

GROWING UNION MEMBERSHIP: HOW IMPORTANT IS THE REPRESENTATION ELECTION PROCESS

Calvasina, Gerald E.
Southern Utah University

Roberts, Wayne
Southern Utah University

ABSTRACT

Union membership in the United States has consistently declined since 1983. According to the Hirsch and Macpherson database, the union membership rate, the percentage of wage and salary workers who were members of a union in 2012 was 11.2 percent, down from 11.8 percent in 2011 (Hirsch and Macpherson, 2013). Across the public and private sector of the US economy, the public sector rate (35.9 %) was five times higher than the private sector (6.6 %) (Hirsch and Macpherson, 2013). In addition to the steady decline in union membership, organized labor's use of the National Labor Relations Board (NLRB) supervised representation election process has also declined over time. In 1983, 4,405 private sector representation elections were held in the United States and only 1,468 were held in 2012. The purpose of this paper is to evaluate the use of the representation election process by organized labor to grow membership in the private sector of the US economy over the last 30 years and recent efforts by organized labor to stem the decline in membership.

INTRODUCTION

Union membership in the United States has consistently declined since 1983. According to the Hirsch and Macpherson database, the percentage of wage and salary workers who were members of a union in 2012 was 11.2 percent, down from 11.8 percent in 2011 (Hirsch and Macpherson, 2013). Across the public and private sector of the US economy the public sector rate (35.9 %) was five times higher than the private sector (6.6 %) (Hirsch and Macpherson, 2013). In addition to the steady decline in union membership, organized labor's use of the National Labor Relations Board (NLRB) supervised representation election process has also declined over time. In 1983, 4,405 private sector representation elections were held in the United States and only 1,468 were held in 2012.

There are three basic ways that new union organizing occurs; secret-ballot elections, voluntary recognition, and National Labor Relations Board (NLRB) directives. While the vast majority of new union organizing occurs through the secret-ballot election process, in recent years organized

labor's frustration with the process has become more vocal and new models of union membership have begun to emerge. These new models are being aimed at sectors of the US economy that have proven to be difficult to organize (Maynard, 2013). The purpose of this paper is to evaluate the use of the representation election process by organized labor to grow membership in the private sector of the US economy over the last 30 years, and recent efforts by organized labor to stem the decline in membership.

PREVIOUS RESEARCH – PRIVATE SECTOR UNION MEMBERSHIP

The steady decline in union membership since the end of World War II has been attributed to a variety of factors. Hirsch and Hirsch identified some of the commonly identified reason for the decline in union in union membership including “structural changes that have reallocated jobs toward industries, occupations, and locations that are typically less unionized” (Hirsch and Hirsch, 2006). Other factors identified by Hirsch and Hirsch include technological change, especially in manufacturing which led to “rapid productivity growth” in manufacturing employment in the U.S., once a key source of union membership (Hirsch and Hirsch, 2006). Farber and Western concluded that the decline in the private sector union membership rate was due primarily to changes in the economic environment that made union representation of less value to workers and more costly to employers. They hypothesize that increased global competitiveness and mobility of capital as likely important contributing factors (Farber and Western, 2001). Farber and Western also concluded that union organizing activity utilizing “NLRB supervised representation elections was a marginal contributor to the decline in the union membership rate” over the period they studied (Farber and Western, 2001). Farber and Western also noted a “sharp decline in organizing activity in the early 1980s,” with “the number of elections falling by almost 50 percent from about 8000 in 1980 to about 4400 in 1990”(Faber and Western, 2001).

Labor market characteristics, including urban location, geographic area, and the change in local employment have also been investigated (Farber and Western, 2001, Koeller, 1994, Dickens et al., 1987, Lawler 1982, Moore and Newman, 1988). Moore and Newman concluded that changes in the structural composition of the labor force best explain the decline in union membership after World War II (Moore and Newman, 1988). Lawler found that changes in county-level employment opportunities adversely affected the odds of bargaining unit members voting for union representation (Lawler, 1982).

Management resistance to unionization has also been hypothesized as a factor associated with the decline in unionization in the private sector (Kleiner, 2001, Koeller, 1994). Kleiner concluded that as much as forty percent of the decline in private sector union membership may be a result of intense opposition by management, while Koeller concluded that there appears to be little basis for attributing a substantial portion of the decline in union membership to intensive employer resistance as measured by employers committing aggressive unfair labor practices (Kleiner, 2001, Koeller, 1994).

PREVIOUS RESEARCH - NEW UNION ORGANIZING

Previous studies of new, union organizing and union success in secret-ballot elections have examined a variety of factors. Heneman and Sandver examined the impact of national union characteristics, including resources devoted to secret ballot elections, and found that the average unit size in secret ballot elections was significantly and negatively related to the union victory rate (Heneman and Sandver, 1989). Sandver and Ready found that election unit size had a significant negative effect on the percentage of votes cast for unions in both single and multi-union secret ballot elections (Sandver and Ready, 1998). Farber examined union election activity over a 45 year period and concluded that unions are less likely to win elections in large units than in small units and that the size-gap in union success rates has widened substantially over the years in his study (Farber, 1999). Studies by Freeman and by Dickens and Leonard found that the decline in union success in secret-ballot elections was linked to reduced organizing activity by unions (Freeman, 1985, and Dickens and Leonard, 1985). Lawler found that changes in county-level employment opportunities adversely affected the odds of bargaining unit members voting for union representation (Lawler, 1982). Farber and Western observed sharp declines in new union organizing activity over time and stated that it would take “a very substantial increase in union organizing activity” to have a significant impact on union membership (Farber and Western, 2001).

A great deal of attention has also been devoted to the study of the impact of right-to-work legislation on union outcomes (Hunt and White, 1983, Wessels, 1981, Bennett and Johnson, 1980, Moore and Newman, 1975, and Lumsden and Peterson 1975). Right-to-work status has been found “to be of little consequence in determining union related outcomes when various other factors are included in predictive models” (Hunt and White, 1983, p. 47).

NEW UNION ORGANIZING PROCEDURES

With regard to secret ballot elections, the process begins with employees demonstrating a showing of interest. Interested employees must demonstrate that they have the support of at least 30% of the employees in a proposed bargaining unit to trigger NLRB processes. Once a showing of interest has been demonstrated, NLRB agents conduct an investigation to make sure the NLRB has jurisdiction, the union is qualified, and there are no existing labor contracts that would bar an election (NLRB, 2013). The NLRB’s basic procedures as presented on the NLRB web-site, are detailed in Exhibit 1.

Exhibit 1: Basic NLRB Procedures

The agents will then seek an election agreement between the employer and union setting the time and place for balloting, the ballot language, the size of the unit, and a method to determine who is eligible to vote. Once an agreement is in place, the parties authorize the NLRB Regional Director to conduct the election. If no agreement is reached, the Regional Director can schedule a hearing and then order the election and set the conditions in accordance with the Board's rules and its decisions.

Typically, elections are held within 30 days of a Director's order or authorization. However, an election may be postponed if a party files charges alleging conduct that would interfere with employee free choice in the election, such as threatening loss of jobs or benefits by an employer or a union, granting promotions, pay raises, or other benefits to influence the vote, or making

campaign speeches to employees on company time within 24 hours of the election. When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least 30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters. Representation and decertification elections are decided by a majority of votes cast. Observers from all parties may choose to be present when ballots are counted. Any party may file objections with the appropriate Regional Director within 7 days of the vote count. In turn, the Regional Director's ruling may be appealed to the Board in Washington. Results of an election will be set aside if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice. Otherwise, a union that receives a majority of the votes cast is certified as the employees' bargaining representative and entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice (NLRB, 2013).

In addition to the basic procedures detailed above, the NLRB web-site also outlines an alternate path to union representation. The NLRB notes that "federal law provides employees a second path to choose a representative: They may persuade an employer to voluntarily recognize a union after showing majority support by signed authorization cards or other means. These agreements are made outside the NLRB process. If a union is voluntarily recognized, its status as bargaining representative cannot be challenged during a reasonable period for bargaining, which the Board defines as not less than six months (and not more than one year) after the parties' first bargaining session" (NLRB, 2013).

The alternate path to union representation detailed above is commonly referred to as the "card check." In the early years after the passage of the National Labor Relations Act, unions frequently utilized "recognition strikes" and "card checks" to organize new workers, techniques that were outside NLRB election process (Farber and Western, 2001). While use of this method waned over time, in recent years the use of this method has been part of the political battles associated with what has been described as "the ongoing political tug of war on most union issues, with unions and Democrats generally lining up on one side, and business groups and Republicans on the other" (Trottman, (2011). The card check approach is one of the components of "top-down organizing" (Bux and Tolar, 2007). When unions use a top-down approach to organizing, unions utilize pressure tactics to convince top management of the targeted firm to sign a neutrality agreement. Under a neutrality agreement, "the employer agrees not to oppose a union's attempt to organize the employer's workforce" (Bux and Tolar, 2007). Bux and Tolar detailed the effective use of top down organizing by the Service Employee International Union's (SEIU) in a 2005 organizing campaign in Houston, Texas. In this campaign, Justice for Janitors, the SEIU and five other unions signed a neutrality agreement with Houston high-rise commercial cleaning contractors that accounted for 80 percent of the commercial cleaning market (Bux and Tolar, 2007). That agreement required employers to provide home contact information to the union and a card check agreement. The SEIU was able to obtain signed authorization cards from

a majority of employees and a contract between the union and the employers was announced in November of 2006 (Bux and Tolar, 2007).

The neutrality agreement, a key component of the top-down approach to organizing is currently under scrutiny by the United States Supreme Court in *Unite Here Local 355 v. Mulhall* (Bravin and Trottman, 2013). In this case, involving a Unite Here Local union and the Mardi Gras Gaming Co., the employer agreed to give the union access to their premises, turn over lists of employee names and addresses and generally remain neutral during the organizing campaign. The union would in turn not picket or engage in a strike as part of its organizing effort. The union also agreed to spend over \$100,000 of its funds to support a ballot initiative to expand casino gambling (Bravin and Trottman, 2013). The important issue in this case for both employers and unions is the legality of the neutrality agreement as a means to facilitate union organizing. Howard Kurman, an employment attorney, believes a decision by the court to limit such agreements could hurt the SEIU because “much of their organizing has been done via neutrality agreements” (Bravin and Trottman, 2013). A decision from the Supreme Court is expected by June of 2014.

Table 1 contains statistics derived from NLRB Annual Reports (1983 -2009), statistical tables for FY 2010, and Election Reports for FY 2011 – 2013 (NLRB, 2013). Table 1 conveys the magnitude of changes in union organizing activity over time. The union election data in the table are consistent through 2009. The reliability and consistency of election data for FY2010 through 2013 are not as strong given some inconsistent reporting across different NLRB reports and tables found on the NLRB web site. The inconsistencies in the data are not large enough to change any assessments or conclusions regarding trends in union organizing activity.

As shown in Table 1, the decline in organized labor’s use of NLRB procedures to secure representation rights continues. Organized labor has had some success in terms of its success rate in representation election. From 1983 through 1998 the union win rate in representation elections ranged from a low of 42 percent to a high of 49 percent. From 1999 through 2012 the rate was consistently above 50 percent and has been consistently above 60 percent since 2007. The decline in the number of election petitions being filed, the number of elections being held, and the number of eligible voters in the representation election process has continued over time and the increase in the union win rate is not sufficient to have a major impact on overall union membership.

Table 1. Union Election Data

Year	Number of Petitions	Number of Elections	Number of Union Wins	Union Win Rate	Number of Eligible Voters	Number of Eligible Voters in Union Wins
1983	5,927	4,405	1,895	43.0%	209,918	91,311
1984	6,016	4,436	1,861	42.0%	249,512	105,919
1985	6,209	4,614	1,956	42.4%	254,220	91,161
1986	5,656	4,520	1,951	43.2%	259,239	91,999
1987	5,578	4,069	1,788	43.9%	241,825	96,384
1988	6,092	4,153	1,921	46.3%	243,692	97,043
1989	6,686	4,413	2,059	46.7%	273,775	110,037
1990	6,005	4,210	1,965	46.7%	261,385	93,789
1991	5,162	3,752	1,663	44.3%	225,842	90,051
1992	4,946	3,599	1,673	46.5%	219,730	83,379
1993	5,084	3,586	1,706	47.6%	231,187	97,166
1994	4,610	3,572	1,665	46.6%	210,834	85,603
1995	4,494	3,399	1,611	47.4%	215,137	86,678
1996	4,308	3,277	1,469	44.8%	219,073	82,947
1997	4,854	3,480	1,677	48.2%	236,016	101,646
1998	4,982	3,795	1,856	48.9%	250,726	100,535
1999	4,679	3,585	1,811	50.5%	242,123	112,291
2000	4,756	3,368	1,685	50.0%	259,534	120,525
2001	4,238	3,076	1,591	51.7%	234,225	95,408
2002	4,402	3,043	1,606	52.8%	201,149	88,481
2003	3,851	2,937	1,579	53.8%	196,557	87,499
2004	3,749	2,719	1,447	53.2%	191,964	94,565
2005	4,116	2,649	1,504	56.8%	176,919	85,383
2006	2,597	2,147	1,195	55.7%	152,275	83,764
2007	2,394	1,905	1,195	62.7%	128,465	83,764
2008	2,556	1,931	1,159	60.0%	137,812	85,247
2009	2,696	1,619	1,033	63.8%	96,030	63,167
2010	2,969	1,834	1,143	62.3%	114,714	75,649
2011	2,636	1,355	926	68.3%	95,803	Missing
2012	2,484	1,215	786	64.7%	83,908	Missing
Ave.	4,491.07	3,222.10	1,579.20	51.2%	203,786.30	92,192.54

Farber and Western found a roughly 50% decline in the number of elections between 1980 and 1990. The number of eligible voters also dropped significantly. While the rate of election activity held relatively steady from 1983 through 1995, the number of elections held has dropped more sharply since then. In 1995, 3,399 elections were conducted and by 2012, that number had fallen to 1,215. The number of election petitions requesting the NLRB to conduct a representation election has also fallen significantly over time. This drop could signal further erosion in organized labor’s confidence in NLRB procedures to facilitate growth in membership. Mark Meinster, a campaign director for Warehouse Workers for Justice, that “works to promote better conditions for employees who work in the supply chain of major retailers including Walmart”, described the current system of labor law in the US as “broken” (Maynard, 2013).

Meinster believes that if positive change to the working conditions workers in companies like Walmart is going to happen, it will only happen when workers come together and take action to hold their employers accountable.

NEW UNION ORGANIZING STRATEGIES

At a 2013 American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) conference entitled “New Models of Worker Representation,” Richard Trumka, AFL-CIO President, lamented that “the basic system of worker representation is failing to meet the needs of American’s working men and women by every critical measure” (Tortora, 2013). Trumka in an address at the conference identified how the American labor movement is using its resources and membership to reach out and organize workers. Trumka highlighted the AFL-CIO’s Working America affiliate, a national membership group that is available to all workers designed to help workers “get closer to unions and begin to take collective action” (Tortora, 2013). Trumka also highlighted the development of new forms of membership that are being developed through “partnership agreements with the National Domestic Workers Alliance” (Tortora, 2013). He also cited examples of new organizing efforts directed at workers who have traditionally not fit the definition of an employee, including home-based workers in child care, workers in low-wage industries like food services, and younger workers between the ages of 16 and 24 (Tortora, 2013).

Organizations are also making use of members-only agreements (Vernuccio, 2013). A members-only agreement is a union agreement made without the exclusivity clause that is typical in collective bargaining. Such an agreement allows unions to represent only those who want to be represented, and it allows workers who want to represent themselves to be free to do so – something workers are not free to do under normal union contracts, even in right-to-work states (Vernuccio, 2013).

Still other unions are endorsing the use of “minority” or “pre-majority” unions to gain a foothold in an organization. With this approach, unions attempt to organize smaller groups of workers in establishments and bargain on their behalf until they can obtain majority status (Maynard, 2013). According to law professor Charles Morris, an advocate of this approach, it was commonly utilized by unions in the 1930s and 1940s by a variety of unions and is “allowed under the National Labor Relations Act” (Maynard, 2013).

In a report from the Litter Mendelson Workplace Policy Institute, the efforts to organize workers in the food service industries is in part being directed by what the Mendelson report called union-front organizations (UFOs), often called “work centers” in the report (Smith, 2013). According to the report, the UFOs “are typically nonprofit organizations offering a variety of services to their members, including worker advocacy, lobbying, employment services and legal advice,” and sometimes “directly engaging employers or groups of employers to effectuate change in the wages, hours and terms and conditions of their members” without engaging in collective bargaining (Smith, 2013). Often organized by industry, the report identified the Retail Action Project UFO, in the retail industry and the Restaurant Opportunities Center (ROC) for restaurant workers. The ROC has targeted companies like McDonalds and Taco Bell calling for higher minimum wages (Smith, 2013). The report also described an initiative called “Fast Food

Forward” devised by a group called the New York Communities for Change. The group, “partially funded by the Service Employees Union” organized a nationwide strike in August of 2013 to protest low wages (Smith, 2013). While the UFOs operate like labor organizations and are partially funded by labor organizations, they are up to now able to operate outside the reporting and legal obligations that a labor union is required to adhere to (Smith, 2013).

These alternative forms of labor organizations or “alt-labor”, a new term coined by Josh Eidelson in a January 2013 American Prospect article, utilize a variety of approaches to accomplish their objectives (Vernuccio, 2013). In recent years, a very popular approach utilized by the alt-labor groups and traditional labor organizations in general is the use of the corporate campaign. Corporate campaigns, also referred to as top-down organizing, typically involves attempts to pressure companies to sign neutrality agreements and to agree to card check recognition. Vernuccio reported on a Service Employees International Union manual discovered in a 2011 racketeering and extortion case in 2011 (Vernuccio, 2013). In the manual, a variety of corporate campaign tactics were described. For example, the manual advocates attempting to the use of outside pressure that can involve attempts to jeopardize the relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds. Vernuccio also noted that a campaign may use legal and regulatory pressure to threaten the employer with costly action by government agencies or the courts. The SEIU manual also advises digging up dirt on both the company and individual officers in order to facilitate charges of racism, sexism, exploitation of immigrants or proposals that would take money out of the community for the benefit of distant stockholders. In the manual, the SEIU recommends that leafleting outside meetings where targeted managers are speaking, their homes, or events sponsored by community organizers they are tied to are some ways to make sure their friends, neighbors, and associates are aware of the controversy (Vernuccio, 2013).

A consistent concern for employers is that many of the new strategies and techniques fall outside the restrictions of the National Labor Relations Act. In addition, given the current majority enforcing the act, even where questionable behavior is alleged organized labor has not yet been challenged by the agency charged with enforcing the act. While the U.S. Supreme Court may rein in some aspects of the corporate campaign with its ruling in *Mulhall v. Unite Here* most of the current initiatives organized labor is utilizing will continue uninhibited at the Federal level of government. Walmart, the target of numerous corporate campaign tactics for a number of years by the United Food and Commercial Workers (UFCW) union, was able to secure a temporary restraining order against the UFCW prohibiting the union and its UFO from “engaging in activities such as picketing, patrolling, parading, demonstrations, flash mobs, handbilling, solicitation, and manager confrontations” (Vernuccio, 2013). The NLRB’s General Counsel recently found merit in some charges alleging that Walmart violated the rights of its employees associated with recent protest against Walmart (NLRB General Counsel, 2013). Additionally, it was recently reported that the NLRB has determined that \$50 gift cards given to Wal-Mart employees by the United Food and Commercial Workers Union (UFCW) who walked off their jobs on Black Friday last year, “did not constitute unlawful restraint or coercion of employees”

(Peterson, Hayley, 2013). The protest activity against Walmart was organized by the by an alt-labor group OUR Walmart with help from the UFCW(Peterson, 2013).

SUMMARY AND RECOMMENDATIONS FOR EMPLOYERS

There are no quick fix suggestions for employers to deal with the emerging organizing strategies employed by organized labor. Creating and maintaining employee-friendly cultures has long been recommended and has a proven record of success. Yet the establishment and maintenance of organizational cultures where employees do not perceive the need for third party representation to maintain balance in their psychological contract with their employer becomes more difficult as time goes on. Difficult economic times, with employees facing more uncertainty regarding their ability to maintain their standard of living while income gaps between top earners and the rank and file continue to widen continue to provide union organizers and their very socially active constituencies ammunition to pursue new forms of membership and representation. These new alt-labor groups of “nonunion workers’ groups are gathering strength across the country” (Eidelson, 2013). In addition, these groups have friends in high places and a great deal of support in the popular press. Employers that ignore these groups do so at their own peril.

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