentini 1999). But the general thrust of U.S. economic policy has been to open its markets and to expect other countries to do the same (U.S. Trade Representative, Office of, 1999).

The impact of such economic policies on collective bargaining in the United States can best be characterized as reinforcing the variation

that exists in law and the decentralization that the actors have helped to create. The market approach of the U.S. economic policy has encouraged firms to respond to the economic environment by following strategies that are viewed as being in the best interests of the individual shareholders of the firm. These responses are individualistic and firm specific rather than coordinated among firms. The individual collective bargaining system of each firm has been forced to adjust to these firm strategies enabled by U.S. economic policies.

The foregoing discussion raises an obvious question: given the absence of systemic encouragement in the United States of the use of the collective bargaining system for competitiveness and employment protection, how frequently is the collective bargaining system used? While there have been case studies and anecdotal information regarding the relationship, they do not address the more general question of incidence.

Despite the absence of a broad-based data set on the incidence of innovations, there has been work that attempted to estimate the frequency of such innovations. Summarizing studies published in the 1980s Voos and Eaton (1992) observed that the evidence suggested that up to 65 percent of unionized firms in the surveys examined had created some form of innovation that could be considered to have a competitiveness-based rationale. The most frequent innovations were information sharing and employee surveys, at over 60 percent of the surveyed unionized firms. Fifty-one percent of the firms and unions in one survey had created quality circles, 29–46 percent had instituted some profit sharing, and 40 percent had established at least one participatory program. Reanalyzing data from a survey done by the U.S. General Accounting Office, Voos and Eaton determined that some form of participation was occurring in 79 percent of the unionized firms. Gain sharing was the least frequent innovation, occurring in 33 percent of the surveyed firms.

A different view of the frequency of use of collective bargaining as a vehicle for encouraging competitiveness and employment protection/creation can be obtained by examining a volume published by the Industrial Relations Research Association (Voos 1994). This book examined collective bargaining in the 1980s and early 1990s in many of the unionized industries in the United States that have been affected by global competition and domestic market deregulation. Among the

industries examined were paper, meatpacking, aerospace, steel, auto assembly, auto parts, trucking, telecommunications, and textile. A summary of the findings of these industry studies will provide some rough sense of the frequency of the use of collective bargaining as a vehicle for competitiveness and employment protection/creation. In a sense, the findings of this study would represent a lower bound on the incidence of the use of collective bargaining, because its researchers focused primarily on the large unionized firms and because the studies were not designed to examine the phenomenon. Thus, absence of a discussion of the use of collective bargaining for purposes of competitiveness and employment protection/creation does not necessarily mean that it was not so used in that industry. It is possible that the researcher simply did not address it. Nevertheless, the studies in this volume provide useful data.

Table 2.1 presents a summary of the results of the studies in the volume. The left-hand column displays the processes by which the outcomes were obtained, the outcomes in the form of shop floor changes, and the contexts/environments in which these outcomes occurred. An outcome was considered to have occurred if it appeared in one of the major firms in the industry.

The great diversity in U.S. collective bargaining has been documented elsewhere (Block, Beck, and Kruger 1996), and this diversity is evident in analyzing the incidence of the use of collective bargaining as a vehicle for addressing issues of competitiveness and job protection/creation. In some industries, the collective bargaining system has been used a great deal to address these problems; in others, less so. Paper, steel, aerospace, auto assembly, and telecommunications have all used the collective bargaining system as a vehicle for increasing firm competitiveness in at least one of the firms in the industry. This has been less the case for auto parts, motor carrier transportation, meatpacking, and textiles.

Competitiveness

With respect to competitiveness, the table suggests that auto assembly and steel are ahead of the other industries as sectors in which at least one of the major firms and unions is using the collective bargaining system as a tool to increase competitiveness. Auto assembly

Flex. classifications	x		x	
Greater subcontracting rights	x			
EE involvement	x			
QWL and training		x	x	
TQMS		x		
Consultation on tech. change		v		x
Information sharing			x	
Company-financed training				x
Profit sharing			x	
Work restructuring			x	
Joint LM comms at all levels			x	
Seat on board			x	
Guaranteed income stream				x
Pay for knowledge				x
EE involvement				
Long-term contracts				x
EE assignments, vacation, etc.				x
Product development				
Variable pay				x
Manufacturing methods				
Employment protection/creation				
Employment guarantee			x	
Employment security			x	x

(continued)

Deregulation	x
Government spending	x

SOURCE: Voos (1994).

has instituted production teams, flexible classifications, joint training, pay for knowledge, and extensive employee involvement. The steel industry, primarily National Steel, has formal information sharing, company-financed training, profit sharing, work restructuring, and joint labor-management committees at all levels. In both of these cases, such changes were jointly agreed upon rather than being forced on the union by hard employer bargaining. The telecommunications industry has instituted company-financed training and variable pay. Similarly, aerospace has instituted consultation on technological change, total quality management systems, and quality of work life systems with training.

The paper industry has also used collective bargaining as a vehicle for increasing firm competitiveness. A major difference between the paper industry and the auto assembly, steel, telecommunications, and aerospace industries was the process by which the changes in the traditional collective bargaining system were implemented. In paper, the changes were made after hard bargaining by employers, and followed de-unionization campaigns by some paper companies in the late 1970s and early 1980s.

On the other hand, there was no substantial use of collective bargaining as a vehicle to increase in competitiveness in the meatpacking, auto parts, and motor carrier industries. All of these industries were characterized by strong de-unionization movements or substantial non-union sectors.

Recently, Gray, Myers, and Myers (1999) examined the U.S. Bureau of Labor Statistics file of collective agreements covering 1,000 workers or more that expired between September 1, 1997, and September 30, 2007. Of the 1,041 agreements in the study, 154 (or 14.8 percent) covering 854,803 workers contained contract provisions requiring high-performance work practices, generally designed to increase productivity and quality, reduce costs, increase the focus on the customer, and ultimately, improve the firm's competitiveness. These include continuous improvement and employee involvement programs, team concept, job security thorough training and multiskilling, creation of an oversight committee, and no layoffs due to the implementation of new work practices.

Two recent studies provide insight into whether unionization affects the frequency of innovative work practices. Based on a study

using a sample of 664 establishments in 1992 from the Dun and Bradstreet establishment file, Osterman (1994) found that roughly two-thirds of the establishments in which 50 percent of the core workers (defined as those workers who are actually involved in making the product produced by, or delivering the service provided by, the establishment) participate had at least one of four identified practices (teams, job rotation, total quality management, and quality circles). There was no evidence that collective bargaining was related to the use of such programs. Gittleman, Horrigan, and Joyce (1998) also found no union effect on the incidence of work practices. Their estimates, based on a data set from the U.S. Department of Labor, found that 42 percent of all establishments, but about 70 percent of establishments with 50 or more employees, had one of six practices.⁵

Employment Protection/Creation

The U.S. collective bargaining system has not been able to generate widespread employment guarantees. Rather, employment security and job protection is obtained through the success of the firm. Put differently, there is very little administered job protection or job security developed through the U.S. collective bargaining system. In general, job security is market-based. This phenomenon is illustrated in Table 2.1.

The results presented by Gray, Myers, and Myers (1999) support the assertion that administered job security is rare in the United States. Of the agreements covering 1,000 workers or more, only 22 of the agreements (2.1 percent) covering 123,811 workers had explicit provisions prohibiting layoffs, and only 14 agreements (1.3 percent) covering 32,537 workers had no subcontracting provisions.

The most well-developed job security system in the United States is in the automobile assembly industry in the 1996 agreement between General Motors (GM) and the United Auto Workers (UAW) Union, in which both parties negotiated a system of secured employment levels (SELs). According to the agreement, the SEL system prohibits layoffs for any reason except market-related volume reductions, reasons beyond the control of the corporation (“acts of God”), sale of part of the corporation, model change or plant rearrangement, or layoff of an employee recalled to a temporary vacancy. National Steel and the

United Steelworkers of America, as part of their cooperative partnership, have negotiated job security over the life of the collective agreement (Arthur and Smith 1994).

Conclusion on Incidence

The results of this analysis indicate that while there has been much written about new work practices and the use of collective bargaining as a means for improving firm competitiveness in the United States, multiple provisions encouraging or requiring the parties to create special structures for competitiveness are found only in a minority of major collective agreements. There continues to be a bias in the U.S. collective bargaining system toward retaining the formalism in the traditional, adversarial U.S. model of collective bargaining. As unionization does not appear to be related to the frequency of such practices, it suggests that the preference of the parties to collective bargaining for the traditional model is comparable to the extent of the preference to maintain the traditional hierarchical system of work organization.

This does not mean that unions and employers are not working toward competitiveness. As the case studies demonstrate, such efforts are often ad hoc and not incorporated into agreements. Indeed, parties often prefer to avoid placing such programs in the collective agreement because placing them in the agreement reduces the flexibility of either party to pull out if it wishes. In essence, placing the cooperative process within the requirements of the legally enforceable collective agreement is inconsistent with the essential voluntariness of cooperation. Nevertheless, these results suggest that formal collective bargaining provisions addressing competitiveness and employment protection/creation efforts are not as common as might be thought based on the literature.

SUMMARY AND CONCLUSIONS

There are no societal institutions in the United States that encourage unions and employers to use the collective bargaining system for purposes of firm competitiveness and employee job security. While the

law enables collective bargaining to be used for this purpose, the law does not require it. In addition, the decentralized structure of unionization permits employers to explore competitiveness options away from the union. Legal ambiguity about whether firm investment decisions are negotiable, along with associated litigation, reduces the likelihood that collective bargaining will be used to address competitiveness and job security.

Government in the United States generally has little involvement in collective bargaining, as bargaining is seen as a matter for the parties. Nongovernmental aggregating institutions for management are lobbying, advocacy, or educational organizations, and do not encourage collective bargaining as a vehicle for addressing competitive and job security. On the union side, although union structures may have the potential for encouraging use of bargaining for competitiveness and job security, decentralized bargaining makes it difficult for high-level union structures to impose outcome preferences on lower-level structures.

The result of this is great variability in the extent to which firms and industries use collective bargaining to address issues of firm competitiveness and job security. Some firms and industries have actively used their bargaining systems to pursue competitiveness; others have not. Job security is rarely provided explicitly; rather, it is linked to competitiveness.

Notes

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1. Whether public policy in the United States succeeds in protecting that choice is a matter of debate. See, for example, U.S. Departments of Commerce and Labor (1994) and Block, Beck, and Kruger (1996).
2. Employees of private, for-profit health care institutions had been previously covered through the board's normal exercise of jurisdiction.
3. A notable exception to this rule is in over-the-road trucking and automobile hauling. See Belzer (1994).
4. The highest union level in the United States often designates itself an international union, perhaps because it may have membership in Canada.
5. See Appelbaum and Batt (1994) for a review of survey evidence on the incidence of new work systems in the United States without taking into account unionization. Appelbaum and Batt indicate that up to 85 percent of the firms in the United

States had at least one practice in one facility, but the percentage dropped to as low as 25 percent on multiple practices.

References

- Appelbaum, Eileen, and Rosemary Batt. 1994. *The New American Workplace: Transforming Work Systems in the United States*. Ithaca, New York: ILR Press.
- Arthur, Jeffrey, and Suzanne Konzelmann Smith. 1994. "The Transformation of Industrial Relations in the American Steel Industry." In *Contemporary Collective Bargaining in the Private Sector*, Paula B. Voos, ed. Madison, Wisconsin: Industrial Relations Research Association, pp. 135–180.
- Belzer, Michael. 1994. "The Motor Carrier Industry: Truckers and Teamsters under Siege." In *Contemporary Collective Bargaining in the Private Sector*, Paula B. Voos, ed. Madison, Wisconsin: Industrial Relations Research Association, pp. 259–302.
- Bernstein, Irving. 1969. *Turbulent Years: A History of the American Worker*. Boston, Massachusetts: Houghton-Mifflin, pp. 1933–1941.
- Block, Richard N. 1995. "Labor Law, Economics, and Industrial Democracy: A Reconciliation." *Industrial Relations* 34(3): 402–416.
- . 1997. "Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View." *Berkeley Journal of Employment and Labor Law* 18(1): 30–55.
- Block, Richard N., John Beck, and Daniel H. Kruger. 1996. *Labor Law, Industrial Relations, and Employee Choice: The State of the Workplace in the 1990s*. Kalamazoo, Michigan: W.E. Upjohn Institute for Employment Research.
- Board of Governors of the Federal Reserve System. 1997. *85th Annual Report*. Washington, DC: Government Printing Office, Washington, DC
- Brooks, Thomas R. 1971. *Toil and Trouble*. 2d ed. New York: Dell.
- Collective Bargaining Forum. 1988. "New Directions for Labor and Management: Views from the Collective Bargaining Forum." U.S. Department of Labor, Bureau of Labor Management Relations, BLMR 120.
- Collective Bargaining Forum. 1999. "Principles for New Employment Relationships." In *BNA Daily Labor Report* 83(April 30): E-1–E-6.
- Detroit Newspaper Agency. 1998. 325 NLRB 64.
- Evening News Association. 1965. 164 N.L.R.B. 1494, enf'd 372 F.2d 569 (6th Cir., 1967).

- Fiorito, Jack, Cynthia L. Gramm, and Wallace E. Hendricks. 1991. "Union Structural Choices." In *The State of the Unions*, George Strauss, Daniel G. Gallagher, and Jack Fiorito, eds. Madison, Wisconsin: Industrial Relations Research Association, pp. 103–138.
- Furstenberg, Friedrich. 1998. "Employment Relations in Germany." In *International and Comparative Employment Relations*, 3d ed., Greg. J. Bamber and Russell Lansbury, eds. London; Thousand Oaks, California; New Delhi: Sage Publications, pp. 201–223.
- Gittleman, Maury, Michael Horrigan, and Mary Joyce. 1998. "Flexible Workplace Practices: Evidence from a Nationally Representative Survey." *Industrial and Labor Relations Review* 52(1): 116–135.
- Gray, George, Donald W. Myers, and Phyllis Myers. 1999. "Cooperative Provisions in Labor Agreements: A New Paradigm." *Monthly Labor Review* 122(1): 29–45.
- Hammerstrom, Olle, and Tommy Nilsson. 1998. "Employment Relations in Sweden." In *International and Comparative Employment Relations*, 3d ed., Greg. J. Bamber and Russell Lansbury, eds. London; Thousand Oaks, California; New Delhi: Sage Publications, pp. 224–248.
- Keyserling, Leon. 1945. "Why the Wagner Act?" In *The Wagner Act after Ten Years*, Louis B. Silverbert, ed. Washington, DC: Bureau of National Affairs.
- Labor Policy Association. 2001. "LPA Connect." Available at www.lpa.org.
- Lucentini, Jack. 1999. "ITC Reverses Anti-Dumping Duties for Steel Imports." *Journal of Commerce*, May 12, p. 11.
- Millis, Harry A., and Emily Clark Brown. 1950. "The Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations." Chicago, Illinois: University of Chicago Press.
- Osterman, Paul. 1994. "How Common is Workplace Transformation and Who Adopts It?" In *Industrial and Labor Relations Review* 47(2): 173–188.
- Pellegrini, Claudio. 1998. "Employment Relations in Italy." In *International and Comparative Employment Relations*, 3d ed., Greg. J. Bamber and Russell Lansbury, eds. London; Thousand Oaks, California; New Delhi: Sage Publications, pp. 144–168.
- Sisson, Keith. 1987. *The Management of Collective Bargaining: An International Comparison*. Oxford and New York: Basil Blackwell.
- U.S. Departments of Commerce and Labor. 1994. *Commission on the Future of Worker Management Relations, Report and Recommendations*. December, Washington, DC.
- U.S. Trade Representative, Office of. 1999. *USTR Releases 1999 Inventory of Trade Barriers*. News Release 99-30, April 1.

- Voos, Paula, ed. 1994. *Contemporary Collective Bargaining in the Private Sector*. Madison, Wisconsin: Industrial Relations Research Association.
- Voos, Paula, and Adrienne Eaton. 1992. "Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation." In *Unions and Economic Competitiveness*, Lawrence Mishel and Paula Voos, eds. Armonk, New York, and London: M.E. Sharpe, pp. 173–215.

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W.E. Upjohn Institute for Employment Research

300 S. Westnedge Avenue

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