

## CARROLL COLLEGE CASE PROVES NO FREE PASS FOR UNIONS ... YET

Publication  
Oct 1, 2009

With membership at its lowest point in over 60 years, unions are steadfastly proving they still know how to play politics. Organized labor has recently taken steps to reinforce its ranks through legislation, introducing significant reform efforts such as the Employee Free Choice Act (EFCA). The Act, in effect, would eliminate secret ballot elections from the provisions of the National Labor Relations Act (NLRA) related to union organizing, substitute card check verification instead, and make employer neutrality mandatory in the electoral process.

Since its introduction, EFCA has garnered substantial support from lawmakers, workers'-rights groups, scholars, and even religious leaders. But management and union opinion remains widely divergent on the force and breadth of this legislation, as evidenced by a large volume of academic discourse and media coverage.

### THE RELIGIOUS ELEMENT

As for EFCA's religious implications, the Act is gaining traction in many religious communities, particularly among the Jewish and Catholic faithful. In early May, the Jewish Labor Committee, a group of 30 rabbis affiliated with the AFL-CIO, took out an ad in Philadelphia's largest Jewish newspaper urging Sen. Arlen Specter to support EFCA. This is just one of many examples of efforts by religious leaders to persuade lawmakers to back the measure. In their letter to Specter, the Rabbis argued that EFCA "is a way of balancing the scales of justice, giving workers rights that most of us

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take for granted" and that opponents of the Act are engaging in a "smear campaign."

In addition to the efforts of these Rabbis, other interfaith leaders have joined together to disseminate the message that labor-law reform is a civil and human right. Faith Leaders of Workplace Fairness, a coalition of Jewish, Catholic, Episcopal, Baptist, Presbyterian, Lutheran, and Muslim groups, are calling on members of their faith communities to support EFCA as a "moral imperative." For many employers this should be cause for alarm because this diverse group and groups like it are speaking not just to their followers, but also putting their money where their mouth is, buying radio air spots, newspaper ads, and holding nationwide conference calls.

The Faith Leaders of Workplace Fairness argue that "as people of faith, we must stand with workers in their struggles and ensure that they are protected and can provide for themselves and their families." Couching this legislation in terms of morality, freedom, human dignity, fairness and justice could prove to be an effective strategy. In fact, the appearance of clergy alone may be enough to sway public opinion, especially for those who are close to their religion's leaders and devoutly follow its traditions.

A 2008 poll conducted by The Pew Forum on Religion and Public Life found that at least 83.1% of all Americans admit they are affiliated with some religion or particular faith. Therefore, if the Act's intentions are cast in terms of rescuing the American worker from the power imbalance in today's economy, employers are going to need a strong but thoughtful response to counter it.

## **THE EDUCATIONAL ELEMENT**

Fortunately for those who oppose EFCA, judges are proving they are not easily distracted by lofty debates among academics or flashy headlines in the media. While support for EFCA is real, there are still some employers who, at least for now, can sleep better at night knowing a union threat is not imminent. One such group consists of religious-academic institutions. Worldwide there exist approximately 2,000 religious higher-education institutions, nearly half of which are in the United States.

On March 13, 2009, a little over two years from the exact date EFCA was first introduced, the U.S. Court of Appeals for the District of Columbia rescued religious schools from the grip of union organizers when it upheld a decision by the National Labor Relations Board that, as a religious institution, Wisconsin's Carroll College met the threshold for the religious exemption under the NLRA, because it presented itself as providing a religious educational environment and is a nonprofit affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church of the United States. *Carroll College v. NLRB*.

## BACKGROUND

The U.S. Supreme Court ruled in 1979 that private educational institutions which teach both religious and secular material are not within the jurisdiction of the National Labor Relations Act since this would be a potential infringement of the schools' freedom of religion. This case, in effect, prevented unions from organizing on campuses of religious schools. *NLRB v. Catholic Bishop of Chicago*.

The NLRB subsequently created a test for determining whether or not a college or university was of "substantial religious character" and entitled to an exemption under the NLRA. But in 2002, the D.C. Circuit Court ruled in *University of Great Falls v. NLRB*, that the NLRB should not go "trolling through an institution's religious beliefs" to determine how closely linked a school is to a particular religion.

In late 2004, the Carroll College case arose when the UAW won a representative election to become the collective bargaining representative of Carroll College's faculty. The College argued that the NLRB's jurisdiction violated the Religious Freedom Restoration Act by infringing upon its free-exercise rights. An NLRB regional director decided that exercising jurisdiction over the college would not violate the Act because the school was not operated by the Presbyterian church and did not specifically teach or endorse Christian philosophies. Although the union was certified, Carroll College challenged the ruling by refusing to bargain.

The D.C. Circuit Court upheld the College and overturned the Board's decision to exercise jurisdiction over Carroll College, finding that it was an error for the Board to 1) analyze how effective the school is in inculcating its beliefs,

and 2) looking at actual religious influence or control over the school. Instead the Court found that in determining whether a university is entitled to the religious exemption, it would apply the test established in *University of Great Falls*, which requires an institution to prove that it 1) holds itself out to students, faculty, and the public as providing a religious education, 2) is nonprofit, and 3) is affiliated with, or owned by, a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Since Carroll College's mission statement, articles of incorporation, course catalog and other documents describe its relationship with the Presbyterian Church and state that its purpose is to serve as a Christian liberal arts college dedicated to God, the D. C. Circuit determined that the school qualified for the exemption. The Court decided that its three prong test did not require that the Presbyterian Church sponsor the college, own the property, or have any right of control over it.

## **LOOKING AHEAD**

Had EFCA been in effect when the union first stepped onto Carroll College's campus, the school may have been in for a much bigger court battle. Since the UAW was elected in a representative election, the college's workers got the benefit of using their secret ballot right, a right that could be obliterated if EFCA passes. All turned out well for Carroll College. However, given how easy it will be to organize and get recognition under EFCA, it is likely that unions will take another stab at the NLRA's religious exemption, making an example out of some other college or university, especially a school that holds itself out as a religious institution but only marginally meets the Court's tests.

Despite having to swallow the EFCA pill and accept the fact that it will become a reality for them in the near future, employers can hold out some hope that courts will continue to carefully analyze labor issues. Luckily, the D.C. Circuit delivered a "birthday" present of sorts to EFCA opponents by sending a clear signal that, for now at least, there aren't going to be any free passes for unions.