

## FREEDOM OF ASSOCIATION IN A TIME OF MOBILE CAPITAL AND LABOR\*

Marley S. WEISS\*\*

**RESUMEN:** Este acercamiento al derecho y a la libertad sindical de los trabajadores tiene como marco referencial el ACLAN, por el acuerdo concertado a través del TLCAN, para asegurar que las disposiciones laborales en cada país prevéan mejorar las condiciones de trabajo mediante acciones gubernamentales y procedimientos para sancionar las violaciones en materia laboral. En esta defensa se incluyen los derechos de asociación y organización. El presente análisis concluye con la perspectiva futurista del TLCAN respecto a los problemas surgidos debido a la movilidad de capitales a través de las fronteras.

**ABSTRACT:** *This approach to Law and union freedom of workers, referred to ACLAN and through NAFTA to insure labor disposition in each country, foresees the improvement of working conditions through government actions and procedures to punish the infringement in laboral matter. We include the right of free association and organization. The present analysis ends with NAFTA's futuristic perspective in regard to the problems arisen due to the mobility of capital through their respective frontiers.*

This paper will discuss the right of workers to organize through unions of their own choosing, or in the language of international labor law, their freedom of association. The laws of all three NAFTA member countries, Canada, Mexico, and the U.S., unmistakably, in plain language, guarantee workers this right. The North American Agreement on Labor Cooperation, NAALC, or as it is popularly referred to, the NAFTA labor side agreement, commits the parties to

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\*\* University of Maryland School of Law, USA.

“enforce through each country’s own laws, procedures and practice,”<sup>1</sup> key, mutually accepted, labor law principles, the first of which is “freedom of association and protection of the right to organize.”<sup>2</sup> NAALC obligates the three party countries to promote compliance with, and effective enforcement of this right, as assured to workers under national labor legislation.<sup>3</sup>

In the NAALC, the parties promise that these labor rights, including freedom of association, will be realizable, and not just fancy sounding exhortations. Each NAFTA party undertakes to “ensure that its labor laws and regulations provide for high labor standards,”<sup>4</sup> to “strive to improve those standards,”<sup>5</sup> and to “promote compliance with and effectively enforce its labor law, through appropriate government action.”<sup>6</sup> The enforcement obligation includes “initiating in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.”<sup>7</sup> Each party’s law must provide functional procedures and meaningful remedies to vindicate core labor rights, including freedom of association and the right to organize.<sup>8</sup>

The NAFTA labor side agreement goes no farther than International Labor Organization Convention No. 87, which assures that “workers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization,”<sup>9</sup> including “any organization of workers... for furthering and defending the interests of workers... .”<sup>10</sup> Ratifying countries undertake “to take all necessary and appropriate measures to ensure that workers... may

1 NAALC, Annex 1, Sept. 8-14, 1993, 32 I. L. M. 1499, 1515. Discussion of the negotiation and adoption of the NAALC may be found in Hagen, Katherine A., *Fundamentals of Labor Issues and NAFTA*, 27 U.C. Davis L. Rev. 917, 917-19 (1994); Roy L. Heenan & Patricia Kosseim, *NAFTA/NAALC. in International Labor and Employment Law* (BNA forthcoming 1997). Substantive provisions, procedures and remedies are described in Hagen, *supra*, at 920-31; Heenan & Kosseim, *supra*.

2 *Ibidem.* art. 1(f), 32 I. L. M. at 1503.

3 *Idem.*

4 *Ibidem.* art. 3, para. 1.

5 *Ibidem.* art. 2.

6 *Ibidem.* art. 3, para. 1(g).

7 *Idem.*

8 *Ibidem.* arts. 4, 5.

9 ILO Convention No. 87, art. 2.

10 NAALC, *supra* note 1, art. 10, 32 I. L. M. at 1504.

exercise freely the right to organize.”<sup>11</sup> While the U. S. has never ratified Convention No. 87, both Canada and Mexico have.<sup>12</sup>

In fulfillment of these treaty obligations, and indeed, long predating the assumption of these treaty duties, the national and provincial legislation of all three NAFTA countries promises workers the right to organize in unions of the workers’ own choosing.<sup>13</sup> I submit, however, that this right in all three countries, but most especially in the United States, is becoming purely formal. Fewer and fewer workers are able to successfully run the gauntlet of the required labor relations procedures to establish, organize and obtain legal recognition for a union of the workers’ choice. In the United States, it seems increasingly clear that the right to organize in the private sector may be available in theory, but often not in practice.

Many of the causes are institutional, stemming from features of the U. S. National Labor Relations Act (NLRA) system which covers most private sector industry in the U. S.<sup>14</sup> Canadian provincial and

11 *Ibidem*, art. 11.

12 The United States, nevertheless, has apparently assumed the international obligation to ensure freedom of association within its borders by resuming its membership of the ILO, whose constitutional obligations are binding on all members, and include freedom of association. See, e. g., Leary, Virginia A., “The Paradox of Workers’ Rights as Human Rights”, in *Human Rights, Labor Rights and International Trade*, 22 y 29, Lance A. Compa & Stephen F. Diamond eds., 1996.

13 As to México, art. 123 of the Constitution guarantees freedom of association for workers, supplemented by provisions of the Federal Labor Law. See generally Buen, Néstor de, in *International Encyclopedia for Labour Law and Industrial Relations*, México, t. 8, 1991; Buen, Néstor de, Buen, Carlos de & Pérez-López, Jorge F., in *International Labor and Employment Law*, México, BNA forthcoming, 1997. As to the U. S., *The National Labor Relations Act* (NLRA) 7, 29 U. S. C. 157 (1996), as well as the Railway Labor Act, 45 U. S. C. 151a, 152 Third, Fourth, Fifth, provide a guarantee of freedom of association covering most of the private sector. The First Amendment to the Constitution of the U. S. provides some assurance of freedom of association to workers organizing in the public sector, and is supplemented by federal legislation covering federal employees, and in many states, by state legislation covering some or all state and local government employees. A compilation of the legislation may be found in Public Employee Department, AFL-CIO, *Public Employees Bargain for Excellence: A Compendium of State Public Sector Labor Relations Laws* (1993) [hereinafter PED]. The Canadian Charter of Rights and Freedoms guarantees freedom of association, but this has been held to cover neither the right to bargain collectively nor the right to strike, both of which are instead provided for by legislation. The federal statute covers specified, primarily national and international industries, and provincial legislation covers the bulk of the private sector. See generally Arthurs, H. W. *et al.*, “Canada”, in *International Encyclopedia for Labour Law and Industrial Relations*, t. 3, 1993; Heenan, Roy L. & Brady, Thomas E. F., “Canada”, in *International Labor and Employment Law*, México, BNA forthcoming, 1997.

14 The low rate of union success in winning representation elections under the current U. S. statutory scheme, has been attributed to several factors by commentators. Some analysts blame the trade union movement’s own lack of diligence and innovativeness. See, e. g., Getman, Julius G., *Ruminations on Union Organizing in the Private Sector*, 53, U. Chi. L. Rev. 45, 46,

federal legislation, modeled in its inception on the original version of the NLRA, the Wagner Act, has been amended in various ways which may cure some of the defects in the American legislation.<sup>15</sup>

1986. Some commentators contend that most American workers no longer desire collective representation, alluding to the allegedly outmoded nature of union representation for a workforce of highly individualistic, well-educated and sophisticated employees. See, e. g., Hechscher, Charles, *The New Unionism: Employee Involvement in the Changing Corporation*, vol. 62, 1988. Polling data, however, renders this assertion questionable. See Weiler, Paul C., *Governing the Workplace: The Future of Labor and Employment Law*, pp. 108-109 & n. 8, pp. 299-300, 1990 (reviewing public opinion survey results). Still other writers attribute the decline of unions to flaws in the NLRB enforcement and remedial system, which has meant that unions are losing more members through workforce reductions, factory closings, and business failures in traditionally-unionized industries, than they can organize in new election campaigns. E. g., Weiler, *supra.* at 40, 105-118, 233-241. This, in my view, is an important factor behind the decline in private sector union membership. Another important factor is the relative economic weakness of unions compared to management under the scheme of permissible economic weapons dictated by the present law. See, e. g., *idem* at 254-256. Workers have less incentive to seek representation when the economic weapons available to employers in most circumstances so greatly outweigh those permitted to unions.

15 Three points of difference frequently highlighted are Canadian union certification procedures, restrictions on the use of permanent strike replacements, and interest arbitration of first collective bargaining agreements. See, e. g., Abraham, Steven E. & Voos, Paula B., "Changes in Canadian Labor Law and U. S. Labor Law Reform", in *Industrial Relations Research Association Series: proceedings of the Forty-Eighth Annual Meeting*, 194, Paula B. Voos, ed., 1996. Procedures and remedies for violations of workers' rights to organize and bargain collectively are also frequently cited. A useful analysis of the advantages for union organizing in Canadian provincial unfair labor practice case procedures may be found in Bruce, Peter G., "State Structures and the Processing of Unfair Labor Practice Cases In the United States and Canada", in *The Challenge of Restructuring: North American Labor Movements Respond*, 180, Jane Jensen & Rianne Mahon, eds., 1993. A recent analysis of Canadian first contract interest arbitration provisions concludes that the option is rarely invoked, but its presence encourages newly unionized workers and their employers to reach their initial agreement without external intervention. Friedman, Sheldon & Wozniak, Robert, "First Contract Arbitration: The Canadian Experience", in *Industrial Relations Research Association Series: Proceedings of the Forty-Eighth Annual Meeting*, 153, Paula B. Voos, ed., 1996. For other commentators regarding various aspects of the Canadian provincial and federal versions as setting models for possible U. S. emulation, see, e. g., Block, Richard N., *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18, Berkeley, J. Emp. & Lab. L., 30, 1997 (immediately effective and automatically judicially enforceable Labor Board unfair labor practice decisions; tripartite composition of Labor Board); Weiler, Paul, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98, Harv. L. Rev., 351, 1984 (first contract interest arbitration); Weiler, Paul, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLR Act*, 96, Harv. L. Rev., 1769, 1983 (provincial card check recognition and quick election recognition procedures); Comment, *A Comparison of the Selection of Bargaining Representatives in the United States and Canada: Linden Lumber, Gissel, and the Right to Challenge Majority Status*, 10, Comp. Lab. L. J., 65, 1988 (card check and quick election provincial Canadian union certification models). Recent changes in Canadian labor relations law are discussed in Abraham & Voos, *supra.* Thompson, Mark, *Labor Law Reform in Western Canada: Rhetoric and Reality*, in *Industrial Relations Research Association Series: Proceedings of the Forty-Eighth Annual Meeting*, 201, Paula B. Voos, ed., 1996; Jain, Harish C. & Muthuchidambaram, S., "Labor Law Reform in Ontario: Evaluation of Bill 40", in *Industrial Relations*

Nonetheless, some of the most serious structural problems I raise here are shared, at least in part, by the Canadian labor relations systems.<sup>16</sup> Mexico's system is quite different from the U. S. pattern, but I will venture to mention one institutional impediment to effectuation of the right to organize in Mexico, and I suggest that other, structural problems in the U. S. and Canada have parallels in Mexico as well.

The American reader is no doubt familiar with the standard statistics about the decline of the U. S. labor movement. From a peak private sector representation level of 35 to 40 per cent in the 1950s, the share of union members among private sector workers now has dropped to 11%, a level not paralleled since before the Great Depression and the adoption of the Wagner Act.<sup>17</sup>

Unionization rates in the public sector in the United States, however, are much higher, in the range equal to and higher than private sector levels in the 1950s.<sup>18</sup> Since legislation granting public sector employees the right to organize is mostly state or county level law, which varies greatly state by state, many public employees in the U. S. still do not have the right to organize.<sup>19</sup> If one calculates the percentage of American workers covered by public sector labor relations legislation who are union members, the percentage is quite high, in the 50-60% range.<sup>20</sup> In federal government employment alone, 80% of unionizable employees have joined a labor organization.<sup>21</sup>

These data give the lie to the argument that the explanation for the drastic drop in the U. S. private sector unionization rate is that

*Research Association Series: Proceedings of the Forty-Eighth Annual Meeting*, 209, Paula B. Voos, ed., 1996.

16 This view is shared by many commentators. See, e. g., Adams Roy J., *The North American Model of Employee Representational Participation: "A Hollow Mockery"*, 15 *Comp. Lab L. J.* 4, 1993.

17 Block, *supra* note 15, at 31-32. Block's figure for U. S. private sector union membership in 1995 is 10.4% (citing Union Members in 1995, USDOL News Release 96-41, tbl. 3, Feb. 9, 1996).

18 PED, *supra* note 13, at 1, 3.

19 See *idem* (compiling state listing).

20 *Idem*.

21 More than 125 federal unions represent about 60% of the U. S. federal workforce. About 1.3 million civilian, non-postal employees, or 80% of the workforce eligible to participate in federal unions. *National Performance Review, From Red Tape to Results: Creating a Government that Works Better and Costs Less*, 87, 1993; PED, *supra* note 13, at 1.

modern workers, in the high technology, information economy, see themselves as individuals and no longer want or need collective interest representation.<sup>22</sup> In institutional sectors such as hospitals and universities, it is not unusual to find heavy levels of unionization among public sector employees, side by side with much lower levels in the private sector. One can infer that either there are differences in the legal situation, in the economic situation, or in the attitudes of private as opposed to public sector management that account for much of the huge discrepancy.

The Canadian data also provide an illuminating contrast here. Canada has much higher levels of unionization overall, both public and private sector, compared to the United States.<sup>23</sup> Nevertheless, Canada has also witnessed a decline in private sector unionization density over the last twenty years, albeit one not as steep as that of the U. S.<sup>24</sup> The possibility looms, moreover, that if measures are not taken, Canada's private sector union movement will follow the path of decline trod by the American trade union movement.

The differences, as well as the similarities between the Canadian and the American experience, like the differences between the American public and private sector, suggest that two different types of factors in the labor relations system are interacting with shifts in the economy and the labor market. The first set of factors relate to procedural, remedial, and substantive deficiencies in the U. S. NLRA. Defects of this type could be corrected without major modification in the internal structure of American trade unions or of the labor relations system as a whole.

The dismally slow American process for conducting elections and certifying a union as collective bargaining agent is, as many others have commented, an open invitation to employers to legally and ille-

22 For examples of arguments of this type, see Estreicher, Samuel, "Some Reflections on the Future Development of Collective Representation and Individual Rights in the Workplace", in *Proceedings of N. Y. U. 45th Annual National Conference on Labor Law*, 163, 164, Bruno Stein ed., 1993; Hechscher, *supra* note 14, at 62.

23 See Block, *supra* note 15, at 33.

24 See Meltz, Noah, "Unionism in the Private-Service Sector: A Canada-United States Comparison", in *The Challenge of Restructuring: North American Labor Movements Respond*, 207, Jane Jenson & Rianne Mahon, eds., 1993; Jenson, Jane & Mahon, Rianne, "Legacies for Canadian Labour", in *The Challenge of Restructuring: North American Labor Movements Respond*, 72, 81-82 Jane Jenson & Rianne Mahon, eds., 1993.

gally exploit the campaign process to undermine employees' exercise of the right to organize.<sup>25</sup> Weak remedies for employer unfair labor practices such as discriminatory discharge of union supporters, compound the problem.<sup>26</sup> Few American public sector employers can afford the political repercussions of waging the type of anti-union campaign which is routine among private sector U. S. employers. This is an important factor in higher American public sector unionization rates.

The Canadian alternatives also illustrate this point. Many of the provinces and the federal government have amended their labor legislation to accept proof of union membership and dues payment to demonstrate the union's majority or higher-than-majority status, eliminating the requirement of an election in most cases. When an election is held, the Canadian laws limit the campaign to a very short period, such as five working days, and drastically shorten the hearing procedures and the litigation process as a whole.<sup>27</sup> Canadian unfair labor practice procedures are likewise structured to produce much swifter legal enforcement when a violation is found.<sup>28</sup> A much higher success rate is evident in Canadian union organizing petitions for certification as bargaining agent, compared to the 50% rate in the American proceedings before the National Labor Relations Board.<sup>29</sup>

The American devotion to due process and judicial review of administrative decisions makes it unlikely that highly abbreviated procedures will ever be adopted or withstand constitutional scrutiny in the U. S. As a result, another often proposed alternative has been that of greatly increased remedies, including penalties sufficient to deter employers from threatening, coercing, and retaliating against union supporters.<sup>30</sup> The NLRB's current efforts to use preliminary

25 E. g., Adams, *supra* note 16, at 6-8; Weiler, *supra* note 14, Weiler, *supra* note 15, at 1776-86; Comment, *supra* note 15.

26 See, e. g., Weiler, *supra* note 15, at 1787-95.

27 See, e. g., Weiler, *supra* note 15; Adams, *supra* note 16, at 9-10; Comment, *supra* note 15, at 81-89. Recent changes in the various bodies of provincial legislation, switching from card check to quick election certification and vice versa, are reviewed in Abraham & Voss, *supra* note 15, at 195-96; Thompson, *supra* note 15, at 203-07; Jain & Muthuchidambaram, *supra* note 15, at 210-11, 214.

28 See Block, *supra* note 15, at 45-46; Bruce, *supra* note 15, at 192-98.

29 Weiler, *supra* note 15, at 1774-76, 1816-19.

30 See, e. g., Weiler, *supra* note 14. For the constitutional, administrative law, and labor policy arguments in support of restricted judicial review of certification proceedings, see Harper, Michael C., *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55,

injunctions to preserve or restore the status quo pending the course of the NLRB litigation is another important approach to solving this problem, and seems to be having some effect.<sup>31</sup>

In addition, many commentators have suggested that American unions suffer from a greatly weakened strike weapon. These analysts have supported legislation overturning the right of employers to permanently replace economic strikers,<sup>32</sup> another change that many of the Canadian provinces have already implemented.<sup>33</sup> Academic commentators have argued that freedom of association cannot be provided unless employees have a full right to strike, without facing the threat of job loss.<sup>34</sup> Certainly, if the balance of economic power between labor and management were less lopsidedly in favor of the employer in most situations, more workers might find it worthwhile to take the risks involved in union organizing.

Several of these obstacles to the exercise of the right to organize and freedom of association are a function of the American process of union certification as collective bargaining agent. They apply both to the initial decision to unionize and to any effort by unionized workers to change representation rights to a different union. Canada has faced similar issues, although it seems to have had success in solving many of them.

Geo. Wash. L. Rev., 262, 1987. The unsuccessful Labor Law Reform Act of 1977 would have provided for greatly increased penalties for those committing unfair labor practices; however, the bill passed in the House only to fail to muster the requisite super-majority for cloture in the Senate. S. 2467, 95th Cong., 2d Sess., 1978; H. R. 8410, 95th Cong., 1st Sess., 123 Cong. Rec. 23,712, 1977.

31 See Gould, William B., *Three Year Report*, reprinted in 1997, Daily Lab. Rep. No. 45, at D 28.

32 See, e. g., Weiler, *supra* note 14; Spector, Jeffrey A., *Comment: Replacement and Reinstatement of Strikers in the United States, Great Britain, and Canada*, 13, Comp. Lab. L. J., 184, 1992.

33 See Abraham & Voss, *supra* note 15, at 196-97; Thompson, *supra* note 15, at 203-04; Jain & Muthuchidambaram, *supra* note 15, at 213-14; Spector, *supra* note 32, at 212-17. Quebec prohibits any operation whatsoever by the employer during a lawful strike. *Idem* at 214.

34 Indeed, the ILO Committee on Freedom of Association has taken precisely this position in holding the U. S. failure to ensure a right to reinstatement of strikers at the conclusion of a lawful strike violates the right to freedom of association under the ILO Constitution and the Declaration of Philadelphia. See Leary, *supra* note 12, at 35, citing Case No. 543, "Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations", 278th Report of the Governing Body Committee on Freedom of Association, paras. 60-93, 1991. The failed Workplace Fairness Act, S. 55, 193rd Cong., 2d Sess., 1994, would have prohibited permanent replacement of economic strikers.



Because Mexico has different mechanisms for workers to choose union representation and obtain formal recognition of that choice, Mexican law creates different obstacles to full effectuation of the right to freely choose one's union representative. Nonetheless, it does have analogous structural problems. A Mexican union has the ability to sign the equivalent of a closed shop agreement with an employer, forcing employees thereafter to join that union, rather than another, as a condition of employment. Such closed shop agreements can plainly be abused to prevent workers from exercising their right to free choice of union representative. Bottlenecks in the union registration process can likewise prevent the emergence of new unions more focused upon serving the needs of their members.<sup>35</sup> Problems in union registration and certification are, I believe, Mexico's parallel to problems in the Wagner Act system of union representation elections. More rapid, streamlined and transparent legal processes, and stronger legal remedies to assure compliance, are necessary for both the U. S. and Mexico to deliver on their promises to effectuate workers' rights to freedom of association.<sup>36</sup> We can all look to the vigorous efforts in much of Canada for examples and inspiration.

<sup>35</sup> The operation of the Mexican labor legislation has been held to violate the country's obligation to ensure freedom of association under ILO Convention No. 87 in a succession of reports by ILO bodies. See, e. g., International Labour Conference, 80th Sess., Report of the Committee of Experts on the Application of Conventions and Recommendations 211, 1993; International Labour Conference, 78th Sess., Report of the Committee of Experts on the Application of Conventions and Recommendations 190, 1991; International Labour Conference, 76th Sess., Report of the Committee of Experts on the Application of Conventions and Recommendations 192, 1989. Issues of abuse of the registration process, formal legal preclusion of alternative trade union representation in state agencies, formal or informal preclusion of alternative trade unions in private sector workplaces, and structural conflict of interest through the role of union confederation appointees on tribunals determining competing union claims to registration and representation rights have been raised in recent litigation before the Mexican Courts. see, e. g., Suprema Corte de Justicia, Amparo en Revisión, 337/94, mayo 21, 1996, discussed in U. S. National Administration Office (USNAO); NAO Submission No. 9601: Public Report of Review 29-30, 1997; Torriente, Anna, "Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca", 1996 (copy on file with USNAO), before the ILO Committee on Freedom of Association, International Labour Office, Governing Body, 300th Report of the Committee on Freedom of Association. Case No. 1844, México, paras. 215-244, 1995, discussed in NAO Submission No. 9601. Public Report of Review, *supra*, at 23-25; and most recently in submissions under the NAALC, before the U. S. National Administrative Office (hereinafter USNAO). See, e. g., NAO Submission No. 9601, Public Report of Review, *supra*; USNAO, Report on Ministerial Consultations on NAO Submission #940003 under the North American Agreement on Labor Cooperation, 1996.

<sup>36</sup> For a review of the past decade in Mexican industrial relations and a discussion of prospects for change in the near future, see Lotena Cook, María, "Mexican Industrial Relations

In the American context, I have identified a few areas in which significant improvement needs to be made in the enforceability and practical implementability of the right to organize under American law. Nevertheless, I suggest that, standing alone, such solutions would prove to be insufficient. American private sector employees would remain at a severe disadvantage in attempting to unionize.

The drastically heightened pace of capital redeployment, both transnational and domestic, and the fragmentation of corporate and workplace structures, are developments that are rapidly rendering the existing system of labor relations in the U. S. and Canada highly problematic. Even if a union wish-list of amendments to the NLRA were adopted, if they did not address this basic set of issues, the likelihood is great that union decline would continue, although perhaps the pace would decrease. In the United States, these changes already have progressed so far that the labor market is beginning to approximate economists' models of people moving like billiard balls or molecules, bouncing thermodynamically and efficiently between workplace and workplace.

The U. S. Canadian labor relations system is founded on a model different from that common throughout most of the industrialized world. When a group of workers petition for certification of a collective bargaining agent, our labor relations boards define an "appropriate bargaining unit", based on a set of job classifications, departments, or workplaces at a single, or in some instances multiple employers. This bargaining unit first acts as election district, and later defines which workers are included within the union's representational activities in negotiating a collective bargaining agreement and later, in interpreting it and applying it.<sup>37</sup> This system worked reasonably well in most industries for a long time, because the workplaces were relatively stable, even if employment levels fluctuated cyclically or seasonally.

This pattern, however, remains intact in fewer and fewer industries and businesses. As business change becomes more pervasive and ra-

in Transition. What's New since NAFTA?". in *Industrial Relations Research Association Series: Proceedings of the Forty-Eighth Annual Meeting*. 348 Paula B. Voos, ed., 1996.

<sup>37</sup> NLRA, §§ 9(a)-(e). 29 U. S. C. §§ 159(a)-159(e). Cf. *J. I. Case Co. v. NLRB*, 321 U. S. 332, 339 (1944).

pid, unions attempting to organize workers, bargaining unit by bargaining unit, are trying to drain the ocean with a sieve. Moreover, since unions are constantly behind the employer-created curve, they are less and less often able to organize an entire body of competitors in an industry or occupation.<sup>38</sup> It becomes progressively harder for unions to take wages out of competition, and unions are forced to compete against each other and against unrepresented shops in a cycle that weakens them further and further, giving employees less and less reason to organize.

In truth, the American industrial relations system has always allowed for two different models. What I have just described is closest to the Congress of Industrial Organizations or CIO model. Roughly contemporaneously with the 1935 enactment of the Wagner Act, the CIO began organizing workers into unions on industrial principles, that is, based on the industry in which, and employer for whom, the employees worked. This model fit the dominant business organization model of the time, and the CIO largely defeated the older American Federal of Labor in new organizing in most industries.

The AFL model, however, never disappeared from the American scene, in part because the 1947 Taft-Hartley amendments made some effort to ensure that the NLRB was neutral as between the two competing models of unionization.<sup>39</sup> In fact, the older Railway Labor Act of 1926<sup>40</sup> was actually structured along lines more analogous to AFL than to CIO structures.

The AFL model was one of union organizing based upon the type of work a person did, rather than the employer for whom the worker worked or the industry in which she or he performed the work. It was competitively successful in the U. S. primarily in the building

38 For the mathematics demonstrating the near impossibility that union organization rates could equal or exceed the pace of destruction of existing union-represented bargaining units, see Freeman, Richard, "What Does the Future Hold for U. S. Unionism?", in *The Challenge of Restructuring: North American Labor Movements Respond*, 361, Jane Jenson & Rianne Mahon, eds., 1993. A discussion of Canadian industrial and social trends that may portend similar, if more attenuated, forces operating in Canada, see Swartz, Donald, "Capitalist Restructuring and the Canadian Labour Movement", in *The Challenge of Restructuring: North American Labor Movements Respond*, 381, Jane Jenson & Rianne Mahon, eds., 1993.

39 See NIRA Section 9(b), 29 U. S. C. 159(b).

40 Railway Labor Act, 45 U. S. C. 152 Third ("The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of organizing and bargaining through representatives of their own choosing.")

and construction trades, where the work has long been transitory and the industry fragmented. These are precisely the conditions coming to prevail in many other sectors of industry today, as corporations subdivide themselves into independent, mutually contracting units, and the employment relationship becomes more transitory. Workers in the old-line crafts identify themselves by their trade and their union affiliation, not on the basis of the employer for whom they happen to be working for a few months or years. They, as well as the employers with whom they deal, rely on the union for the permanent organizational structure that the employment relationship lacks. Through the use of hiring halls and similar systems, job mobility is provided for workers, and ready access to a qualified, temporary labor force is provided for employers. Unions in other sectors should adapt these strategies, building upon the strong occupational identification many workers possess,<sup>41</sup> to reinforce a sense of permanent union identity which they will carry with them through successive job changes.

I am not suggesting that American industrial unions should fold their tents and abandon the field. But I am suggesting that it is time for labor to redeploy its capital, and reconceive of organizing to focus more on the nature of the work an employee does, particularly where that work is professional, technical, craft, or otherwise skilled in nature, as well as on the community in which the employee lives, in fields where occupational skill cannot provide the common identity. Unions must attempt to develop a lifelong bond, with suitable support structures, between union and member. Even if formal union recognition had to be obtained as new bargaining units came into existence, the process of winning representation rights would be vastly different if unions routinely started with a solid base of members among the workforce. Creating "associate" members barely begins to address the type of changes I am urging.

I am also suggesting that the labor movement explore producer and service provider cooperative forms for its members who work in fields where their employment has already been turned into "consulting", work, and that efforts be directed toward labor law changes which aggregate subcontractors and contractors into the equivalent

41 See generally Trice, Harrison M., *Occupational Subcultures in the Workplace*, 1993.

of a single employer, an expanded version of the present law covering the garment industry.<sup>42</sup>

Such a change in direction within the union movement is essential to cope with the increased mobility of large segments of the labor force; that is surely justification enough. Equally important, such a move is also essential to stem the tide of further corporate shifts in the direction of fragmenting labor relationships. Employers are choosing daily how far to go in contingentizing their workforces and to what extent to dismember themselves into smaller corporate entities with less permanently integrated relationships.

If the labor movement responds to the corporate and labor market shifts by redeploying itself to effectively organize and bargain on behalf of the mobile worker, it will decrease the corporate incentive to move in that direction. This, in turn, could lead to the preservation of a significantly greater proportion of industry in long-term, secure employment relationships. If the labor movement delays much longer in responding to these changes, there will be that much smaller of a segment of industry preferring a competitive strategy of stable workforce and cooperative labor relations, as opposed to turning every employee into an independent contractor or an "atypical" worker.

The fact that a renewed trade union effort to organize along these lines could particularly address the needs of marginalized women workers as well as workers of color, disproportionately concentrated in small, service sector business in impermanent workplaces holding very insecure forms of employment, is, of course, an important further incentive for this form of union organizing.<sup>43</sup> It is essential to realize, however, that it is the survival of the union movement as a whole that is at stake in pursuing such a course.<sup>44</sup>

42 See NLRA Section 8(e), 29 U. S. C. 158(e).

43 See Cobble, Dorothy Sue, "Introduction: Remaking Unions for the New Majority", in *Women and Unions: Forging a Partnership*, 3, 13-16, Dorothy Sue Cobble, ed., 1993.

44 Other analyses advocating similar strategies include Cobble, Dorothy Sue, *supra* note 43; Herzenberg, Stephen, "Morality, Economics, and International Labor Rights", in *Human Rights, Labor Rights, and International Trade*, 99, 110-12, Lance Compa & Stephen F. Diamond eds., 1996; Wial, Howard, "Rethinking the Microeconomic Foundations of Workers Representation and Its Regulation", in *Industrial Relations Research Association Series: Proceedings of the Forty-Seventh Annual Meeting*, 414 Paula B. Voos, ed., 1995; Wial, Howard, "New Bargaining Structures for New Forms of Business Organization", in *Restoring the Promise of American Labor Law*, 303, Sheldon Friedman et al., eds., 1994; Wial, Howard, *The Emerging Organizational Structure of Unionism in Low Wage Services*, 45 *Rutgers L.Rev.* 671, 1993.

Some of these changes, under American law, can be done without legal modifications; others would require legislative changes in the NLRA,<sup>45</sup> although perhaps such amendments would be more palatable to Congress and the public than more traditional labor law reform proposals such as the striker replacement bill.<sup>46</sup> Many novel legal questions of anti-trust law and common law tort will arise. In a sense, this is a suggestion that to effectively exercise the right to organize in the current economy, workers and the unions representing them will have to go back to the future. Pre-Wagner Act law must be reconsidered in its interactions with the labor relations act and with modern business and union institutional arrangements. One virtue of this strategy is that it can be partially pursued prior to any legislative change whatsoever. This is, in effect, a union self-help strategy to compensate for the shortcoming of present labor law institutions in light of increased mobility of capital and labor, and increased malleability of the individual work relationship.

An alternative strategy for unions is to legislate differently about capital redeployment. Strengthened successorship laws, along the lines of some of the Canadian developments or those in the European Union,<sup>47</sup> would be a good first step. Legislation limiting corporate transformations, providing that the union contract as well as certification conveys to and binds the successor, or providing employees with legal job or income security protection at successor as well as predecessor employer expense, would also help. However, political prospects in the U. S. for such legislation must be described as far-fetched. In any case, capital is now so mobile, that unless legislation is comprehensive, it is simply likely to encourage the shift of capital transformation transactions into different, less regulated forms. Mo-

45 Modification to extend a version of Sections 8(e) and (f) of the NLRA, 29 U. S. C. 158(e), (f), to all industries, or at least those with specified characteristics, would be a desirable step. For a discussion of the problems in the entertainment industry, which has implemented something along these lines despite the lack of supporting legislative change, see Meredith, Mark D., *Note, From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96. Colum. L. Rev. 178, 1996.

46 S. 55, 103d Cong., 2d Sess., 1994. The Workplace Fairness Act, was defeated for lack of the requisite 60 votes necessary to invoke cloture in the Senate. 140 Cong. Rec. 8844.

47 Directive No. 77/187, O. J. (L 61), March 5, 1977. See also Directive No. 78/855, O. J. (L 295), October 20, 1978; Directive No. 82/891, O. J. (L 287), December 31, 1982. See generally Blanpain, Roger & Engels, Chris, *European Labour Law*, 465-79, 3rd ed., 1995.

reover, provincial, state, or federal legislation is ill-suited to address trans-border mobility of capital.

Some more drastic proposals have called for abandonment of the North American single channel, bargaining unit-based system of exclusive representation. Several commentators have advocated a move to something closer to the German system, with unions bargaining industry-wide economic agreements and independent, workplace-based, works councils, elected from among all employees at the workplace, handling shop floor and employer issues; others have proposed introducing works councils without modifying the remainder of the North American collective bargaining system.<sup>48</sup>

I view these proposals as a step backward, for several reasons.<sup>49</sup> First, the works council is a stable workplace-based structure, hence entirely vulnerable to the capital mobility problems described above. Second, bifurcating representation rights into two institutions is likely to greatly weaken already weak North American unions, and to lead to ineffective works council representation and no union representation at all. By taking the unions out of their institutional role on the shop floor, their greatest source of grass roots contact would be eviscerated.

Third, works councils have been successful, by and large, only when combined with sectoral level bargaining, a legal change which is highly improbable in the U. S., although less so in Canada. Fourth, strong works councils rely heavily on a broad and powerful trade union movement with which they are politically, if not formally, integrated; as U. S. private sector union representation drops into single digits in the coming years, this condition simply will not obtain.

Fifth, a critical factor is the legal power that would be accorded to any legally-mandated works council system, such as co-determination or veto rights over employer measures on particular subjects, and a binding process for resolving deadlocks, since works councils generally are prohibited from engaging in strikes and economic pressure tactics. Many proposals neglect the essential point of providing

48 These commentators have a disturbing tendency to de-emphasize the collective bargaining aspect, and focus almost entirely on works councils. See, e. g., Weiler, *supra* note 14, at 289-90; Adams, *supra* note 16, at 11-12; Freeman, Richard B., "Lessons for the United States", in *Working Under Different Rules*, 223, 236, Richard B. Freeman, ed., 1993.

49 These points are discussed in much greater depth in my co-authored work in progress, Weiss, Marley S. & Tóth, András, *Works Councils for the U. S.? Lessons from the Hungarian Experience*, 1997 (copy on file with the author).

a source of power to the works councils, without which the functioning of a works council would predictably resemble that of American high school and university student governments.

Finally, works councils are often portrayed by advocates as a vehicle to provide universal employee rights to democratic participation in the workplace, particularly reaching smaller businesses that trade unions find hard to organize and to represent efficiently. However, even in Germany, the paradigm for the works council model, works councils are seldom elected in small and medium sized enterprise, and are sometimes absent even from larger ones.<sup>50</sup>

This does not mean that something more like the Swedish model, with sectoral or industry-wide economic bargaining coupled with union representation at employer and shop floor level might not be a fine solution, provided it were politically possible. In relatively stable industries, such a solution might be the best, assuring workers of portability of union membership and representation in the case of movement between employers within the same industry. The Quebec experiment with extension of collectively bargained agreements industry-wide in construction and other industries is a move in this direction,<sup>51</sup> and one that should be watched closely. It has the advantages of the European sectoral bargaining models, in permitting unions to establish minimum industrial standards, partially taking wages and benefits out of competition.

For the U. S. to move in this direction, however, the first essential step would be to amend the NLRA to permit certification of multi-employer bargaining units, even over employer opposition. Some Canadian provincial legislation has already taken this step, and it is one which might not be too difficult for American labor law to absorb. In addition, however, the NLRA would have to be modified to authorize the NLRB, upon petition by unions and employers whose collective bargaining agreement covered, say, 70% of the workforce in the industry, to extend the terms of their agreement to the

<sup>50</sup> See Weiss, M., "Federal Republic of Germany", in *International Encyclopedia for Labour Law and Industrial Relations*, t. 5, 453, at 169, 1994.

<sup>51</sup> Description and analysis of the Quebec extension decree system may be found in Brennan, Geoffrey H., *The Big Picture: Broader-based Bargaining and the Decree System*, 1993; Hébert, Gérard, "Unionism in a Different Context: The Case of Quebec", in *The Challenge of Restructuring: North American Labor Movements Respond*, 93, 101, Jane Jenson & Rianne Mahon, eds., 1993.



industry as a whole. This would entail a change in the NLRA section 8(d) principle that no employer can be required to accept contract terms to which it has not voluntarily agreed, either itself or through authorized multi-employer bargaining. Strong feelings in the U. S. about employer control over property and managerial interests make this a problematic direction politically.

Within Mexico, it would appear that similar issues may arise regarding the structure of collective labor relations, since most union organization is at company rather than industry level. However, Mexican legislation does permit the possibility of multi-employer agreements or extension of agreements to cover an entire industry in some circumstances.<sup>52</sup> Expansion of these approaches would require a shift in labor relations culture and prevailing practice, but not any drastic modification of the legal labor relations system.

Finally, one must return to the future of NAFTA to consider the trans-border aspects of the capital mobility problem. Two approaches, neither mutually exclusive, are possible. One is for increased cross-border cooperation, and perhaps ultimately collective bargaining, between national union organizations and the multi-national companies at which they share representation rights. The history of such efforts in the European Union, however, suggests that progress in this area is likely to be very slow. The other alternative is for the NAALC to evolve into a more substantial body of regional labor law, again, perhaps, looking to the European Union for examples. It is important here to bear in mind the very short life span of NAFTA, compared to the four decades long existence of the European Union and its predecessors. The European common market existed for three decades before social policy became a topic of major, if partial treaty regulation;<sup>53</sup> by those standards, we in the NAFTA bloc face many years of future development.

<sup>52</sup> Belfort, Stephen F. & Cornett, Virginia. *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17, *Comp. Lab. L. J.* 269, 289, 304, 1996.

<sup>53</sup> While prior treaties contained scattered provisions pertaining to social rights, by and large hortatory, only in the 1992 Treaty of Maastricht did the Member States agree to the Social Agreement supporting binding EU legislation on a broader range of topics, and even then, only by permitting the U. K. to opt out. See generally Blanpain & Engels, *supra* note 47, at 82-115.