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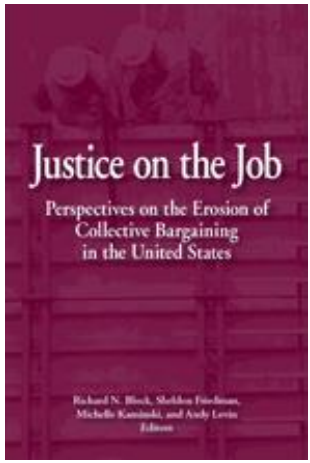

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10
America's Union-Free Movement in Light of International Human Rights Standards

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Within North America there is a school of thought that holds that unions have no place in well-managed enterprises. From that point of view, remaining "union free" and "union avoidance" are legitimate objectives of corporate policy. Maintaining a union-free environment not only relieves corporate management from the necessity of dealing with a potentially disruptive influence, it is also a public symbol suggesting that good human resource practices and business practices are in place. Thus, from this perspective, unionization of a nonunion enterprise or facility suggests poor management.[1]

The International Labour Organization (ILO), on the other hand, promotes a philosophy that is completely at odds with union-free principles. The vision of the ILO is that of an industrial relations system whose basic elements are those of social partnership—with worker representatives and employer representatives as the partners—and social dialogue in which the partners discuss and negotiate a broad range of issues of mutual interest. Unions are seen to be the major institutions through which workers are able to participate in employment decision-making. So that social dialogue may take place, unions and collective bargaining are to be encouraged rather than discouraged as indicated by union-free philosophy.

The ILO is a tripartite agency affiliated with the United Nations. Representatives from governments, trade unions, and the business community from most of the world's countries meet once a year in Geneva to legislate international standards for workers around the globe.

Employer and union representatives are appointed by their national governments. At a minimum one might expect those representatives to respect and help to foster acceptance of the ILO's mission. If so, with regard to the employer representatives from the United States, that expectation would not be met. Instead, the U.S. Council on International Business, the organization delegated the responsibility for dealing with the ILO, pursues policies that have the effect of thwarting acceptance of ILO philosophy in the United States while accepting and sheltering adherents of the union-free philosophy.

THE UNION-FREE MOVEMENT IN NORTH AMERICA

The fundamental tenets of the union-free philosophy may be summarized as follows:

- Unions are unnecessary if workers are fairly treated and well managed.
- Unions are disruptive and frequently result in poor enterprise performance.
- Because of one and two above, managers have a responsibility to the enterprise to institute policies that will maintain a union-free environment.
- Unions are "outside organizations" standing disruptively between enterprise management and its employees.

As Kaufman (1993) has demonstrated, union-free philosophy has long had a strong following within the ranks of U.S. management. In the first decades of the twentieth century the labor problem was a major sociopolitical issue as workers protested their conditions of work and demanded that they be treated with respect and dignity rather than as soulless commodities. One answer to this social issue was good "personnel management" unilaterally instituted by employers with as much or as little employee input as the benevolent employer deemed to grant. As Kaufman (1993, p. 41) notes:

> PM [personnel management] advocates held labor unions in low regard. While they were prepared to admit that workers are all too

> often driven to seek a union by autocratic, exploitative employers, they thought unions are not only incapable of solving the underlying problem (poor management) but often saddle the firm, and workers with restrictive work rules, inflated wage demands, strikes, and international political intrigues.

Moreover,

> (t)hey also believed that labor unions are run by outsiders whose self-interest is served by fomenting conflict.

Among the organizations most firmly supporting this position was and continues to be the National Association of Manufacturers (NAM). Throughout the twentieth century it consistently backed initiatives designed to check the growth of unions and collective bargaining. In the 1970s it organized the Council For a Union-Free Environment, whose mission is explicitly to foster union-free philosophy and behavior (Derber 1984, p. 105). The council and the NAM continue to be closely interconnected, and the NAM actively circulates material produced by the council designed to aid employers intent on remaining union free.[2]

The philosophy has been embraced not only by organizations whose major purpose is to thwart the advance of unionism, but also by human resources academics who have accepted "union substitution" as a legitimate corporate goal. Consider the following comments that appear in a popular Canadian human resources text. In order to effectively implement a union-substitution strategy, "Human resource managers need to apply the ideas discussed in earlier chapters of this book. Failure to implement sound human resource policies and practices provides the motivation for workers to form unions" (Schwind, Das, and Wagar 1999, pp. 661–662).

THE ILO AND ITS PHILOSOPHY OF EMPLOYMENT RELATIONS

The ILO was formed at the end of World War I. Its mission was to promote "social justice" as an essential condition for a lasting peace (Bartolomei de la Cruz, von Potobsky, and Swepston 1996). Its annual labor conference, attended by delegates not only from states but also,

as noted above, by representatives of labor and management, was conceived of as a kind of World Parliament of Labor (Kaufman 2004, p. 205). Its function was to establish, by the passage of conventions and recommendations, basic standards applicable globally. A professional bureau was created with a permanent professional staff whose job was to promote the standards and culture of the organization. One of its major missions was to pressure, cajole, or otherwise convince member states to make ILO conventions and recommendations part of their domestic labor legislation and to foster practices that are consistent with ILO principles.

Except for a period in the 1970s, when it withdrew as a protest against what it perceived to be undue influence of the Soviet Union, the United States has been a major supporter of the ILO and its mission (Kaufman 2004, p. 552; McIntyre and Bodah 2006). Indeed, although its enforcement capacity is limited by both custom and constitution, one reason for the considerable amount of success that the ILO has had over the years (see, e.g., Valticos 1998) is that the United States pressures nations depending on it for trade and development aid to institute labor practices consistent with ILO standards (see Compa and Diamond 1996). The flaw in this arrangement is that there is no world power strong enough to ensure that the United States itself abides by the standards it fosters elsewhere.

Over the years the ILO has adopted nearly 200 conventions. Although they establish the standard for all nations, most of them do not become binding unless ratified by the legislature of each state individually. A small subset, however, addresses "fundamental human rights." These deal with freedom of association, collective bargaining, discrimination, forced labor, and child labor. The failure of any state to institute practices consistent with the principles inherent in these instruments is considered to be improper and offensive to the international order.

Recently, in its Declaration on Fundamental Principles and Rights at Work, the ILO affirmed its support for the human rights nature of the core set of labor standards (ILO 2000). Labor, business, and state representatives from the United States all supported and voted in favor of this declaration.

With respect to unions and collective bargaining, the ILO's philosophy is embedded in two major conventions—numbers 87 (Freedom of Association and Protection of the Right to Organize Convention) and 98

(Right to Organize and Collective Bargaining Convention). It is further elaborated in the jurisprudence of the ILO's Committee on Freedom of Association, which hears complaints and issues public opinions which have accumulated into a body of international case law (Bartolomei de la Cruz, von Potobsky, and Swepston, 1996, pp. 102–107). Whether they have ratified conventions or not, all member states of ILO are required, as a constitutional condition of membership, to institute policies consistent with the ILO's interpretation of the meaning of the term Freedom of Association. Through its opinion on specific cases, it is the job of the Committee on Freedom of Association to give the concept concrete substance.

A review of relevant documents reveal the ILO philosophy on unions and collective bargaining to have the following basic tenets:

- As stated in Article 2 of Convention 87, "All workers without distinction whatsoever, shall have a right to establish and . . . to join organizations of their own choosing."
- All workers have the right to select representatives of their own choosing (Bartolomei de la Cruz, von Potobsky, and Swepston, 1996, p. 192).
- Legitimately selected worker representatives have the right to be recognized by employers and other relevant authorities. As stated in Bartolomei de la Cruz, von Potobsky, and Swepston (1996), "The general principle is that employers, including governmental authorities in their capacity as employers, should recognize for collective bargaining the organizations that represent the workers employed by them" (pp. 219–220).
- Employers have a responsibility both to recognize and negotiate with legitimately selected worker representatives. As Bartolomei de la Cruz, von Potobsky, and Swepston (1996) put it, "Without recognition of the right to negotiate the rest of the guarantees in the Convention (no. 87) are meaningless" (p. 228).
- Member states have a responsibility, not merely to permit but rather to "promote" collective bargaining. As stated in the Declaration on Fundamental Principles and Rights at Work,

> "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of member-

> ship in the Organization, to respect, to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining." (ILO 2000, Annex 1)

- Budd's (2004, p. 13) statement that "participation in decision making is an end in itself for rational human beings in a democratic society" is an almost perfect expression of fundamental ILO philosophy.

The ILO's position on worker representation is well expressed in the report of the Director General to the 87th Session of the International Labour Conference in 1999 entitled *Decent Work* (Somavia 1999). Somavia says, "The ILO is a forum for building consensus. Its tripartite structure reflects a conviction that the best solutions arise through social dialogue in its many forms and levels, from national tripartite consultations and cooperation to plant-level collective bargaining." He goes on to announce an initiative to "strengthen employers' organizations, workers' organizations and the government authorities that deal with labor." A key objective of the programme is to "stress the importance of building strong bipartite and tripartite institutions." In short, decent work for all is the central objective of the ILO and a collective voice for all workers is a keystone element of decent work.

Union-free philosophy and that of the ILO are clearly irreconcilable. The ILO's mission is to promote acceptance of unionism and the use of collective bargaining. The object of the union-free movement is to highlight the negative side of unionism and to encourage employers to take steps that will dissuade employees from unionizing and bargaining collectively.

U.S. EMPLOYER REPRESENTATIVES AND THE ILO

In 1980, when the United States rejoined the ILO, it invited the U.S. Chamber of Commerce to appoint a representative for employers. The Chamber refrained but instead turned the task over to the U.S. Council of the International Chamber of Commerce, which later became the

U.S. Council on International Business (USCIB) (Derber 1984, p. 105). That organization continues to represent the interests of the U.S. business community at the ILO. In general, the USCIB, like the U.S. government, has supported efforts by the ILO to promote its mission in countries outside of the United States. With respect to the United States, however, it has instituted policies that have the effect of hindering the mission of the ILO and protecting adherents of union-free philosophy.

One of the major affiliates of the USCIB is the NAM, an organization that, as noted earlier, has been promoting union avoidance since early in the twentieth century.[3] Although the USCIB has not taken such an active role in the United States in promoting union-free philosophy, its activities at the national and international level have been consistent with those of the NAM.

A keystone element of USCIB strategy is the assertion that ILO standards apply only to states and not to corporations.[4] Within the ILO (where consensus is a prime operating principle), they and their international employer colleagues have insisted on that interpretation. As a result, to achieve its mission, the ILO secretariat is, for the most part, limited procedurally to work through the aegis of domestic legislation rather than through direct pressure on labor organizations and employers. Nevertheless, according to recent legal research on international human rights law, that employer position is untenable with respect to a subset of ILO standards that have been heralded to be fundamental human rights.

Until recently the ILO had not "found it necessary to adopt an official position designating some conventions as those covering 'fundamental human rights'" (Bartolomei de la Cruz, von Potobsky, and Swepston 1996, p. 129). But in the context of globalization and concerns about the negative effects of expanding global trade on labor conditions, it has recently taken steps to clarify that certain core rights are human rights and, as such, are subject to the same respect and obligations as pertain to other universally accepted human rights. These core labor human rights are, according to the ILO's recent Declaration on Fundamental Principles and Rights at Work, the right to be free from discrimination, slavery, and child labor; the right to freedom of association; and the right to organize and bargain collectively one's conditions of work. Underlying these rights are eight ILO conventions and a body of case law, which define the behavior required for compliance with the standards

(ILO 2000). Although ordinary standards and conventions respecting them apply only to states, human rights standards apply universally.

According to Paust (2002), international human rights standards apply not only to states but also to individuals including corporations, which, at law, are simply juridic persons. In the words of the International Court of Justice (quoted by Paust), international human rights are obligatio erga omnes. They apply not only to states but instead are "owing by and to all humankind."

This interpretation was recently supported by a United Nations Subcommission for the Promotion and Protection of Human Rights, which produced a report entitled *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. With regard to corporations, the subcommission, composed of human rights experts from around the globe, stated that

> even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.[5]

Freedom of association is prominently mentioned in the Universal Declaration, and the ILO and its organs (such as the Committee on Freedom of Association) are considered by the international community to be the appropriate vehicles for interpreting that right (see, for example, OECD 1996).

Not surprisingly some employer representatives found fault with the report. As an article at the USCIB's Web site noted:

> The International Chamber of Commerce and the International Organisation of Employers have opposed adoption of the Norms [by the full Human Rights Commission], contrasting the dichotomy of this compulsory approach to company behavior with the voluntary 'good-practices' approach of other UN initiatives, most importantly Secretary-General Kofi Annan's Global Compact. (USCIB 2003)

After hearing from various stakeholders, in February 2005 the UN's High Commissioner for Human Rights issued a report on "The responsibilities of transnational corporations and related business enterprises

with regard to human rights."[6] In the report, the high commissioner suggests that business has three types of responsibilities with respect to human rights: to respect and support human rights and to make sure they are not complicit in human rights abuses. Respect requires "business to refrain from acts that could interfere with the enjoyment of human rights." With regard to complicity, she notes "one definition of 'complicity' states that a company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse."

After noting that the responsibilities of corporations are not as extensive as those of states, the high commissioner goes on to consider the human rights that are most relevant to business. Among them she identifies freedom of association and the right to organize. Rather than draw firm binding conclusions, the high commissioner called for continuing dialogue with a view toward better clarifying the responsibilities of business. Nevertheless, it seems clear from the high commissioner's comments that business does have human rights responsibilities and in some areas those responsibilities are obvious. Labor relations would appear to qualify as one of those areas. Active attempts by companies to dissuade their employees from evoking their right to organize and bargain collectively surely "interfere with the enjoyment of human rights" and thus constitute human rights violations.[7]

Since the right to organize and to bargain collectively is a fundamental human right, behavior with respect to it is subject to the standard laid out by Paust (2002). U.S. employers who put in place policies intended to maintain union-free status do not offend contemporary U.S. labor relations norms. They do, however, offend international human rights law. And, by insisting that the ILO promote its agenda through governments rather than directly, the USCIB shelters U.S. employers from criticism for implementing union-free strategy and thereby reneging on their human rights obligations.

Below is a quote from a document of the International Organisation of Employers (the organization, of which the USCIB is a constituent, whose primary role is representing employer interests at the ILO and in other international forums) interpreting the Global Compact which incorporates the declaration:

> The Global Compact is not a code of conduct nor is it a prescriptive instrument . . . Instead, the Compact creates a forum for learning and sharing experiences in the promotion of the nine principles. Through the Global Compact, companies demonstrate to their employees and communities how they are being responsible corporate citizens. *How, or even whether, a company seeks to display this commitment is a matter of choice.* (International Organisation of Employers 2001, italics added)

In other words, it is the employer representative position that it is perfectly acceptable for corporate members of IOE-affiliated employer associations, such as the USCIB, to ignore or offend the principles included in the compact, even when they publicly endorse it and even though some of those principles deal with fundamental human rights and thus are subject to international human rights law. This stance has led one international trade union official to wonder whether employer strategy with respect to this issue has more to do with image manipulation than with making an honest behavorial commitment to comply with international standards (Baker 2004).

Although it supports ILO work with respect to the behavior of other countries, many aspects of U.S. law do not comply with ILO principles. The United States has ratified neither of the two basic conventions (numbers 87 and 98) having to do with freedom of association, unions, and collective bargaining. This failure is due in part to opposition by the USCIB despite endorsement of those principles by its Geneva representatives who voted in favor of the Declaration of Fundamental Principles. Its rationale for doing so is its position that, although many U.S. laws fail to conform to the letter of international labor law, the body of U.S. law, nevertheless, provides protection equivalent to or better than international norms. U.S. workers are, it is claimed, better off than those in most other countries and so the details of how that is accomplished are unimportant (Morehead 2003; Potter 1984).

A recent study by Human Rights Watch (2000), which reported research indicating that denial of basic labor rights is rampant in the United States, found great difficulty with the position that U.S. law and practice conforms to international standards. McIntyre and Bodah (2006) are also critical of that position. The notion that the United States has the right to institute laws it considers to be adequate, even if they are inconsistent with ILO requirements, makes a mockery of the prin-

ciple that all of the world's workers should enjoy certain common standards. It is also offensive to the basic democratic notion that all (nations in this case) are equal under the law. Nevertheless, that position is used by U.S. governments, supported by U.S. employer representatives, to justify their failure to ratify core ILO human rights conventions, while at the same time insisting that other countries conform to them.

One way in which U.S. law may be technically in line with ILO jurisprudence has to do, oddly enough, with union recognition. Recent research by Morris (2005, 2006) suggests that policies intended to preserve union-free status offend existing U.S. law. Building on previous legal analysis by Summers (1992), Morris demonstrates that U.S. employers have a legal duty under the National Labor Relations Act and the U.S. constitution to recognize and negotiate with representatives chosen by their employees whether or not those representatives have been certified by the National Labor Relations Board. If no union has exclusive representation, then the employer responsibility is, voluntarily, to recognize and deal with the legitimately chosen bargaining agent of any group of employees.

The ILO standard with respect to union recognition is identical to the Morris/Summers interpretation of U.S. law. According to the authors of a recent review of ILO collective bargaining principles: "If no union covers more than 50 percent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members" (Gernigon, Odero, and Guido 2000, p. 38).

The Morris/Summers interpretation of U.S. labor law arrived as a surprise to many academics and practitioners. In practice, U.S. employers commonly refuse to deal with any union other than exclusive representatives who have been certified by the state and the norm is for employers vigorously to oppose certification. That practice has gone on for some time, without challenge, so it is still a matter of legal opinion whether or not the courts would uphold the Morris/Summers position. It is clear, however, that refusal to recognize and deal with minority unions is a violation of ILO human rights standards, and thus of international human rights law binding on all. In short, failure to recognize and deal with a minority union is a human rights offense of the same order as engaging in overt discrimination or employing child labor.

Another element of USCIB strategy, as already mentioned, is to oppose ratification of ILO standards by the United States. One of the main

justifications for doing so is the assertion that many U.S. laws would have to be altered as a result. There is differing legal opinion about the validity of that assertion (McIntyre and Bodah 2006). Nevertheless, it is certainly beyond doubt that many laws regulating labor relations in the United States are offensive to the letter and spirit of ILO standards.

Edward E. Potter has long been one of the USCIB's main spokespersons at the ILO. In the mid-1980s he wrote a monograph entitled *Freedom of Association, the Right to Organize and Collective Bargaining* (1984). His avowed purpose in doing so was to elaborate the American employer view that ratification of basic ILO conventions would have a disruptive effect on the United States by requiring changes to many U.S. laws. The document was, in fact, a compendium of instances in which U.S. law fails to comply with international standards. For example, while ILO standards require governments to "encourage and promote the full development and utilization of the machinery for voluntary negotiations between employers or employers' associations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements," in the United States "a number of states . . . do not provide collective bargaining rights for all or some categories of employees and, in Virginia, collective bargaining has been determined by the courts to violate the state constitution" (Potter 1984, pp. 58–59). To one formally committed to seeing the standards of the ILO implemented globally, bringing U.S. law up to international standard might seem to be the obvious solution to this situation. Instead, the USCIB defends the continuation of practices clearly offensive to ILO philosophy.

Not only does the USCIB shelter the union-free movement by opposing ratification by the United States of ILO human rights conventions and insisting that ILO standards apply to governments but not corporations, it also has recruited outspoken union-free advocates to serve as ILO representative. Morehead (2003) made the following statement at a meeting on human rights in employment, to which he was invited because of his role as an employer representative at the ILO:

> I was bemused at the naiveté in one part of the Human Rights Watch Report (2000) where as evidence of management hostility to unions they cited a study by Professors Freeman and Rogers that a majority of managers would oppose any unionization effort in their workplace, and at least one-third of them said it could

> hurt their advancement in the company if employees they manage formed a union. Of course it is going to hurt their advancement. If I have learned one thing in over 30 years of dealing with unions, it is managements—not unions—which organize a workplace. I should add bad management at that, so of course it will reflect badly on them. In hundreds of conversations with local union leaders over the years, it was never wages or benefits that got them interested in a union: it was their treatment by management.

The statement is an excellent example of union-free philosophy at work.

CONCLUSION

Union-free philosophy is irreconcilable with international human rights standards and the philosophy of employment relations advocated by the ILO. The two cannot coincide with integrity. The union-free philosophy is offensive to the human right of workers to organize and bargain collectively. Union-free philosophy must be rejected by everyone who supports the international human rights consensus and the work of the ILO. It follows then that the appropriate course for the agency chosen to designate representatives and develop employer strategy within the ILO is to reject it. America's employer representatives at the ILO should be expected to embrace the standards and philosophy of that organization and work toward its vision of ethical industrial relations. If the USCIB is unwilling to commit to that project, the U.S. government should appoint another, more progressive organization to fulfill that task.

Notes

1. This view is well articulated in the management manual of a large, nonunion U.S. firm and in the seminar materials of a law firm advertising itself as specializing in "union avoidance." Both of these documents are available from the author on request.
2. See http://www.nam.org/s_nam/doc1.asp?CID=22&DID=201891 and http://www.cueinc.com/about_us/overview.asp?id=0&tkn=0.

3. The president of the NAM serves as a USCIB trustee (see the USCIB Web site, at http://www.uscib.org/index.asp?documentID=742, accessed December 10, 2004).
4. Interviews and written exchanges with ILO officials, including Lee Swepston and Ed Potter. Potter has long been a key member of the USCIB's team of representatives to the ILO. Most of these exchanges took place during 2002.
5. See http://www1.umn.edu/humanrts/links/norms-Aug2003.html.
6. Available online at http://www.business-humanrights.org/Home.
7. In July 2005 the UN appointed John Ruggie of the United States, an expert on human rights and one-time UN official, Special Representative on Business Enterprise and Human Rights. Ruggie's prime mandate is to clarify the human rights responsibilities of corporations. He is expected to issue an interim report in 2006 and a final report in 2007.

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