

Whose Interests Are Being Served?

In crowded movie houses throughout North America in 1979, millions cheered as Sally Fields defiantly stood atop a worktable and with a clenched fist held high, led fellow workers in a drive to unionize the textile company they worked at. Ms. Fields won the Best Actress award for her role as a “Norma Rae” — a struggling single mother seeking dignity, self worth, economic justice and fairness in her workplace.

While Ms. Fields’ portrayal may have been genuine, the grass roots industrial “democracy” depicted in the film is somewhat strained when compared to the construction industry’s experience with unionization. From the process of “organizing” a company, to the dispatching of tradesmen through “hiring halls”, construction unionization bears little resemblance to the idealized struggle reflected in the movie. In fact, considering the lack of success building trades unions have recently had in securing work, combined with disciplinary measures taken against members, it is arguable that the individual rights given up to maintain membership outweigh the benefits of being a member.

The Rise and Fall of Canadian Construction Unions

For many tradesmen following W.W.II, having a career in the construction industry meant being “organized” through one of the traditional internationally affiliated Building Trade Unions (BTU’s). Despite the post war economic expansion, the fundamentally volatile characteristics of the industry remained unchanged. This made the industry ripe for the structure and organization provided by the U.S. based Building Trades Unions affiliated with the AF of L/CIO.

As opposed to the grass roots uprising depicted in the movie “Norma Rae,” construction industry unions sought to achieve their monopoly objectives through the “top down” organizing of job sites and contractors. The process of contractors “voluntarily recognizing” the building trades unions, pulled new employees into collective bargaining. It also provided an outlet for existing union members to be dispatched to job sites through “hiring halls” when the contractor was awarded a contract. By the late ‘60s, the BTU’s achieved virtual monopolies in many North American markets and sectors accounting for an estimated 70 - 80% of new construction.

To offset this concentration of power, most jurisdictions developed laws permitting construction contractors to form employer organizations to bargain collectively on an industry wide basis. These laws structured a process to mitigate but not alter the adversarial nature of industry collective bargaining.

Failing to recognize that their mutual self interest rested with servicing their clients - purchasers of construction - unionized contractors and unions became vulnerable to world wide economic forces. Labour unrest, declining productivity and spiraling construction costs, alienated many purchasers and caused them to throw open their tendering policies and procedures.

Favorable owner experience with open shop contractors caused rapid changes including dramatic declines in union memberships. The landscape of the industry was indeed changing. As this sector matured, more and more purchasers gained confidence in open shop contractor capabilities.

Westcoast Energy for example, spends hundreds of millions on construction annually. In a 1995 submission to B.C.'s Construction Industry Review Panel, the company noted: "Many Westcoast projects suffered from drawn out schedules, low productivity, work slow downs and stoppages, poor labour morale and high costs. Contractors were often unable to control their work forces under their labour agreements and West Coast and other owners were expected to stand by and simply pay for inefficiency and delay. The customer's needs and wishes were being ignored. ...There had to be a better way and the open shop sector has shown that to be the case. Our projects are done in less time, more efficiently and at least as safely. The quality of work done by the open shop sector is equal to, if not superior to work done by building trade contractors."

With reviews like this, it's no coincidence that market shares between unionized and open shop contractors virtually reversed themselves. It's now estimated that open shop contractors undertake between 80 - 90% of new construction in Saskatchewan, Alberta and British Columbia.

UNION MARKET RETENTION AND RECOVERY ACTIVITIES

Plummeting memberships and market shares has prompted the building trades unions to pursue a variety of market retention and recovery strategies. The retention strategies have tended to rely on traditional approaches. When traditional strategies met mixed results, newer strategies were developed and implemented to bolster their existing ranks.

TRADITIONAL TACTICS TO RETAIN MARKETS

When All Else Fails, Change the Rules

Canada is one of the last industrialized countries to permit closed shops and mandatory payment of union dues. With dues being tax deductible, union leaders in Canada have enjoyed tremendous freedom to engage in various political activities without being accountable to members. Moreover, in a landmark decision that was more suited for an episode of “the Twilight Zone” or “Ripley’s Believe it or Not!”, the Supreme Court of Canada in the *Levine* decision upheld the freedom of unions to spend money on whatever political activities union leaders deem appropriate, while, at the same time, compelling all bargaining unit employees to pay for these activities.

This has provided the means for organized labour to have employment legislation and policies altered in their favor. For example, after 15 years in Opposition, it took only months of returning to power, for British Columbia’s new NDP government to introduce amendments to **B.C.’s Labour Relations Code**. One amendment replaced the secret ballot vote as a precondition to certification with a more qualified hybrid system that re-introduced “automatic certification” to B.C.’s labour relations system.

The right to a secret ballot vote is fundamental to the integrity of any democratic institution. Yet, it is curious that several Provincial labour codes in Canada see fit to dispense with this fundamental procedure. In fact, many codes provide for certification based solely on “evidence” of majority support. This evidence is normally the completion of an application for membership or an actual union membership card. No vote is required once evidence of support is found to be in the range of 50 - 60%. So why is a secret ballot vote so important to employees?

In the construction industry, the evidence of support basis for determining the true wishes of employees is very precarious for a variety of reasons. Given the cyclical nature of

construction, some employees have little desire to see their employer unionized and only maintain union membership cards to maximize their employment options.

For example, consider the 1992 case of a Calgary roofing contractor. In Alberta secret ballot votes on certification are mandated once a union demonstrates it has support from at least 40% of employees in a bargaining unit. In 1992, Calgary's roofing industry was the object of an intensive union organizing campaign which resulted in seven certification applications being filed. In one instance, 16 of 24 employees were members of the applicant union. In jurisdictions with automatic certifications, this level of "support" would be sufficient to unionize the contractor. However, when the ballots were counted, all 24 employees chose not to support the union!

Further support for secret ballot voting is evident from an occurrence in British Columbia in 1996. A company was automatically certified with the Boiler Maker's Union. A number of employees questioned the decision because they had not signed cards. Further investigation revealed that in fact many cards were fraudulently signed. Given the opportunity for fraud, one wonders about the seeming anomaly of requiring witnesses to signatures on revocation petitions but not on evidence of support documentation.

So why is it that organized labour generally and building trades unions more specifically continually advocate "automatic certification" procedures in employment legislation? The simple fact is that they have enjoyed minimal success when forced to demonstrate a reasonable amount of support followed by a mandatory secret ballot representation vote. In Alberta, building trades unions have seen a steady erosion in their success ratios. In 1990-91, construction unions filed 112 certification applications of which 55 were ultimately successful - a win ratio of just under 50%. By 1996-97 only 27% of applications resulted in certification orders.

Do Restrictions Protect Employee Rights or Union Interests?

Philosophically, the process of determining workplace representation is vested with employees. Yet, the reality in many jurisdictions is that employees seeking to terminate a relationship with a union face incomparable individual exposure and procedural barriers that

do not exist in certification processes. They must also deal with quasi-judicial adjudication panels that tend to be pre-disposed to a unionized point of view. The combination of these factors serve to frustrate employees exercising their rights during the revocation process. Are these limitations in the best interests of employees or do they exist to protect the union's interests?

According to one Labour Relations Board decision in Alberta, the answer seems clear. In deliberating on how a revocation application would be dealt with if a tie vote occurred when unionized and non-unionized units were merged, the Board stated: "The truth is that union support waxes and wanes over time depending on things like staff turnover, economic conditions, collective bargaining issues and most dramatically, the existence of a strike. The majoritarian principle notwithstanding, the Code gives unions some security to enjoy and exercise their bargaining rights despite fluctuations in employee support. ... If one or the other of these contractual regimes must yield however, we think that the policy of promoting industrial stability and minimizing employee unrest favors continuation of the collective bargaining regime and the incorporation of the non-union employees into that regime. We say this because the ensemble of employee rights achieved under a collective bargaining regime is almost invariably superior to those enjoyed under an individual contract of employment." Is it any wonder that unions use every legal means to thwart revocation votes?

One of the great anomalies in labour law is that while unions are virtually free to test a company's non-union status, there is no automatic review or fixed term for employees to have their attachment to the union reviewed. Rather, employee rights to have union representation "revoked" or the certification rescinded, is severely limited. The window of opportunity only opens briefly ' a period usually lasting two months every two years.

That this is to the benefit of building trades unions was evident in the frustrations encountered by employees of Turner Murray Contractors in Ontario. In 1991, Turner hired a number of employees from a bankrupt construction company. In doing so, by order of the Provincial Labour Relations Board, the collective bargaining obligations with the Laborers International Union transferred from the bankrupt company to Turner Murray. None of the employees, either former ones from the bankrupt company or those from Turner Murray had had an opportunity to vote on certification. Despite all employees having signed a revocation petition, their initial attempt was set aside until the collective agreement expired. A subsequent application was thwarted due to a technical issued raised by the Laborers'

lawyer. The result was that the application was adjourned for a further year with the employees responsible for incurring additional legal expenses and union dues.

In November 1997, employees of a small electrical firm in Alberta attempted to revoke certification with the International Brotherhood of Electrical Workers (IBEW). The Chairman of Alberta's Labour Relation Board dismissed the application because the revocation application was filed after a Construction Industry Disputes Resolution Tribunal was formed to resolve a collective bargaining dispute.

The Board rejected an opportunity to correct this injustice. In responding to a request to have the issue reconsidered, the Vice-Chair noted: "This suggests that the wishes of the employees should prevail, which the Board has not always found to be the case in either revocation or certification applications. Clearly, the legislature contemplated that there may be circumstances where the Board could be convinced not to revoke bargaining rights, even if employees had voted in favor and the application was timely. That discretion is solely within the purview of the Board in the particular circumstances."

Notwithstanding costs, procedural impediments and the "strained" logic of some labour boards, every year numerous individual employees bring revocation applications forward. In 1992 over half the revocation applications filed in Alberta came from construction employees. Of these, 77% were successful. In 1996-97 an astonishing 50 of 53 (94%) applications from employees were successful in revoking union certifications. The question remains; how many more decertifications would be initiated should the open period for making applications be increased beyond 2 months in every 24 month cycle?

Influence on Purchasers Through Subtle and "Other Means"

In their hay day, the Building Trades Unions laid claim to controlling the supply of skilled manpower to major construction projects. That they could make similar claims in the 1980's was open to debate. Following the virtual collapse of unionized construction in the commercial sector early in the 1980's, open shop contractors began developing significant capabilities in supplying manpower to large industrial construction sites.

Through a network of inter-provincial hiring halls, building trades unions nonetheless maintained sufficient presence in industrial construction that an ever present threat to withdraw, or refusal to supply manpower to some projects frequently caused anxious owners and governments to accede to union only agreements for many large industrial projects. An example of this, occurred in 1990 when the Governments of Canada, Saskatchewan and Alberta and their private sector co-owner Husky Oil, entered into a project collective agreement for construction of the Bi-Provincial Upgrade at Lloydminster Saskatchewan. Ultimately, the project was 28% over budget costing taxpayers and Husky \$360 million more than the original \$1.2 billion original estimate.

When more subtle approaches failed, some union members have used violence or vandalism to get their point across. In Nova Scotia, a province which saw it's legislature stormed in 1994 by building trade union members, there was no turning back for a project in Cape Breton. In 1995, a mob of 1,000 burnt down a partially constructed apartment complex. Why? Because one sub-contractor on the job employed non-union staff. To insure the devastation was total, the mob held police and firefighters at bay until the project was completely reduced to ashes.

NEWER INITIATIVES

With traditional market retention strategies meeting mixed results, BTU's developed new strategies to recover lost markets. These include negotiating "enabling clauses" into industry wide agreements, establishing so called market enhancement recovery funds (MERF's) and more militant and systematic organizing campaigns designed to harass contractors and members alike.

Being Competitive or is it Smoke and Mirrors?

The recent emergence of so called "enabling clauses" and "job targeting programs" are heralded in some circles as building trades unions acknowledging that they need to be more competitive in certain markets. Others, with longer term memories, see these programs as simply smoke and mirrors. They ask: "Why not simply negotiate competitive agreements?"

Enabling clause provisions take the form of a temporary suspension of specific collectively bargained terms and conditions of employment in the industry wide master agreement. Typically, the union agrees to reduce the stipulated hourly wage rate to at or even below what it believes to be the prevailing open shop rate. Other provisions, such as overtime, or travel time may be altered as well. The contractor factors these adjustments into his bid. If you will, this mechanism operates similar to a “project” agreement.

Job targeting programs (JTP's) or MERF's (market enhancement recovery funds) are more complex in design and more controversial in delivery. According to a study released in 1998 by the Work Research Foundation of Mississauga, Ontario, MERF's involve members of a local union contributing a portion of their hourly wages into a fund used to directly subsidize contractor bids. The fund is controlled by the union and the contractor must apply for subsidy on a project by project basis. Immediately prior to the tender closing deadline, the contractor is advised of the amount of subsidy that may be incorporated into the bid. The criteria and amounts of subsidy can vary widely ranging from \$1.50 to a staggering \$19.00 per hour worked.

While enabling clauses and MERF's may be viewed as flexible competitive responses to market changes, their implementation in jurisdictions with industry wide collective bargaining seems suspect. If the legislative intent behind multi-employer collective bargaining is to arrive at uniform terms and conditions of employment which apply equally to all unionized contractors and tradespeople in a trade group (the stability objective), the sporadic use of project specific wage reductions creates an opportunity for selective application and abuse. In Alberta, it is common knowledge that industrial purchasers pay a premium for their union labour to subsidize the commercial builder who is the largest beneficiary of this cross industry subsidy.

If you're a purchaser of construction services, will your project be the beneficiary of these funds or will you be a net payer? If you're a contractor, are you on sufficiently good terms with the local union leadership to negotiate “enabled provisions” or to apply for subsidies? If you're a tradesman, will you be assigned to work on the higher paying industrial project or will you be dispatched to the “enabled” out of town job? Perhaps, you're a tradesman who primarily works on industrial jobs out of town. Did you miss the early Sunday morning membership meeting when the unemployed members of your local who would like to obtain more in-town commercial work voted to reduce your pay by \$3.00 per hour?

Is it Organizing or Legalized Harassment?

In the 1990's Canadian Building Trades Unions adapted the COMET program: (Construction Organizing Membership Education Training) from their US counterparts. This program required members to attend a training program on organizing tactics. Upon completion, members were expected to become actively involved in union organizing activities at non-union construction sites.

A key part of the strategy is to harass and drain financial resources from non-union contractors through the systematic abuse of rules designed to protect union organizing activities. This is apparent from the strategy outlined in COMET's training publication: "...Our goal is to achieve the organization of a loose monopoly of the manpower pool... Success lies in who the non-union employer hires and by our ability to control that function while making it difficult for the employer to replace us. ...[it] means filing unfair labour practices ...[and] citing him for safety violations or apprenticeship ratio extremes. Employers are going to pay a big financial price..."

COMET participants are instructed to actively seek employment with non-union contractors. As well as displacing an open shop employee, the "salt", as the organizer is called, operates to provide leadership in organizing the company. Typically, this leadership is very visible. If the opportunity arises, the salted employee files an unfair labour practice with the Labour Relations Board claiming the contractor has either failed to employ him or has wrongfully terminated the salted employee for engaging in union activities.

Defending against these cases is expensive for contractors because in unfair labour practice charges, the onus shifts to the employer to prove the employee was not fired because of union involvement. Even if the initial charge is successfully defended against, the contractor might be forced to respond to other regulatory charges as well. This happened to one Edmonton electrical contractor who after successfully defending against an unfair labour practice charge was forced to deal with provincial authorities concerning journeymen to apprentice ratios. He was exonerated.

As part of their effort to drain the resources of the opposition, unions have filed frivolous and vexatious complaints - seemingly with impunity. For example, in 1997, the IBEW filed

unfair labour practice complaints against a small contractor and the Merit Contractors Association of Alberta. Both the contractor and the Association, requested that the union elaborate on its complaint. The union declined. In fact, the day before the complaint was scheduled to be heard - after the respondents prepared their defense - the union withdrew its complaint. Consequently, the Association requested that the Labour Relations Board direct the union to pay its legal fees. The Board took the position that the union's original complaint and subsequent withdrawal were legitimate tactics. In a lengthy decision, the Board cited numerous precedents supporting the view that awarding costs was contrary to labour relations interests. And, while the Board said it might "describe the Union's actions as discourteous," it declined to award costs because the Association had received a favorable outcome by the union withdrawal of the complaint.

In 1996, Alberta's Labour Relations Board dealt with 33 such unfair labour practice cases. Although 27 were dismissed as being without merit, 6 were upheld with the employer facing penalties for back wages and legal costs.

A New Concept in Client Service: Do it My Way!

The SALT strategy highlights perhaps the most disturbing of union powers - the authority of business agents to dictate when and where members will work. Union members are sometimes encouraged to seek out employment with non-union contractors. The local business agent is then empowered to determine how long members will work for the contractor. By virtue of the "Salting Clearance Agreement" each member signs, the union can withdraw manpower from the contractor at any time. For example, the IBEW's "Agreement" binds members to "promptly and diligently carry out the organizing assignments and leave the employer or job immediately upon notification of the Business Manager or its Agents." The contractor thus is placed in a double jeopardy situation because he cannot discriminate in hiring practices but could face a potential shortage of manpower at a critical time if the union directs its members to withdraw their services.

The edicts of a local business agent may not necessarily be in the interests of the individual tradesperson especially if the local is unsuccessful in obtaining work. In Alberta, it is an unfair labour practice for a union to take disciplinary action against an employee working for a non-union contractor unless it can find the member alternative work. With the dearth of union work available, some union members have chosen to work for non-union contractors.

The constitution and by-laws of most unions prohibit this without authorization. For example, the following by-law for a local carpenters union states:

“Members working on non-union job sites must inform the union where and who the member is working for and must be available to assist in any organizing effort undertaken by the local. Any member who fails to inform the local that they are working non-union shall be removed from the dispatch board until they produce a separation certificate.”

In 1998, Alberta's Labour Relations Board ruled on a complaint from a former member of the Pipefitters Union who had his name removed from the out of work list and was fined \$1,000. The central issue was whether these fines were imposed for working with a non-union contractor. On review, the Board found there was no evidence the Union had made work available to the member between June or September of 1997 a period in which a tradesperson is normally most active. Nonetheless, the Board upheld an initial fine imposed against the employee for failing to voluntarily remove his name from the out of work list. The second fine was for failing to present a referral slip to the job steward on the work site. The Board found that because the pipefitter was working with an open shop contractor, there was no job steward to present a referral slip to. In short, he was fined **for failing to do something that was impossible to do!** It was apparent to the Board that this was a thinly veiled penalty imposed because the tradesperson was working for an open shop contractor.

If this seems incredible, consider the situation in 1995, when the International Union of Operating Engineers fined 50 employees up to \$4,000 each for working with a contractor not affiliated with the building trades council. According to a magazine report: “if the operating engineers had offered them other work, they would have turned down the jobs. Instead they were expected to continue living off unemployment insurance” One employee stated: “I was told to put my feet up and rest for the winter,” a situation he felt jeopardized him legally, and morally: “What happens if I collect UI all winter and then they find out I turned down a job?” His frustration was made more apparent by the following statement “I’ve been a dues-paying member ...for nine years. For most of that time I paid \$20.00 a month. For three months I paid \$45 ...that was the one time they found me a job. In his opinion: “[the] local...exists mostly for the benefit of the executives and a small clique of workers who are given employment nearly year round. For the average member, like myself, they can’t provide enough work to make it worth paying the fines and staying in.”

Conclusion

Following WW II, building trades unions served a very important function in the industry by providing services to members and supplying tradespeople to contractors. However, having secured virtual monopolies, continuous abuses of this market power ultimately led many purchasers to seek alternatives. Many found that the open shop sector successfully satisfied their needs. Consequently, both markets and tradespeople shifted to the open shop sector.

In reaction, the building trades unions have sought to retain markets through traditional means including altering labour legislation, manipulating employment laws to their favor and attempting to have construction purchasers declare their projects built union only. When these did not work in their favor, some union members resorted to violence.

When traditional strategies failed to achieve desired results, building trades unions introduced new strategies such as enabling clauses and job targeting which challenge the fundamental tenets of industry wide collective bargaining. They also implemented new organizing strategies whose main design is to harass contractors and in some cases apply disciplinary measures against employees. These latter measures call into question whether these unions are really acting in the best interests of their membership. Surely, our legislators never envisioned these kind of abuses when our labour laws were proclaimed.

Consider a possible scene from 'Norma Rae; The Sequel' It's 20 years later. Union demands and technology forced the textile company she helped organize in 1979 to go bankrupt. Unable to help find her work, the union instructs her to live off social assistance. Being self reliant, she finds work with a non-union company that pays decent wages, has a benefit plan and treats employees fairly. In doing so, she violates the union's constitution. In a dramatic moment, the camera pans to a tired, weary Ms. Fields. With head bowed, she stands before a 'court' of union leaders who have just fined her \$1,000 for failing to help organize the new company.

I wonder if the audiences are cheering now?