CHAPTER THREE

Waiting for the Workers: How Labor Policy Can Better Protect Unionizing Employees

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Introduction

Organized labor exploded in the United States in 2022. While industries in the US created thousands of brand-new non-union jobs that year, the number of Americans who became represented by a union grew by 200,000 individuals and demonstrations such as strikes grew by 52%.[1] During this cascade, unions added a surprising group of Chicago workers to their ranks: museum workers. In early August of 2022, workers of The Art Institute of Chicago (the second largest art museum in the United States) and its associated school voted to unionize.[2] The workers cited concerns with a hierarchical work culture, pay, workloads, and the museum's response to the COVID-19 pandemic.[3] The Art Institute of Chicago represented the first of a coming wave of cultural institutions in Chicago whose workers have sought or are seeking to unionize.

These Chicago cultural workers have been organizing under the American Federation of State County and Municipal Employees (AFSCME) – a national union that represents public service, municipal, and cultural workers across the country.[4] These unionizing efforts, many of which are still being adjudicated by the National Labor Relations Board (NLRB), have been challenging for the workers involved. As the United States moves into nearly a century since the passing of the original policies that created the current body of worker rights, a new generation of voters and legislatures has begun to renegotiate the protections organizing workers receive.

Employers, employees, and unions derive their bargaining rights from the Wagner Act of 1935, and its few succeeding amendments. These rights are enforced by the NLRB – an independent agency of the federal government responsible for refereeing labor disputes across the US[5] - and apply to all workers in the US, regardless of which state they work in. Individual states (and even municipalities) can contribute more worker protections in their laws if they wish. In Illinois, in 2022, the

state legislature passed, and voters approved, a state constitutional amendment called the Illinois Workers' Rights Amendment. The amendment enshrines employee rights to collectively negotiate with their employers and outlaws the passage of laws that make collective bargaining more difficult for workers, such as "Right-To-Work" laws.[6]

Chicago's City Council has also made it a point to weigh in on labor disputes and protect worker rights to form unions. Most recently, in March 2023, the Council passed an ordinance to safeguard the rights of workers in human service agencies to organize and form unions. The ordinance also prohibits strikes and picket lines from the workers in these agencies in exchange for these new protections.[7]

At the national level, workers may see an amplification of their rights to organize within the next year. Legislation introduced in the Summer of 2021, the "Protecting the Right to Organize Act", outlines the expansion of rights to employees to participate in secondary strikes; prohibits employers from hiring replacements during strikes; prevents employers from making employees attend mandatory anti-union or "informed choice" meetings; and establishes harsher penalties for companies that violate worker rights.[8]

The current body of policies governing worker rights intends to assure workers of their freedom to organize without fear of coercion from unions nor retaliation from the companies they work for; however, in practice, these policies are insufficient to meet that goal. The experiences of the ongoing unionization efforts in Chicago's cultural institutions provide insight into how collective bargaining within the current legal framework plays out in practice. More specifically, close examination of the status quo national labor policy through its manifestation in these proceedings will appraise the efficacy and shortcomings of worker rights policies. These policies will prove to be antiquated and insufficient for protecting worker rights in challenging contemporary circumstances. The contemporary political landscape is allowing the reexamination of labor policy to begin to reform laws to grant workers more agency. The conclusion of the chapter will look at the promise and potential pitfalls of the Illinois Workers' Rights Constitutional Amendment and the national Protecting the Right to Organize Bill, in this moment of revitalization for labor organizing.

Current Union Protections

In 1935, the US Congress passed the Wagner Act in response to the lack of enforceability of previous worker rights policies. The Wagner Act outlined the rights of employers and employees during labor disputes and created the NLRB to help

enforce these rights. The Wagner Act guarantees workers the right to collectively bargain with a union that is selected by a majority of employees; establishes the principle of exclusive representation by majority rule; and provides enforcement for NLRB rulings.[9] Major changes to the Wagner Act were made in 1947 during the Truman administration, expanding the explicit rights of both workers and employers.

The Taft-Hartley provisions added six new unfair labor practices, which applied to both labor unions and employers. At the time, Congress's dominant perception of labor unions was that they were organizations that operated by coercion, and that the NLRB should act to protect employees from unfair labor union practices. The perception largely stemmed from the influence organized crime (particularly the Italian Mafia) had on some large unions in prior decades. While still monitored, the issue of racketeering in labor unions is not as prevalent as it was in the past.[10] The Taft-Hartley provisions greatly limited unions' power to strike, and included a "free speech" clause, which exempted the expression of non-coercive views, arguments, and opinions from being considered as evidence of unfair labor practices. Taft-Hartley also altered union election procedures, outlawing supervisors from joining bargaining units, but also expanding employee powers to vote on union decisions.[11] While preventing supervisors from joining unions may have helped prevent labor racketeering, today it tends to preclude union membership for employees holding low-level managerial positions.

The Taft-Hartley provisions constituted an effective power shift towards employers: the number of unions that won their election campaigns dropped by 10 percent after its passing. Reforms in 1959 accentuated this power transfer to employers. The legislative adjustments following the Wagner Act reflect a sentiment that the government must protect workers from two parties who may be interested in exploiting them: their employers and unions. Sections 7 and 8 (in the current iteration of the amended Wagner Act) define what unfair labor practices the NLRB disallows by employers and unions.[12] What this sentiment of potential exploitation forgets, however, is that even though unions exist as independent organizations, they typically are representative of the workers, not of the interests of the company or institution. Unions are not entities entirely separate from the workers – they are the workers.

Historically, labor unions have faced perceptions of being coercive entities. High profile instances of unions having ties to organized crime surely have helped to create these perceptions. But sometimes a powerful union becomes misconstrued as coercive, whenever it wields substantial influence in negotiations or strikes.

Corporations are often powerful, and the primary purpose of unions is to provide a counter to corporate power. A union would not exist at a workplace if the employees had not voted to bring the union in. Unions derive their bargaining strength from the solidarity of workers. When workplace conflicts arise, unions serve as mechanisms for dialogue and negotiation, seeking to address employee grievances and advocate for fair treatment: this is not the same as coercing employers or employees.

Shortcomings of Current Worker Rights

Unions are born among workers in companies, but the NLRB oversees their upbringing. Unions begin with workers conducting a union drive, where they publicly announce their intentions to form a union and begin to gather support from fellow employees. When a union organizing drive goes public, the company becomes aware of the employees' actions and aware of the union the employees are trying to join. Employees working with the union collect petition signatures from other employees to show interest in forming a union, or assemble signed union membership cards. When enough employees in the company show that they have an interest in forming a union, the organizers may send the petitions or cards as evidence to the NLRB; approval from the NLRB will trigger an election. Strictly speaking, the election is not a necessary component for the formation of a union, because an employer may bypass the election and accede to union formation – but this almost never happens.[13]

During the organization drive and the electioneering, employers typically run their own campaigns to dissuade workers from voting to join the union. Actions the employer takes to undermine support for a union within the company are pejoratively known as union busting. Union busting in the US has become its own industry, with law firms advertising their ability to bust union election campaigns as a specialty they offer to companies. Companies hire these law firms to devise lawful strategies that take advantage of the limitations of worker rights laws to reduce the likelihood that the union vote will succeed.[14]

In the case of the Museum of Science and Industry (MSI), the museum hired the law firm Jackson-Lewis to help prevent a union win; a representative from AFSCME estimated that the MSI spent about fifty-thousand dollars in fees for this legal assistance.[15] The Jackson-Lewis firm has successfully worked to prevent unions from forming in large companies such as Google and Amazon and in graduate student populations in several universities.[16] They also actively advertise their union

busting services on their website.[17] Labor organizers and workers have reported that Jackson-Lewis's techniques have successfully undermined organizing power in unions, identifying the law firm as a prominent player in the union busting business.[18]

Anti-union strategies can be perfectly legal. Union busting scare-tactics, for instance, are actions that skirt the definitions of unfair labor practices, while being protected by free speech commitments, in a way to persuade employees to vote against the union. Companies have historically implemented these tactics by convening mandatory all-staff meetings where they disseminate material that is critical of unions. The NLRB cannot deny companies the freedom to hold mandatory meetings. The NLBR, however, does not allow these gatherings and the associated material to be overtly anti-union. Nonetheless, the NLRB cannot prevent companies from highlighting criticism of union organizations (including by portraying unions as potentially coercive) during these "captive audience meetings."[19]

In the case of the MSI, the museum implemented a strategy known as an "informed choice" campaign. Informed choice campaigns are a pre-election strategy that intends to help employees understand all the facts about joining a union. Companies present these facts in mandatory meetings and signage with messaging that paints the company as having the workers' best interests at heart. The facts that a company may present are not always fully correct or leave out important context, painting the union in a bad light. Companies also typically deliver this information in the form of disturbing but hypothetical scenarios – scenarios that are not impossible, but which generally would arise from noncooperation with the union on the part of the company.[20]

At the MSI, there were posted notices warning employees that union dues may be burdensome, that union membership overall is declining, and that AFSCME is running a campaign on false promises that their collective bargaining will automatically make them effective at negotiating with the museum.[21] At other institutions, such as The Art Institute of Chicago, distributing literature about the possibility of losing benefits and disseminating potentially misleading information about union eligibility was part of the museum's strategy.[22] The rules against unfair labor practices prohibit threatening employees with loss of benefits, with the closing of the company, or calling a union futile, but the law allows this type of language to be used when presented within hypothetical scenarios. Unions can disseminate their own literature and talk to employees about their views of the union. At work, however, firms can impose restrictions on where employees may be able to conduct union-

related conversations while on the clock.[23] The asymmetric restrictions against union organizing at work may have been adopted to combat coercive practices by unions at the workplace, but they operate at the cost of putting unions at a significant disadvantage during the election campaign.

The unfair practices policies provide protections for workers against retaliation from employers. Nonetheless, companies often seem able to retaliate in ways that are consistent with the rules. Companies have many internal rules, and they have wide scope in enforcing them. Workers who support unions have historically seen retaliation from employers in the form of companies assigning increasingly difficult and impossible duties or being subject to stricter or more punitive forms of existing policies.[24] The current worker rights legislation does not address internal policies, which effectively creates a huge vulnerability for workers and creates what is essentially a loophole for companies to use to root out employees who are leading unionization efforts.

In the case of the MSI, a representative from AFSCME reported that employees noticed a substantial increase in the strictness of enforcement of policies outlined in the employee handbook. The AFSCME representative claimed that employees reported that the MSI did not enforce these policies as harshly in the past, and that they believed that the intensified enforcement was adopted in response to the election results. This observation is consistent with claims made to the Chicago Sun-Times following the results of the union election in July of 2023.[25] The AFSCME representative reported that the museum has penalized or fired employees for rule infractions that range from tardiness of two minutes to wearing the wrong type of shoes. The representative from AFSCME discussed that the union has plans to bring forward a grievance to the NLRB regarding these policy changes and firings -- but the limitations of the regulations concerning unfair labor practices renders the outcome uncertain. The Chicago Sun-Times also reported similar practices at the Art Institute in 2021 in response to unionization efforts. Employees claimed that the Art Institute used their performance review system to retaliate against unionizing employees through a sudden increase in poor review scores.[26]

Worker rights that are officially protected might nevertheless suffer from enforcement shortcomings. While the rules are effective at shielding workers from various sources of coercion and retaliation, the processes for accessing adjudication and redress are tedious, slow, and cumbersome. Unionization disputes and grievances can take months and even years for NLRB resolution. Companies, being long-lived

organizations, possess the resources that enable them to be comfortable with delays, but employees fighting for something like a living wage or health insurance may not have the same luxury. Companies, likewise, tend to opt for a federally controlled blind election for employee unionization in part because these formalities can help companies draw out the process.

In July of 2023, the NLRB held a blind election to determine if employees at the MSI would be able to form two bargaining groups to form a union under AFSCME. The election results for both bargaining groups were in favor of unionization, but the NLRB has not yet certified the election results. The MSI challenged the vote for both bargaining groups, the crux of their argument being that three individuals who voted in one of the bargaining groups are not eligible for union representation.[27] The MSI based this claim on their view that the three individuals were temporary contract employees. AFSCME and the MSI have submitted rebuttals and are awaiting a final ruling from the NLRB on the matter to be issued later. While the election for both bargaining groups remains uncertified, the NLRB has also ruled that the challenged votes for the other bargaining unit are non-determinative, meaning that once the NLRB releases its final decision, 115 employees at the MSI will be unionized under AFSME.[28] In the interim, AFSCME cannot legally negotiate a contract with the MSI, nor can they respond to grievances that employees may bring against the museum.

Unionization at Chicago's cultural institutions has come a long way but has faced significant challenges along the roads to contract adoption. As of November 2023, the Art Institute is the only Chicago cultural institution to have a union contract in place at their institution. At present, the Museum of Science and Industry, the Field Museum, the Chicago Academy of Sciences (Peggy Notebaert Nature Museum), and the Newberry Library are in various stages of unionizing, each with their own set of challenges and roadblocks. What these institutions have in common is that the roadblocks to unionization have stemmed from worker rights policies that place substantial burdens on union organizing.

Policymakers have recognized that change must occur to address these shortcomings, and since 2022 have introduced both national and state policy changes in response. At the national level, the "Protecting the Right to Organize Act" seeks to address many shortcomings in preventing unfair labor practices and other aspects of the Wagner Act. The Protecting the Right to Organize Act has passed the US House but has yet to be taken up by the Senate. In Illinois, protections for workers became

more robust in 2022 with the Workers' Rights Amendment to the state constitution (see below). While these policies represent the biggest labor rights reforms at both the national and state levels since 1974, it is important to address how these policies respond to the shortcomings of their predecessors and to identify their own limitations.

New Labor Policies

At the end of 2022, Illinois Governor J.B. Pritzker issued a Proclamation of the passage of the Worker's Rights Amendment to the Illinois constitution, after Illinois voters supported the new amendment in a referendum. The amendment outlaws policies that would otherwise restrict peaceful organizing efforts by unions in Illinois. According to the Economic Policy Institute:

> The Illinois Workers' Rights Amendment adds language to the state constitution affirming that "employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work." The new clause also specifies that "no law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively." (Sherer, 2023)

The text of the bill is only two paragraphs long and vaguely gestures towards employees (without specifying which) and codifying rights and bans to laws that are undefined. The amendment's vagueness speaks to its purpose of providing broad protections that can be interpreted to apply to a wide range of actions and laws. Simultaneously, the vagueness presents questions about the legality or future interpretations of the amendment, given that laws are supposed to provide notice about what acts are legal or illegal.

The Workers' Rights Amendment was introduced and ratified in response to possible threats from federal and state governments to repeal long-standing worker rights policies and to preclude the passage of "Right-to-Work" laws in Illinois.[29] Right-to-Work" laws already exist in many states with conservative-leaning legislatures; these laws prevent unions from negotiating agreements that require workers to join a union as a condition of employment in a company – agreements that sometimes are referred to as union security agreements. While there is no federal "Right-to-Work" law, there have been several attempts in Congress to introduce bills

that would enact such a policy, with the most recent bill being introduced in the Senate in early 2023.[30]

In "Right-to-Work" states, workers have a right to extract benefits from unions, such as legal representation for grievances, without paying dues. This legitimated free riding tends to cripple unions, that devote resources to employees who do not contribute funds for union operations. In other words, employees have the right to work at a job they are hired at and be protected by collective bargaining regardless of their affiliation with a union.[31] Dues paying under such circumstances is voluntary, while those who choose not to pay still reap union benefits; as a result, the incentive to join and support the union with dues diminishes.

"Right-to-Work" laws result in lower wages and reduced unionization rates. In states without "Right-to-Work" laws, often an employee would not be hired if they object to joining the union and paying dues.[32] "Right-to-Work" laws go beyond a ban on compulsory union membership, as such a nationwide ban is already in effect. If a worker were to object to joining a union in a workplace with a security agreement, then the employee would not have to pay full dues; rather, these employees would pay reduced rates designed to cover the costs directly associated with representation. Further, if an employee possessed certain principled objections to union membership, such as for religious reasons, then the money they would otherwise pay for dues would be donated to a nonreligious charitable organization.[33]

The Illinois Workers' Rights Amendment also encompasses the protection of all workers' rights, regardless of industry or occupation. The initial Wagner Act did carve out sectoral exceptions (hence the 1974 reforms repealing the exceptions for healthcare workers), leaving states the responsibility for deciding how much protection they wanted to offer unions in excepted sectors, but also prohibited supervisory employees and workers with temporary or independent contracts from joining unions or collectively bargaining. Explicit sectoral exceptions include workers in agriculture, domestic labor, and the public sector (the type of workers that AFSCME organizes), as well as supervisors and independent contract workers. The Illinois Workers' Right Amendment eliminates these exceptions in the state of Illinois.[34]

The Illinois amendment cannot contravene or override federal law: it can add to worker protections as long as these additions are consistent with federal rules. If courts decide that some new collective bargaining options presented by the Workers' Rights Amendment are pre-empted by the National Labor Relations Act, then those

options will not be legally available. The Amendment's vague language might inspire future litigation concerning its application to private sector employees, given the potential for federal pre-emption. The Wagner Act allows private sector employees the right to organize under a union, but the Workers' Rights Amendment would alter these rights to allow employees to bargain collectively with employers without using a union as an intermediary.[35] Whether this component of the Amendment expands union rights or restricts them (and therefore would be pre-empted by the Wagner Act) is a debate that has yet to be settled.

The new constitutional protections in Illinois do not address all the union-restricting limitations of the Wagner Act. For example, the amendment does not speak to employer captive audience meetings, override the Taft-Hearly restrictions on union demonstrations, nor directly affect the NLRB's enforcement powers and policies during union drives. Nevertheless, the Amendment generally is considered a victory by organizing workers, as their rights to collectively bargain with employers are now constitutionally protected in Illinois. The Illinois Workers' Rights Amendment should be celebrated by union supporters as providing a foundation for the development of more reforms.

The national Congressional docket now features bills that go further in addressing the limitations of the Wagner Act. The "Protecting the Right to Organize Act" of 2023 was submitted to the Senate in early 2023 and is currently, as of October 2023, in committee. The bill seeks to amend current federal labor law to offer more protections for workers' rights; the Senate bill currently has forty-seven cosponsors.[36] The potential federal reforms would pursue at the national level the goal that motivated the Illinois Workers' Rights Amendment: broadening the scope of union protections to supervisors and some independent contractors. Unlike the Workers' Rights Amendment, however, the Senate bill does not extend the Wagner Act protections to employees in all industries – exempt industries are untouched.[37] Nevertheless, the federal bill, should it become law, would pre-empt "Right-to-Work" laws nationwide, via a provision that requires all employees who extract benefits from a union to pay dues.

The federal bill also would repeal the Wagner Act's ban on secondary strikes and prohibit employers from bringing claims against unions that conduct secondary strikes. Secondary strikes (or "sympathy strikes") are strikes that workers in a union elect to conduct to show solidarity with a related industry or a cause they feel strongly about. Such work actions were initially prohibited because of Congressional fear of

economic instability, and their inclusion in section 8 enumerating unfair labor practices indicated a reflection of the sentiment that unions were coercive organizations that could indirectly pressure employers.[38] Under the proposed federal legislation, striking employees would also benefit from protections against replacements from permanently taking their jobs. The bill's new policies on strikes would represent a shift away from the notion that unions are coercive organizations, while expanding the freedom of speech for workers as well.

The Wagner Act does not prevent employers from disseminating union-critical information in mandatory meetings. These "captive-audience" meetings would be prohibited as an unfair labor practice under the new federal bill. Further, under current rules, workers waive their rights to bring class action suits against employers if the workers were represented by a union, but the proposed amendments would eliminate that waiver requirement.

Perhaps one of the most important provisions in this bill concerns the mild penalties that the NLRB is able to bring against companies that violate the law. Currently, the consequences to employers for breaking the laws enforced by the NLRB are quite small. If a company were to illegally fire an employee for unionizing, for example, the company would only be required to provide backpay: a tiny penalty relative to the thousands of dollars companies spend a year in anti-union consulting fees.[39] In addition, companies that have knowingly violated the law may be required to publish a public notice that they have violated the law, and promise not to do so again.[40] Intentionally violating unfair labor practices laws, therefore, can be highly effective at interrupting momentum, destroying morale, and ultimately scaring employees into voting against unionization, with only a very limited downside. These tactics are so effective and inconsequential to employers that in the U.S., employers are charged with violating federal law in 41.5% of union election campaigns.[41]

The federal bill seeks to better deter employers from breaking the law through harsher penalties. Under the proposed policies, penalties could reach up to $50,000 for first-time offenses and up to $100,000 for additional offenses. Employers would also have to compensate any financial damages an employee may incur (including back pay) on top of the fines. The bill provisions also provide a framework for the NLRB to secure injunctions and fines against employers who refuse to comply with their rulings. The new injunctive powers the amendments give the NLRB would significantly increase its authority in labor disputes.[42]

In brief, the Protecting the Right to Organize Act would provide workers with protections yet to be seen at the national level and will work to strengthen the Taft-Hartley union protection policies. The bill, if passed, would help secure the ability of employees to form unions if they want them, with little interference from employers.

While the Protecting the Right to Organize Act does reinforce worker rights, there remains room for further reforms to expand their reach. The Senate bill, for instance, does not address the exemption of some industries from the Wagner Act, which leaves thousands of agricultural, domestic, and public service laborers without federal rights to form a union. The proposed rules also do not eliminate the legal tactics that companies use to retaliate against unionizing workers. These workers could still be vulnerable to overloaded duties or harsh punishments for minor work rule infractions. While the increase in financial penalties would be a meaningful change, the $100,000 maximum fine that the NLRB can impose on non-compliant employers might be too small for larger companies to be deterred from unfair labor practices. Unionization efforts are occurring in Amazon warehouses and Walmart stores across the country; these large companies make billions of dollars annually. Compared to those revenues, potential penalties up to $100,000 may seem like a risk worth taking for a labor law violation that might help forestall unionization.

Wrap Up

The labor landscape in the United States is evolving, with a significant increase in workers seeking representation through unions since the beginning of the COVID-19 pandemic. The surge in unionization efforts in various industries, including cultural institutions in Chicago, highlights the ongoing struggle for worker rights and the need for the reformation of existing labor policies that are ineffective at protecting workers during their unionization drives.

The Wagner Act of 1935 laid the foundation for protecting worker rights and enabling collective bargaining. Subsequent amendments, such as the Taft-Hartley provisions, born out of fear of the potential for unions to exploit workers and lead to racketeering, have proven incapable of providing sufficient protections to worker rights to bargain collectively. In particular, both the certification process and organizing efforts are unduly hindered. Current rules and their implementation harm independent grassroots worker movements attempting to unionize their workplaces, a scenario that has become more common since the COVID-19 pandemic.

The shortcomings of current worker rights policies include insufficient controls on employer union-busting tactics, the under-deterrence of employer retaliation against unionizing workers, and the often slow and cumbersome NLRB adjudication process. As unionization efforts develop in Chicago's cultural institutions, these theoretical shortcomings become quite concrete, affecting workers who take care of Chicago's most important cultural landmarks.

The ratification of the Illinois Workers' Rights Amendment to the state constitution and the introduction of the federal "Protecting the Right to Organize Act" represent the emerging sentiment among voters and policy makers in the US that the current laws require wide-reaching reforms. The Illinois Worker's Rights Amendment leads the way for the state to broaden the scope of protections for workers and guard against "Right-to-Work" laws. The amendment, however, does not redress all the shortcomings of existing collective bargaining rules, and its broad language may pose challenges for further policy reforms.

The "Protecting the Right to Organize Act" at the national level would grant workers in the entire country rights they have never seen before. The proposed changes aim to ban "Right-to-Work" laws, allow secondary strikes, enhance protections for striking employees, and provide harsher penalties for companies violating labor laws. Despite these positive steps for worker rights, challenges remain. Workers in industries exempt from the Wagner Act still lack the necessary rights to form unions, and internal company policies that retaliate against unionizing workers can persist. The financial penalties imposed on companies may not be sufficient to deter larger corporations with significant resources from being less-than-scrupulous in their anti-union activities. These new policies have the potential to significantly improve the bargaining power of employees, fostering an environment more conducive to organizing and unionizing for workers nationally.

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