RIGHT TO WORK LAWS: HISTORY AND FIGHT BACK

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Introduction

December 10 is supposed to be a day to celebrate human rights. But last year Michigan Governor Rick Snyder and his fellow Republicans spent the day attacking human rights in Michigan and betraying the state's proud tradition of organized labor.

On December 10, 1948 every nation of the United Nations endorsed the Universal Declaration of Human Rights. On December 10, 2012, in a cruel irony, Michigan Republicans passed "Right to Work" (RTW) legislation effectively gutting the human right to form and join unions to protect workers interests as provided in section 23.4 of the Declaration.

This passage of RTW in Michigan is another blow to the labor movement whose ranks have been under attack for so many years that the unionized percentage of the workforce is less than in 1916. Unions and workers should be responding to this fact with a sense of urgency. This article will provide a short history of the Right to Work provision in the National Labor Relations Act, explain what it does, discuss prior challenges, and offer several arguments as to why these laws must be considered illegal. Hopefully these arguments will be useful in the fight back against them.

I. The Original National Labor Relations Act of 1935

The National Labor Relations Act (NLRA) of 1935 (the Wagner Act) unreservedly supported unionization and promoted the benefits of collective bargaining as the policy of the United States. Section 1 of the law declared:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of wage rates and working conditions within and between industries.
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> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment and interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees……
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> It is hereby declared to be the policy of the United States to eliminate the causes of substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.[1]

[1] 29 USC 151

The authors of the original NLRA understood the fundamental truth that without full freedom to organize workers would never achieve equality of bargaining power. They further understood the economic instability which results from the inequality between rich and poor.

The National Labor Relations Board (NLRB) which implemented the NLRA for the first twelve years of its existence required employer neutrality (actually silence) in the face of union organizing drives and allowed for the "closed shop" under which all members of the workplace had to become and remain union members in order to remain employed. From 1935 through 1947 there was a meteoric rise in unionization rates throughout the United States. From 1935 until the passage of Taft-Hartley in 1947 unions won over 80% of the elections they petitioned for.[2]

II. The Taft-Hartley Amendments of 1947: Right to Work Laws

Employers, who did not want workers to have equality of bargaining power, organized to undercut the protections of the law. Using the emerging anti-communism in the Cold War, they were successful in attacks on the labor movement through the Taft-Hartley amendments to the NLRA. These attacks were particularly successful against unions led by Communists or socialists. The Taft-Hartley amendments, however, did not change the declaration of policy in favor of equality of bargaining power, or collective bargaining. Instead, they introduced the basis for turning the law against workers and the labor movement and creating an internal tension within the law between realizing the collective rights of workers to protect their interests by forming and joining trade unions with equality of bargaining power, and the individual's right not to act in concert with anyone, undermining the solidarity of the union.

The Taft-Hartley amendments declared the right of workers to join or not to join unions. Employers encouraging or discouraging union membership became an unfair labor practice under section 8 (a) (3). Union leaders had to sign non-communist affidavits, and neutrality was abrogated by employers having the right to "express their opinions" against unions during organizing drives. Secondary boycotts were banned. Most importantly, for purposes of this article, the Taft-Hartley amendments outlawed "closed shops" and limited "union shops"[3] to those states where it was lawful to require union membership as a condition of employment.[4] Closed and union shops were outlawed in all Right to Work states despite the proviso in 8 (a) (3) of the Act which permitted collective agreements to include clauses which required an employee

[2] See, Dale E. Good, "Some Effects of the Taft-Hartley Act" University of Illinois Bulletin, Institute of Labor and Industrial Relations, Volume 47 Number 18, October 1949 p. 22.

[3] A closed shop is a shop in which persons are required to join a particular union as a precondition to employment and to remain union members for the duration of their employment. It differs from a union shop, in which all workers, once employed, must become union members within a specified period of time as a condition of their continued employment. In non RTW States, union shops are allowed where members of the bargaining unit vote to ratify contracts with union shop clauses.

[4] 29 USC 164 (b)

to be or become a member of the union as a condition of employment, (otherwise known as union security clauses).[5] This provision was passed over the veto of President Truman.

States which passed laws prohibiting such union security clauses in collective bargaining agreements became known as "Right to Work" states. However, nothing about these laws gives anyone the right to work. Initially, most of the States which enacted Right to Work legislation were in the South. Racism and anti-communism played a key role in the passage of these laws. One of the early proponents of these laws, Vance Muse, was a racist right-wing leader of the Christian American Association. Prior to his "right to work" efforts he opposed women's rights, child labor laws, racial integration and Franklin Roosevelt's New Deal programs. Using support of business leaders he railed against unions and union security clauses with blatant appeals to racism. He is reported to have said of closed or union shops: "From now on white women and white men will be forced into organizations with Black African apes who they will have to call brother or lose their jobs". Appeals to racism were effective and by the end of 1947 14 states had passed "right to work" laws.[6]

Other supporters of Right to Work laws included Fred Koch, the father of David and Charles Koch, and a supporter of the John Birch Society.

Right to work laws were opposed by leaders such as Martin Luther King Jr., who said:

> In our glorious fight for civil rights, we must guard against being fooled by false slogans, such as 'right to work.' It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone….Wherever these laws have been passed, wages are lower, job opportunities are fewer and there are no civil rights.

III. Right to Work Laws Undermine Equality of Bargaining Power and promote Income Inequality

In right to work states, paying dues is voluntary, yet union and non-union members alike enjoy the benefits of the union contract. In right to work states, when a union is certified as the exclusive bargaining representative of all the workers in a workplace, the union owes a duty of

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[5] The proviso in section 8 (a)(3) reads: That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization.

[6] There are currently 24 right-to-work states which have established right to work by state constitution or legislation. These are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Most of them became right-to-work states before the 1970's. In 2012, Indiana and Michigan joined the ranks of right to work states.

fair representation to all the employees, and is required to negotiate on behalf of all workers, as well as accept and adjust worker grievances under the contract regardless of their membership in the union.

This encourages people to be "free riders" because they get the benefits of union membership without paying for them. The resultant decreased membership leads to depletion of union coffers and resources. A union needs resources to service the members and those covered by the collective bargaining agreement and to insure that workers have a meaningful voice in the workplace. Without resources, the union cannot pay the costs of processing grievances to arbitration when the collective bargaining is violated, or cannot develop a strike fund to insulate workers from harm should they need to strike, or engage in public relations campaigns in support of their contract demands or to organize more workers in the industry into the union, thus promoting the type of wage stabilization which accompanies "union density." When the union loses resources, soon it loses power at the bargaining table and workers lose the equality of bargaining power the NLRA was designed to achieve.

This leads to a downward spiral where those who have voluntarily joined and paid dues logically question whether they are getting anything in return for their dues. Sooner or later the workers see no reason to belong to a very weak union which does not have the power to protect their interests. The result is either a move to decertify the union or representation by a union which by virtue of having no power cannot stand up for the workers.

This result is, of course, what managements want. This is why business interests are so heavily invested in promoting right to work laws throughout the country and why union leaders refer to these laws as "Right to Work for Less" laws.

IV. The Initial Legal Challenge to Right to Work Laws

Several state constitutional provisions which prohibited union security clauses were passed in the late 1940s. The Supreme Court ruled on union challenges to them in in *Lincoln Federal Labor Union No 19129 v Northwestern Iron and Metal Co et. al.,* 335 U.S.525 (1949). The Supreme Court found these laws to be constitutional. The Taft-Hartley amendments which said the same thing were found constitutional by extension.

Union arguments in this case included: (1) these laws abridged freedom of speech, assembly and the right to petition; (2) that they conflicted with Art. I, s 10, of the United States Constitution, insofar as they impair the obligation of contracts made prior to their enactment; (3) that they denied equal protection of the laws and (4) that they denied due process by interfering with liberty of contract. Each of these arguments failed. Ultimately the decision characterized the right to work laws as anti-discrimination laws to ensure workers belonging to unions and those who did not were treated equally with regard to their right to obtain and retain a job. Although the unions raised concerns that the laws negatively impacted their equality of bargaining power and the right of self-organization for stability of wages stated in the declaration of policy in the NLRA, the opinion written by Justice Black, did not even mention the NLRA or the Taft-Hartley amendments. Indeed, with respect to the due process/liberty to contract argument the Court stated:

> There was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this antiunion employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of 'yellow dog contracts.' This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts.

The Court's reasoning was that if it was possible to ban yellow dog contracts, it was just as legal to ban discrimination against those who do not want to join a union.

The concurring opinion of Justice Frankfurter, perhaps gives more insight into the Court's rationale for agreeing to uphold right to work laws. Frankfurter based his concurrence on the perceived great strength of organized labor. He stated as follows, *inter alia:*

> It is urged that the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized labor. But can it be said that the legislators and the people of Arizona, Nebraska, and North Carolina could not in reason be skeptical of organized labor's insistence upon the necessity to its strength of power to compel rather than to persuade the allegiance of its reluctant members? **In the past fifty years the total number of employed, counting salaried workers and the self-employed but not farmers or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times;** at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three. However necessitous may have been the circumstances of unions in 1898 or even in 1923, its status in 1948 precludes constitutional condemnation of a legislative judgment, whatever we may think of it, that the need of this type of regulation outweighs its detriments." *Id.* at 335 U.S. 538, 547-548.

Whatever misgivings the Court may have had, at least Justice Frankfurter did not see right to work laws as the death knell of unions which had grown strong through militancy and support from the NLRB.

V. International Labor Organization Takes No Position on Union Security but Refuses to Put The Right to Join a Union on equal footing the "Right" not to Join

In 1948 and 1949, the International Labor Organization (ILO)[7] in Geneva adopted two Conventions which protected the right to organize and promote collective bargaining. These

[7] The International Labor Organization (ILO) was created as a part of the Treaty of Versailles which ended World War I. The ILO adopted a structure that included representatives of government, business, and labor, allowing it to adopt international standards that would be accepted by everyone.

conventions, 87[8] and 98[9] respectively are silent on the question of union security. This is because the employer members of the ILO wanted the International Labor Conference (ILC) (the policy making body of the ILO) to include the language similar to the Taft-Hartley amendments regarding a workers right not to join a union.

> The report of the ILC states with respect to this issue as follows:
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> The Employers' members observed that freedom of association should be guaranteed in its negative aspect – freedom not to join – as well as in the positive aspect – freedom to establish organizations and to join them. In their opinion, the form of the international regulations should be left to be determined by the next session of the Conference. The regulations should state clearly that no employer or worker should be forced to join an industrial organization against his will. Such coercion would be contrary to the principles stated in the Convention concerning freedom of association. Consequently, Governments should take a clear decision, first, whether they intended to limit the freedom of an individual to refrain from joining any particular organization, and secondly, whether they intended to impose on the interested parties the obligation to bargain collectively, or whether they would limit all intervention to the simple fact of facilitating the conclusion for collective agreements.

Moreover, several Employers' members emphasized the point that not only should the international regulations expressly guarantee the liberty not to join, but they should also fully safeguard freedom of expression and provide clearly that no compulsion to organize could be exercised in regard to either workers or employers.

The workers' members pointed out that the right to organize and the right not to organize could not be placed on a footing of equality, and therefore, opposed any inclusion in the international regulations of a clause specially guaranteeing the right not to join. The international regulations, as emphasized by the French Workers' member, were intended primarily to make the principle of freedom of association effective by guaranteeing to those concerned the right to establish organizations freely and allowing them to function freely, an essential condition of collective bargaining.

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[8] Convention 87 protects the right of freedom of association to form and join unions without restriction. If further guarantees, *inter alia* the right of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

[9] Convention 98 affords protection to workers against acts of anti-union discrimination, including unjust dismissals, suspension, transfer and demotion of workers by reason of their trade union membership; it affords protection to workers' and employers' organizations from acts of interference against each other and recognizes the collective bargaining rights of workers. The Convention requires member states to take appropriate measures to encourage and promote collective bargaining between workers' organizations and employers or employers' organizations and workers' organizations in order to regulate the terms and conditions of employment by means of collective agreements.

The result was that Conventions 87 and 98 do not include any language about the right to not join a union. The ILO decided not to issue any convention on the issue of union security clauses, but left the matter to the member states.

VI. Developments in the Law since the 1949 Challenge to Right to Work Laws

Since *Lincoln Federal Union supra*, there have been no substantive challenges to right to work laws. Most challenges which have been filed raised questions of "preemption" where the right to work laws appeared to apply to Federal enclaves in States which are not covered by right to work laws, or seeking to exempt workers in Federal enclaves, or where it was claimed the language in the statute went beyond what 14(b) prohibited.

In 1974, in *Ficek v International Brotherhood of Boilermakers et. al*,.[10] the North Dakota Supreme Court addressed the question of whether an "agency shop" provision in a collective bargaining agreement violated the North Dakota right to work law. Agency shop agreements require workers who do not want to join a union in a unionized workplace to pay an "agency fee" designed to cover the unions cost of representation and administering the contract in their favor, so as not to be "free-riders". The fees are limited to the initiation fees and the equivalent to union dues. Although the state attorney general in North Dakota had interpreted the right to work law which was silent on the question of any fees allowed agency shop agreements, the Court, after considering cases from other states which had similar right to work laws, found North Dakota's law to prohibit agency shop agreements viewing them as tantamount to requiring union membership.[11]

VII. Developments in the Facts and Law since Taft Hartley recognized Right to Work Laws Requires these Laws to be considered Illegal.

The full impact of Taft-Hartley was not felt immediately, but the assault on unions in the United States has been unrelenting since at least the 1970's and the advent of neo-liberal globalization which has among its pillars de-unionization and casualization of work. In many instances, especially when the NLRB had a majority of Republican appointees, the NLRB issued decisions which have elevated the individual rights of workers not to join unions over the collective needs for solidarity of the workers, using those portions of the Taft-Hartley amendments which introduced those individualist notions into the NLRA. Those offering "union avoidance services" have become very wealthy. Managements do not fear committing unfair labor practices given the limited remedies available to workers.

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[10] 212 N.W. 2d 860 (1974)

[11] There are several cases which have whittled membership in unions to its "financial core". See *NLRB v Genreal Motors Corp*., 373 U.S. 734 (1963) and *Communications Workers of America v Beck* 487 U.S. 735 (1988) Both of these cases involved agency fees and what constituted . In *Beck* the court defined the financial core to be those costs germane to collective bargaining, contract administration and grievance adjustment and did so for the purpose of saying that agency fees could not exceed that amount Nonetheless, the most recent Court decision representing a challenge to RTW laws was issued on January 17, 2013 in *Sweeney v Daniels*, 2013 WL 209047 (N.D.Ind.). This case addressed a challenge to Indiana's RTW law passed in early 2012. The Indiana law outlawed any requirement that any worker be required to pay an agency fee. The case unsuccessfully raised equal protection challenge to the exemption of building trades workers from the law. It deferred any State constitutional challenge to the State Court.

Internationally, the law has developed since 1947. The right of workers to form and join trade unions to protect their interests is a universal human right recognized in both human rights and labor law and is binding on all states.[12]

Consider the following:

The Universal Declaration of Human Rights requires all governments to work towards achieving the rights stated in the Declaration.

Article 23 of the Universal Declaration states:

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself (and herself) and his (or her) family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his (or her) interests.

The right of everyone to form and join trade unions is for the purpose of protecting their interests. The "protection of interests" language in the declaration has substantive meaning. Trade unions must be treated under law in a manner which enables people who join together in trade unions to be actually able to protect their interests, so as to achieve such rights as favorable remuneration and conditions of work and ensure an existence worthy of human dignity.

The Universal Declaration was the basis for two Human Rights treaties which provide more specifics to rights contained in the Declaration. These treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). In 1992 the United States ratified the ICCPR. The United States has signed but not ratified the ICESCR.[13]

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[12] The next section of this article is taken from a statement written by this author on behalf of the International Commission for Labor Rights (ICLR). The Statement was sent to Michigan law makers when they were considering the Michigan Right to work law in December of 2012. The thrust of the argument is that it is important to challenge RTW laws in light of developments in international labor and human rights law.

[13] Even though the United States has not ratified the ICESCR there are two reasons why the United States is bound by its provisions. (1) under the doctrine of *pacta sunt servanda* a country which has signed a treaty is bound by its provisions until such time as it is repudiated (see Vienna Convention on the Law of Treaties) and (2) At present 160 countries have ratified this Covenant such that the provisions are customary international law and binding regardless of ratification. Customary international law is that law which is so widely accepted that the law is binding on all countries. See *Sarei v Rio Tinto* 456 F.3d 1069 (9th Cir 2006) Where the UN Convention on the Law of the Sea (UNCLOS) which was ratified by at least 149 countries was considered customary international law.

The ICCPR at Article 22 reiterates that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his (or her) interests. The only restrictions on the right are those which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Under the ICCPR, any restrictions on trade unions must be necessary to a democratic society etc. Necessity is a high bar. Trade Unions are one of the major building blocks of a democratic society. As such there can be no necessity for this legislation which is aimed at weakening the ability people to protect their interests by voting for a union.

The ICESCR has similar language. Article 8 (a) ensures "the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. The ICESCR also has that high bar for restrictions on organization of trade unions.

As human rights norms have developed, so have labor rights norms which protect the rights of unions, freedom of association and collective bargaining. As noted above, in 1948 and 1949 the International Labor Organization (ILO) issued Conventions 87 and 98 respectively. These conventions protect the right to organize and to collectively bargaining. The ICCPR and ICESCR at Article 22 (3) and Article 8 (3) integrate the provisions of ILO Convention 87, into these human rights treaties. This subsection states that no State which has ratified Convention 87 may pass legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention. Although the United States has not ratified either Conventions 87 or 98, given their universality, they should be considered binding as customary international law. In fact, in 1998 the ILO issued the Declaration of Fundamental Principles and Rights at Work (FPRW) which gave special status to "core labor" standard which members of the ILO were bound to observe and report progress on to the ILO regardless of ratification. Conventions 87 and 98, the rights to organize and collective bargaining are part of the core labor standards with this special status. United States membership in the ILO requires compliance with these conventions.

Therefore, reading the ILO Convention 87 together with subsection 3 of Article 22 of the ICCPR and sub section 3 of the ICESCR, no state may be allowed to pass a law which prejudices the guarantees provided for in Convention 87. Right-to-work laws prejudice workers' rights under Convention 87 and the above described human rights instruments.

Right-to-work laws prevent unions from fulfilling their duty to protect the interests of the workers. Laws aimed at weakening trade unions so as to prevent them from protecting workers interests should therefore be considered illegal.

CONCLUSION:

Republican controlled state governments in Michigan and Indiana passed Right to Work laws in 2012 despite massive protests. These attacks on the right of workers to organize are being advanced at a time when the percentage of unionized workers is lower than it was in 1916.

Justice Frankfurter's rationale for his concurrence is no longer viable. The statements of policy in the NLRA of promoting equality of bargaining power and collective bargaining have been undermined with increasing right to work laws. Unions need to evaluate the developments in the law, including international law, since the passage of Taft-Hartley and place challenging right to work laws in the context of a broader strategy of rebuilding the trade union movement.