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Foreword

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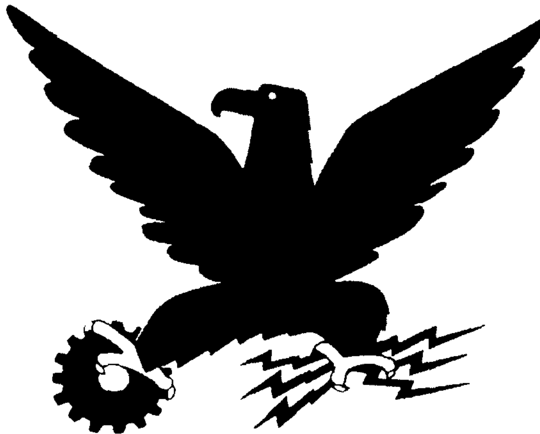
The Blue Eagle at Work

Reclaiming Democratic Rights in the American Workplace

CHARLES J. MORRIS

With a Foreword by
Theodore J. St. Antoine



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Foreword

Specialists in any field have a vested interest in their mastery of the subject. Expertise, after all, is their stock in trade. Assaults on the conventional wisdom can be unnerving if not discrediting. In the pages that follow, such an experience awaits all conscientious readers with a labor background who dare to expose themselves to Professor Charles Morris's provocative, iconoclastic, and ultimately persuasive arguments. He insists that a half-century of American labor law thinking has gone astray in failing to recognize the duty of an employer to bargain with a labor union representing less than a majority of the firm's employees.[1] While the experts will have a field day with the pros and cons, the general reader will have no trouble following Morris's well-honed prose. Anyone can gain much insight into this important if neglected legal issue.

Every labor specialist knows that the American law of collective bargaining is unique. One feature of this uniqueness is the concept of exclusive representation. Once a union has the support of a majority of the employees in an appropriate unit, it is the sole bargaining agent for all the employees in the unit. The National Labor Relations Act (NLRA) requires employers to bargain with a majority union concerning the terms of employment of all the unit's workers. That even includes employees who may vigorously oppose the majority union. This system of exclusive representation is justified on such grounds as industrial stability and predictability, worker solidarity, and employer convenience.

In the absence of a majority union exercising exclusive authority, the law allows an employer to bargain with a union that represents only a minority of the employees. Such negotiations can cover the union's own members and can lead to what is commonly called a members-only contract. But some time in the first decades after the passage of the Wagner Act, the original NLRA,

in 1935, it became generally accepted by labor practitioners and scholars that employers had no statutory *duty* to bargain with a minority union. "Majority rule" did not allude merely to exclusive representation; it referred to the only kind of status that conveyed legal obligations.

In 1990, into this seemingly settled scene, stepped that imaginative legal thinker and doughty champion of workers' rights, Professor Clyde Summers.[2] Summers contended that in the analysis of workers' bargaining rights, too much emphasis had been placed on Section 9(a) of the NLRA, which makes a majority union the "exclusive representative" of all the employees in a bargaining unit. In Summers's view this obscured the even more fundamental provision of Section 7, entitling employees to "bargain collectively through representatives of their own choosing."

Section 7 draws no distinctions between majority unions and minority unions. For Summers this meant that when no exclusive representative is present, an employer should be obligated to bargain with a union representing less than a majority of a unit's employees. Yet even Summers conceded: "We have probably proceeded too long on the questionable assumption that the employer has no affirmative duty to bargain with a nonmajority union to now recognize that duty short of a statutory amendment."[3]

Professor Morris will have none of this temporizing. His is no quixotic quest for some shimmering, unattainable ideal. A former labor practitioner himself, Morris is a hard-headed realist who aims for a practical, viable theory that can be sold to the National Labor Relations Board (NLRB) and the courts. So he has dug deep into the legislative history of the NLRA and its predecessor, the National Industrial Recover Act (NIRA). He has also scoured the early Labor Board and judicial decisions that touch on the issue of minority-union bargaining, as well as the major Supreme Court pronouncements that might have some bearing on the question. His exhaustive research efforts have borne rich fruit.

Morris meets head-on the notion that a minority union has no legal bargaining rights and can negotiate on behalf of its members only at the sufferance of the employer. He says he "can report with assurance" that there is not a single NLRB or court decision holding any such thing. The case law reveals the issue has never been squarely faced and resolved. Turning to the positive side, Morris demonstrates convincingly that minority-union bargaining and members-only contracts were common sights in the labor relations landscape at the time the NIRA and the NLRA were adopted. There is not the slightest indication that Congress intended to change that situation.

Perhaps Morris's most personal contribution is his lovingly detailed reconstruction of the world of the NIRA and its Blue Eagle, and the subsequent developments leading to the enactment of the NLRA. Context can be crucial in the interpretation of a statute. What Morris shows is that minority-union bargaining was taken for granted during the critical period of the 1930s. Indeed, members-only contracts were as common as majority-exclu-

sivity contracts, and more so in such major industries as steel and auto. Wouldn't Congress have addressed the issue if it felt that employers were not required to engage in this frequent and sometimes favored form of negotiation? Yet the legislative history contains not a hint of disapproval of minority-union bargaining. And the plain language of Section 7 of the NLRA, unchanged from Section 7(a) of the NIRA and unchanged to this very day, says without qualification or limitation that "[e]mployees" have the "right" to "bargain collectively through representatives of their own choosing."[4] There is no suggestion whatsoever that employees lose this right if they cannot get a majority of their fellows to go along.

Why, then, did the conventional view take hold that employers have a duty to bargain only with majority unions? Morris is convincing on this as well. He points out that in the first decade after the passage of the Wagner Act in 1935, unions won over 85 percent of the representation elections and card-checks conducted by the NLRB. This quick and easy route to recognition meant a majority union was now entitled to exclusive bargaining authority under Section 9(a). Members-only recognition fell into disuse and memories of its prior prominence soon faded. By 1945 a labor leader quoted by Morris even voiced the opinion that employers could only recognize majority unions.

The Morris thesis confronts two big hurdles. The first, cited by Professor Summers, is that for more than half a century the contrary proposition has been accepted. Inertia can be a force in the law. Morris responds, correctly, that civil rights rulings both older and clearer than minority-bargaining principles have been reversed when their errors became manifest. These days, however, labor claims may not be accorded the same high priority as civil rights. The second objection is a practical one. It is entirely possible that two or more hostile minority unions might assert competing bargaining rights in the same unit. That could cause factional divisions among the workforce and serious operational difficulties for an employer. Morris believes, and I agree, that those problems could be worked out. But the NLRB and the courts can be expected to scrutinize such functional factors with a wary eye.

Finally, what might have been an intriguing but redundant modus operandi in the 1940s and 1950s could assume great practical significance in the current industrial relations climate. With union density in the private sector now dipping below 10 percent, the unique American institution of collective bargaining, with all its capacity for economic and humane contributions to our society, stands in need of major rehabilitation. The requirement of minority-union recognition might be the very ingredient to jump-start the process. If the sequence follows that of the 1930s—minority-union bargaining leading to full-scale majority-exclusivity contracts—that will be all to the good. In today's increasingly polarized world, we tend to forget the benefits that a mature, cooperative union-management relationship can bring to the workplace. Management is invariably best qualified to direct the overall enter-

prise. The workers in the shop, however, are often better able to determine just how a particular operation should be performed.

When Professor Morris first broached his theory about minority-union bargaining, I was close to total skepticism. Most of us are unreceptive to what appears completely at odds with widespread basic understandings. Some will say we have enough difficult questions in the labor field, legal and otherwise, to deal with as it is. But Morris is like an irresistible force—and, more important, he is a thorough researcher, a keen analyst, and a persuasive writer. His remarkable, salutary message deserves our fullest attention.

THEODORE J. ST. ANTOINE