A Timely Analysis of Legal Developments

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A prevailing misconception about international labor standards is that they somehow limit the ability of employers to engage in freedom of expression and opinion in the context of union organizing efforts. Recently, the Committee on Freedom of Association of the International Labour Organization in Geneva, Switzerland issued a decision in ILO CFA Case No. 2683 that employers have the right to free speech in a union organizing campaign provided they do not interfere with workers' right to freedom of association.

Employer Freedom of Opinion and Expression Within the Context of Union Organizing – A Fresh Perspective from the ILO

By Stefan Marculewicz and Brent Wilton

In May 2010, the Committee on Freedom of Association of the International Labour Organization (ILO) in Geneva, Switzerland issued a decision that confirmed the right of employers under international law to freedom of expression and opinion in the context of a union organizing effort. In ILO CFA Case No. 2683, the ILO confirmed that employers have the right to free speech in a union organizing campaign provided they do not interfere with workers' right to freedom of association. This case is the first definitive statement by the ILO to confirm that the right of employers to express their opinion about labor unions trying to organize their employees under U.S. law is consistent with international law.

Background

It has long been a principle of international labor law that workers and labor unions enjoy the right to freedom of expression and opinion. In fact, without such rights, it is unlikely a free and independent labor movement would exist. "The full exercise of trade union rights calls for a free flow of information, opinions and ideas. . ."[1] To that end, the ILO has issued many decisions from its Committee on Freedom of Association, which define the principle and challenge laws that limit those rights. Yet, with respect to application of those rights to employers, there have been scant few cases from the ILO, and none that directly address the right as it relates to employers under U.S. law.

U.S. laws, and in particular the National Labor Relations Act (NLRA), are frequently criticized by labor unions and other groups, asserting that U.S. labor laws do not comply with international labor standards. One common criticism arises out of the ability of employers under U.S. laws to express their opinions about a labor union. Such criticism often is used as a means to convince employers to remain silent or "neutral" during union organizing efforts. Many employers have the mistaken belief that international labor standards somehow limit an employer's ability to express its opinion with regard to a union and to convey facts to employees considering whether to have a labor union serve as their representative.

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The ILO's decision in Case No. 2683 provides clear guidance on the scope of an employer's right to freedom of expression and opinion under international law.

Case No. 2683

The case arose out of the AFL-CIO's efforts to challenge the manner in which workers select a union under the Railway Labor Act (RLA). Under a long established rule, the National Mediation Board (NMB) required a majority of all eligible voters to designate a labor union before the agency would certify a union and require an employer to bargain with it. Under NMB procedure, the only way an employee could vote against a union was not to vote. There was no place on the ballot for an employee to cast a "NO" vote.

In its Complaint to the ILO, the AFL-CIO claimed that conduct of a major U.S. airline during two previous NMB union elections showed that U.S. law violated the principles of freedom of association under international law. Among other things, the AFL-CIO claimed the airline violated the principles of international law by engaging in a campaign to tell employees to destroy their ballots if they did not want the union to represent them. The AFL-CIO claimed that in the face of such conduct by the employer, the principles of freedom of association were better served by providing for a modified election procedure that allowed employees to designate a union merely based upon a majority of votes cast. This was known as a Laker ballot, a rarely used method for conducting a re-run election in situations where the NMB found substantial employer interference. Unlike ballots under regular NMB procedure, a Laker ballot provides a place for a "NO" vote, and a union is certified merely by securing support from a majority of those who vote in the election, as opposed to the entire group of eligible voters. As remedy for the claimed international law violations, the AFL-CIO sought to have the ILO condemn the manner in which the NMB customarily conducted representation elections. Securing such a condemnation perhaps could have served to assist the AFL-CIO in its efforts to change the NMB's rules – to provide for the designation of a representative through a majority of the votes cast. (Ultimately, the AFL-CIO did not need the ILO to assist it in changing the rule, as a new rule was finalized by the Obama Administration's NMB in the Spring of 2010.)[2]

As part of its argument to the ILO, the AFL-CIO attacked statements that had been made by the employer which conveyed information to employees on how to vote against the union. Specifically, the Complaint claimed that the employer told employees to destroy their ballots and distributed buttons containing the words "Shred It."

The U.S. employer community, led by the United States Council for International Business, mounted a vigorous defense to the AFL-CIO's Complaint. It argued that the manner of voting for a labor union under the RLA was consistent with international labor law, and that employers have a right to freedom of expression and opinion during union organizing efforts.

After a lengthy debate on the case, the ILO issued a decision that denied the AFL-CIO the relief it sought. Contrary to the AFL-CIO's position in the case, the ILO confirmed that the voting method used under the RLA was consistent with international law.

Perhaps as an unintended consequence of the AFL-CIO's failed efforts to secure criticism of U.S. labor law, the ILO also issued conclusions related to the statements made by the employer during the prior elections. In those conclusions, the ILO made it clear that employers can express their opinion during union organizing efforts provided the employers do not engage in interference with workers' right to free choice. More importantly, the ILO made it clear that freedom of expression, whether it be expression by an employer or a union, cannot be limited merely because that expression is made within the context of union organizing efforts.

The ILO wrote, "[w]hile having stressed the importance which it attaches to freedom of expression as a fundamental corollary to freedom of association and the exercise of trade union rights on numerous occasions, the Committee also considers that they must not become competing rights, one aimed at eliminating the other." The ILO further wrote that "providing all relevant ballot information, including how to vote against a union, would be acceptable as part of the process of a certification election," but an employer's active participation in a way that interferes with the an employee's exercise of free choice would be a violation of the principles of freedom of association. It went on to cite several earlier decisions in which it acknowledged employer freedom of speech, and certain parameters under international law within which it may be exercised.

Subsequent to the issuance of Case No. 2683, on behalf of the ILO's Director-General, the Labour Standards Department of the ILO published a letter on July 12, 2010, to the Secretary General of the International Organisation of Employers in which it further clarified

the conclusions of the case. It wrote that in the case, the ILO "set out certain basic principles that could be borne in mind in order to avoid circumstances where freedom of expression could result, in practice, in the infringement of freedom of association." It continued by saying "[t]here is no doubt that freedom of expression is a basic civil liberty whose protection . . . is essential to the meaningful exercise of freedom of association. Care should be taken within the national context . . . to ensure that the former freedom does not interfere in practice with the free choice of workers in relation to their right to organize." In other words, unless the statements serve to interfere with a worker's free choice, they are permissible under international law.

Conclusions from Case No. 2683

There are many important conclusions one can draw from ILO CFA Case No. 2683, but two are particularly important as they relate to employers and their navigation of international labor law.

One is the fact that under international law, free speech is not only available to unions and workers, but to all parties involved. Employers have the right to freedom of expression and opinion in the context of organizing activities provided such expression and opinion do not interfere with the rights of workers to exercise their free choice on whether to affiliate with a labor union or not. Such a conclusion is of tremendous significance in the United States where under both the NLRA and the RLA, employers have comprehensive rights to freedom of expression and opinion. The fact that the two statutes prohibit employer "interference," and have a comprehensive body of law defining what that is, makes both wholly compatible with international law.

A second conclusion one can draw from the case is that it may be a violation of international law for employers to be limited in their right to freedom of expression and opinion. Many labor unions seek so-called "neutrality" agreements from employers. While styled as "neutrality," they are more akin to agreements to remain silent in the face of efforts by unions to organize workers. By agreeing to remain silent, an employer effectively may deny workers information, opinions and ideas they have a right to receive under international law. Without such information, workers are left with an incomplete picture as they make their decision whether or not to affiliate with a labor union. Where this occurs, the right to freedom of association has effectively eliminated the right to freedom of expression, and that violates the principles of international law.

Ultimately, workers decide whether to affiliate with a labor union, and, to do that, they have the right to receive the benefit of as much information as is available, irrespective of its source. As the result of ILO CFA Case No. 2683, it is now clear that under international law, information from employers in the form of expression and opinion is not only welcome, but also – it might be argued – necessary.

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[1] ILO CFA Digest of Decisions ¶ 154 (2006).

[2] See Littler ASAP, *District Court Clears Way for Implementation of New NMB Rules for Union Elections in Air and Rail Industries* (June 2010).