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Repurposing American Labor Law: Immigrant Workers, Workers' Centers and the National Labor Relations Act

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**REPURPOSING AMERICAN LABOR LAW:
IMMIGRANT WORKERS, WORKERS' CENTERS AND THE
NATIONAL LABOR RELATIONS ACT**

by

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THESIS

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by

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ABSTRACT

Contemporary debates on immigrants and the labor movement focus on whether immigrant workers are joining and thereby revitalizing unions. But Somos un Pueblo Unido or “Somos”, an immigrant resource center in Santa Fe, New Mexico, has been using an obscure provision of the National Labor Relations Act (NLRA) less to boost union density than to develop an *alternative* to contract unionism. By helping non-unionized workers use Section 7 of the NLRA to act concertedly in their own defense, I argue, Somos is simultaneously combating employer abuse, in the short run, and demonstrating that immigrants may be transforming, rather than simply revitalizing, the US labor movement in the long run.

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Introduction

Labor historians have long recognized the contributions of immigrants to the United States labor movement. These contributions were particularly marked during the Progressive Era, when immigrants like Sidney Hillman, Samuel Gompers, and Philip Murray lay the foundation of what would eventually become the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and the New Deal Era, when they were portrayed as the “new men of power” by C. Wright Mills (1948). In contemporary times, however, when unions have arguably been at their weakest, a debate has arisen over the role of immigrants in their potential revitalization. Some scholars have seen immigrants as crucial to organizing efforts. For instance, Ruth Milkman (2006) argues that low-wage Latino and Latina immigrants were on the frontlines of union innovation in Los Angeles in the 1990s. And Jake Rosenfeld and Meredith Kleykamp (2009) used survey data to show that some subgroups of Hispanic immigrants were more likely than their white, native-born counterparts to join or belong to unions in the late twentieth and early twenty first centuries (pg. 932). Others have expressed skepticism, however, about the contributions of immigrants to the revitalization of the labor movement. In his review of Milkman’s book, for example, Michael Piore (2006) notes that half of her case studies—all of which involve large numbers of immigrant workers—failed to achieve a viable collective bargaining agreement, and argues that we need a better understanding of why half of the attempts to organize immigrants failed. On the national level, moreover, Peter Catron (2012) finds that Rosenfeld and Kleykamp’s

(2009) conclusions may be premature, and that immigrant gains in unionization were not maintained through the Great Recession of 2008.

While this lively debate has enriched our understanding of both immigrant organizing and union tactics more generally, recent experiments by labor activists and immigrant workers in a number of US cities suggest that the debate itself is myopic. Both sides assume that immigration's primary contribution to the labor movement—whether realized or not—lies in whether immigrants help to revitalize traditional unions that serve to promote conventional collective bargaining; that is, whether immigrants serve to bolster labor's power in the *existing* system of industrial relations. But it seems no less possible that immigrants are *transforming* an industrial relations system that has itself become anachronistic. With the help of worker centers and legal justice clinics, for example, some non-unionized immigrants have been banding together to use a little known provision of the National Labor Relations Act (NLRA or “the Act”), the “concerted activities clause” of the NLRA’s Section 7, in their own defense on the job. Despite a longstanding focus on the collective bargaining provisions of the Act, Section 7 protects union and nonunion workers alike who act together for their own “mutual aid or protection” (Morris 2005). Workers can therefore engage in numerous forms of collective action to voice grievances about their working conditions. If the employer retaliates by discharge or discipline, it is considered an unfair labor practice under Section 8 of the Act and workers are eligible for the remedies of reinstatement and back wages. Immigrant workers have capitalized on this provision in order to collectively make demands on their employers while knowing that they are protected in doing so. By mobilizing the Act’s protections in the nonunion workplace, they are potentially transforming the US labor

relations system away from traditional “contract unionism” and toward a new—and as of yet indeterminate—model, and they may therefore be more successful than the skeptics anticipated, but not in the way that their opponents imagined.

In the remainder of this thesis, I first describe the lack of protections for workers in the US labor force, and the heightened vulnerability of immigrant workers. I then discuss the debate over immigrants’ historical and contemporary contributions to the labor movement and provide a critique of this existing scholarship. To do so, I use a case study of a New Mexico immigrant resource center, Somos un Pueblo Unido (or “Somos”), to show how immigrant workers have used a law previously thought be anachronistic in new and potentially transformative ways. Ultimately, I argue that the group’s discovery and successful deployment of an overlooked provision in the NLRA provides a more nuanced portrait of the way immigrants are *reshaping*—rather than revitalizing—the US labor movement today. The experiences of Somos and their immigrant members contribute not only to a deeper understanding of immigrants’ roles in the labor movement, but also to theories of institutional transformation. Specifically workers’ centers and immigrant workers’ repurposing of the NLRA demonstrates that institutional paths that are thought to be one-way streets often contain within themselves “possibilities and resources for transformation and off-path organization” (Schneiberg 2007 pg. 47)

Theoretical Context

Economic restructuring, declining union density and the de facto deregulation of the low wage labor market have increased worker vulnerability to employer abuse in the

contemporary United States. In contrast to the Fordist era when large groups of workers were concentrated within stable firms, more workers today are employed in smaller workplaces, under flexible and contingent arrangements. In addition, US labor and employment law agencies are understaffed and underequipped to protect a workforce that is dispersed throughout the economy in small places of employment (US Government Accountability office 2008, 2009). Moreover, union density is now in the single digits, thereby removing one of the most effective mechanisms for protecting the rights of workers.

Academics have demonstrated how these changes have resulted in worsened working conditions by documenting trends in “wage theft” —or the illegal underpayment or nonpayment of wages—throughout the United States. The largest of all of these studies used innovative sampling methods in New York, Chicago and Los Angeles, and found that while no one is immune to wage and hour violations, immigrant workers are the most vulnerable (Bernhardt et al 2009). Other studies have focused on day labor, an industry with high concentrations of immigrant workers. Valenzuela et al (2006) conducted a national survey of 2,660 day laborers and found that wage theft was widely prevalent. Approximately half of all respondents reported that their payments had been completely denied by an employer in the two months prior to the survey, and a similar number (48 percent) reported being underpaid for a job (Valenzuela et al 2006 pg. 14). Researchers have also documented high rates of wage and hour violations among immigrant construction workers and day laborers in New Orleans (Fussell 2011), and in the building services industry in Miami (Nissen 2004). In addition to the widespread violation of workers’ rights under minimum wage and hour laws, there is some evidence that

employers who commit one type of labor law violation are also likely to commit other types. For instance, construction workers often report non-payment of wages along with health and safety violations (Bernhardt, McGrath and DeFilippis 2008). That workplace violations come in bundles further underscores the point that economic restructuring has resulted in deteriorated working conditions, and that workers—especially immigrant workers—are largely unprotected in the US labor market.

Immigrants and the Labor Movement: Past and Present

Given the heightened vulnerability of immigrant workers, contemporary academics and activists argue that immigrants both have a greater need for unions, and may be playing a key role in their revitalization (Milkman 2006). Yet, the relationship between immigrants and unions has historically been a complex one. Economic theories tend to emphasize the effects of immigrant entry into the labor market in terms of labor market segmentation. As most new immigrants enter in unskilled jobs, differences of race, ethnicity and language are often compounded by differences between skill sets. Thus, diverse labor markets with large numbers of new immigrants are frequently viewed as obstacles to establish the class solidarity necessary for organizing. In the past, many unions acted exclusively, focusing on protecting native-born white workers at the expense of immigrant and minority workers. Olzak (1989) for example, argues that immigration furthered the union movement as native-born workers organized in order to resist increased competition from immigrant and minority workers. Other accounts focus on employers' use of immigrants as strikebreakers, which obviously served to impede the labor movement.

However, some labor historians argue that solidaristic accounts, which focus on immigrants' effects on working class solidarity, are overly simplified. While the craft unions of the early twentieth century were overtly hostile toward immigrant workers and unions needed to overcome significant obstacles to establish worker solidarity, immigrants were crucial contributors to the Progressive era's organizing attempts (Dubofsky 1968). In his analysis of the Chicago meatpacking industry at the turn of the century, James Barrett (1987) showed that deep racial and ethnic divisions—which were also compounded by skill differences and neighborhood segregation—could be overcome by shared grievances in the workplace. Moreover, the deep cohesion within ethnically divided neighborhoods actually served as an important resource for mobilization and organizing during strikes. As newly arrived and more established immigrants joined forces to bolster the union movement, unions also provided new immigrants with the resources to adapt to life in the US.

Similarly, in a study of the New York City garment trades during the first decade of the twentieth century, Melvyn Dubofsky (1968) highlighted the strength immigrants provided to the labor movement. East European Jews and southern Italians who immigrated to New York City presented the labor movement with the challenge of uniting workers of diverse backgrounds, with differing skills and economic needs. Yet, as Dubofsky describes, the situation was not insurmountable. Immigrants from Southern Italy were often hostile to unions due to their desire to save quickly and return to Italy, yet they would organize when unions welcomed Italians and promised improvements in wages (pg. 18). On the other hand, East European Jewish immigrants brought much needed idealism to the labor movement, largely because of their experience with political-

economic action stemming from Bund movement of Tsarist Russia. Jewish immigrants, for example, were indispensable to the progress of the International Ladies' Garment Workers' Union (ILGWU) which had struggled to unite the interests of more conservative Americanized members, and the more militant immigrant members. As Jewish immigrants ascended within the organization, they pushed the ILGWU toward more direct action, and by the end of 1910 had waged two successful strikes for union recognition (pg. 49).

De-unionization and the new immigration

While historians and some economists have argued that immigrants were indispensable to the earlier labor movement, the strength of the resulting trade unions was not sustained in the postwar era. Beginning in the second half of the 1950s, union density began to decline, due in part to growth in non-union sectors of the economy, followed by aggressive employer attacks on unions beginning in the 1970s. Freeman reports that in the 1950s and 60s more than a third of nonagricultural wage and salary workers were union members, as were more than half of all blue collar workers. Yet by the 1970s and 1980s private sector union density had plummeted to 14 percent, and today is now in the single digits (Freeman 1988, pg. 63; Bureau of Labor Statistics 2012). In addition to the effects of growth in nonunion industries and employer anti-union campaigns, Rogers (1994) argues that the base conditions for a system of majority-union, collective bargaining is no longer present. While this system presupposed blocks of workers with homogenous interests concentrated in large firms, economic restructuring has resulted in smaller firms, which are less stable, and less “determinately bounded sites of worker organization” (Rogers 1994 pg. 18).

Along with de-unionization and economic restructuring, the labor market was also transformed by the new immigration which gathered speed in the 1960s. As many native workers left jobs in non-union industries, employers looked to Mexico and Central America for a vast supply of foreign laborers (Milkman 2006 pg. 81). While Milkman argues that the decline in unionization preceded the influx of immigrants, many union leaders blamed immigrants for labor's inability to stem a growing loss of influence, and thus efforts to organize new immigrants were rare throughout the 1960s and 1970s (pg. 82). During the 1970s and some of the 80s, immigrants were largely thought to be unorganizable by both unions and employers—thereby increasing their desirability to employers. It was assumed that immigrant workers viewed their conditions through standards set by workplaces in their own countries, and therefore were not as easily agitated as native workers. Even labor activists who were sympathetic to immigrants assumed that the fear of deportation would discourage many immigrants from organizing. This view eventually began to change, as unions such as the Ladies Garment Workers (ILGWA) attempted to organize and found that immigrants were often more open to the idea of unionization than native-born workers. In his study of the successful drive to organize immigrant workers in a Los Angeles waterbed factory, Hector Delgado (1993) reported that most immigrants did not express fear of deportation as an obstacle.

Ruth Milkman compared four immigrant unionizing drives in L.A., and found that immigrant workers—present in each case—were often more open to the idea of unionizing due to experiences with militant labor activities in their home countries. Moreover, immigrant workers were enmeshed in tight social networks that facilitated mobilization. Finally, most immigrants in the post-Immigration Reform and Control Act

(IRCA) era have long term commitments to the US, and therefore judge workplace conditions relative to native born workers, rather than to conditions in their home country. Because of these attributes, immigrant workers in LA were at the forefront of some of the most active union movements in the 1990s at the turn of the century.

Quantitative data at the national scale found some support for Milkman's argument that immigrant workers are bolstering the new union movement. In their 2009 study using CPS data from 1973-2007, Rosenfeld and Kleykamp found that some Hispanic subgroups were more likely to join or belong to labor unions than native-born whites. They thus reject solidaristic accounts of immigrant organizing, and argue that unions did not shy away from organizing immigrants due to fears that immigrants would disrupt existing class solidarity.

Other social scientists are not so optimistic. As noted above, Michael Piore (2006) argues that Milkman's analysis left the question of why half of the immigrant unionizing drives failed. After all, Piore points out, the organizability of immigrants does not necessarily lead to organizing unions, and immigrant mobilization has also occurred around broader community issues, with workplace issues not necessarily being at the foreground (pg. 384). This suggests that the sustained energy necessary for a drawn-out unionizing campaign may not currently be present in many communities. Finally, Catron (2012) further tested Rosenfeld and Kleykamp's hypothesis, and found more reason for caution. The author extended the original study through the Great Recession of 2008 and showed that Hispanic immigrants who had higher odds of entering union jobs before the recession were more likely to lose those jobs during the recession. His findings suggest

that immigrant workers are more vulnerable to macroeconomic changes and that their gains may not be sustainable in the face of downturns.

While this lively and important debate has added to our knowledge of immigrant propensity to unionize, and has helped to envision the future of the labor movement, I argue here that the debate has become myopic. Academics on both sides of the debate assume that immigrants' potential contributions lie in whether they join unions, thereby boosting union density. Yet, the experiences of some immigrants today suggest that their main contribution may lie in the transformation of the system of industrial relations itself. Since the passage of the NLRA, and the rise of majority contract unionism, many discussions of the labor movement assume that it is synonymous with the system of collective bargaining. However, Dorothy Sue Cobble (2009) argues there is another labor movement growing alongside the traditional one. This movement includes alternative forms of organizations—such as the workers' centers identified by Janice Fine (2006)—and new tactics to help workers in the workplace outside of the realm of contract bargaining. While workers' centers and their strategies have not gone unnoticed, one of their more innovative tactics to help immigrant workers in the workplace largely has proven all but invisible—even to their champions in the academy. Specifically, some workers' centers and legal clinics' use of Section 7 of the NLRA to help non-unionized workers act together indicates other potential paths to worker empowerment within the labor movement.

Several recent cases provide important examples. In September of 2012 groups that work to organize the employees of warehouses and staffing agencies that form part of Walmart's supply chain—Warehouse Workers United in California and Warehouse

Workers for Justice in Illinois—helped the workers strike and walk out in response to egregious working conditions and employer retaliation in response to earlier attempts to voice demands. In addition, and perhaps motivated by the warehouse strikes, employees of Walmart’s retail stores in LA also began striking, and these strikes have since spread to other parts of the country, with discussion of staging rolls of strikes over Thanksgiving weekend (Bradford 2012). While workers in all of these cases have exercised their Section 7 rights, there have been numerous accounts of retaliation, and workers have filed NLRB charges against Walmart and its contractor companies (Fowler 2012; Gruenberg 2012; Katzanek 2012; Wilkie and Hines 2012).

These strikes are notable not least of all because they involve both Walmart and the warehouse companies and staffing agencies that form part of the corporation’s supply chain. The workers face the organizing difficulties that are endemic in today’s economy: supply chains that are characterized by multiple layers of contracting relationships and powerful corporations that have well established their hostility to unions. In both locations workers had acted together to demand the amelioration of unsafe working conditions, and were subsequently retaliated against. Thus, their actions were largely to publicize and protest the retaliatory treatment, and they were successful in gaining the attention of the national media and winning some concessions from their employers (Lee 2012, Bradbury 2012). Yet retaliation in response to the workers’ Section 7 actions still continues, and the NLRB charges filed by the workers are currently being investigated (Fowler 2012; Warehouse Workers United 2012). Thus, despite the significance of workers within Walmart’s supply chain successfully engaging in collective action, these cases are ongoing, making their character and longevity difficult to discern. For this

reason, I use a case study of a workers' center—Somos un Pueblo Unido of New Mexico—which has used Section 7 with a great deal of success since 2008. This particular case, therefore, provides a clearer picture of the strategy, including its adaptation, evolution and potential implications.

The Case Study: New Mexico's Somos un Pueblo Unido

Somos un Pueblo Unido or “Somos” of Santa Fe, New Mexico provides an important case study for several reasons. First, the organization operates in a state that has a vulnerable workforce. Service jobs that support New Mexico's tourism industry, agriculture and natural resource extraction make up a large portion of the state's economy, and the state's immigrant workers are largely concentrated within these low-wage industries. While immigrants make up only around eleven percent of the state's total population, around 28 percent of immigrants in the labor force work in the service sector. Another 24 percent are employed in construction jobs (New Mexico Fiscal Policy Project 2008). Furthermore, there is evidence that immigrant workers in the state experience wage and hour violations at similar rates as those documented by researchers in other parts of the country. We surveyed immigrant workers in the Mexican consulate in Albuquerque, New Mexico during the summer and fall of 2012 and found that 27 percent of the respondents had experienced at least one wage and hour violation and that 17 percent had experienced physical or verbal abuse by their employers. These numbers are striking in light of the fact that New Mexico is often viewed as a state with an immigrant-friendly environment, which some researchers have theorized lessens the vulnerability of immigrant workers (Fussell 2011).

Somos un Pueblo Unido of Santa Fe, New Mexico stands at the crux of this paradox. The organization is partially responsible for the policies which mark New Mexico as an immigrant friendly state, but they are well aware that these gains have not significantly improved the lives of immigrant workers. Indeed, a strong focus on workers' rights is relatively new to the Santa Fe organization, which has its roots in a small movement to pass a memorial in opposition to California's Proposition 187 in 1995. One of Somos's guiding principles is that trust between the immigrant community and the state—and especially law enforcement agencies—will translate into advancement in other aspects of immigrant life. Thus, one of the group's first campaigns was to pass a city council resolution in Santa Fe which limited the ability of local law enforcement agencies to cooperate with Immigration and Customs (ICE) agents. Without this protection and the increased level of trust it brings between the police and the community, the staff of Somos believe there is little to be done to help immigrants who may face substandard conditions in the workplace.

Today, Somos mirrors the key elements of workers' centers as defined by Janice Fine (2006): community-based organizations that engage in service delivery, advocacy and organizing. While maintaining a network of collaborative and supportive organizations, Somos remains unaffiliated with the larger networks of workers' centers such as the National Day Labor Organizing Network, and the Interfaith Coalition for Workers' Rights that are prominent in other parts of the country. The group operates largely out of Santa Fe, yet the staff—around seven to ten people—travel throughout the state, and help to organize around local issues as well as larger state-wide projects. As Fine argues is true of many workers' centers (2006), many of their accomplishments have

been in the policy realm. Immigrants' access to the state's universities and their ability to obtain drivers licenses were the victories of coalitions in which Somos was heavily involved, and both policies distinguish New Mexico's immigration policies from neighboring states with more restrictive policies such as Arizona.

Yet, it is not only Somos's accomplishments in the policy realm that make it an important case study. While the Walmart cases described above have only recently started, Somos has been using the protected concerted activities clause of the NLRA since 2008. Essentially, the group helps workers act collectively to make demands on their employers, and in the case of employer retaliation, helps them to file a charge with the NLRB. The majority of their cases have resulted in successful outcomes for workers, most often through settlements. Drawing largely from their expertise in other areas, the group's earlier organizing successes in low-wage workplaces throughout Santa Fe have developed into a honed and practiced strategy, and the NLRB itself seems to view the organization's use of Section 7 as a model. Upon the recent launch of an effort to inform workers of their nonunion rights under the NLRA, the agency featured Somos and one of their cases on their website ("Protected Concerted Activities"). Finally, it was the collective action of immigrant workers that sparked the use of this method, thereby shedding light upon an unrecognized contribution of immigrants to the labor movement.

Methods

This ethnographic study of Somos un Pueblo Unido evolved through a cooperative relationship that started when we began to carry out a survey in the Mexican consulate system in New Mexico on behalf of the organization. This relationship resulted

in extensive access to the organization, and through this time with them, I learned of their use of the NLRA. It was clear that the strategy presented an innovation, and I therefore designed this thesis project to explore the organization's evolution toward this tactic. While initially, I planned an interview-based study, eventually I was invited to participate in the organization's Wage Theft Working Group, a group formed to address problems with the enforcement of the state's minimum wage laws, and the workers' committee meetings that are further described below. Through these meetings, I observed the group's strategic discussions, and I witnessed their efforts with workers, and the efforts of the workers themselves. Thus, while a small number of formal interviews with the staff informed my presentation of the group's history with using the NLRA, this thesis is based largely upon participant observation over the course of a year and a half.

Somos un Pueblo Unido and Section 7 of the NLRA

The Hilton Case

Somos staff had anecdotal evidence that immigrants in New Mexico had been experiencing workplace abuses similar to immigrants in other parts of the country (Bernhardt et al 2009; Bobo 2009). From the start, Somos helped members deal with wage problems on an individual basis, but they were aware that this was not creating institutional change in the same way that some of their other campaigns had. In 2004, the group became a key part of the Living Wage Network, a coalition committed to passing and maintaining a living wage law in Santa Fe. The law was passed, but in the first weeks of its implementation, many employers retaliated against workers who now needed to be paid higher wages. A group of McDonald's workers who experienced employer

retaliation came to Somos for help. Because the Santa Fe minimum wage law includes a provision which protects workers from employer retaliation for asserting their right to the new living wage, Somos helped them sue for wrongful termination and publicized the case.

Somos director Marcela Diaz now views their support of the McDonald's workers as their first experience with worker organization. Yet it was another situation a few years later that spurred their evolution into a workers' center. In 2008, 14 female housekeepers at the Santa Fe Hilton hotel decided to voice concerns about their working conditions with management. While conditions had always been substandard, a change in management resulted in an increased workload. Once they were expected to clean around 23 rooms per a seven-hour shift, and work with harsh chemicals without protection, the woman collectively refused to work until a manager heard their concerns. When they demanded to speak with their manager, a human resources employee told them that they needed to return to work unless they wanted to be fired. They refused and were subsequently fired.

Afterward, they all went to the office of Somos un Pueblo Unido although none of the women were members of the organization at the time. The staff thought that the women had few options for recourse. Noting that the employer may have had every right to discharge them, the organization nevertheless encouraged the women to stick together. If the women stayed on the same page they would at least be able to hold a press conference and publicize the story. Getting press coverage was nothing new to the organization, which had used publicity tactics heavily in other campaigns, including the McDonald's wrongful termination suit. After speaking with several attorneys, Somos

staff helped the women to write a letter to their employers, asking to come back to work. They stated that they had collectively acted in order to discuss various working conditions and that all they wanted was a meeting. The Hilton management denied them their request to return to work.

While they remained doubtful that there were any channels for legal redress, the staff members were convinced that the press would not cover the women's story unless official complaints were filed. Thus, Somos and the attorneys sifted through the women's stories, looking for potential legal grievances. They filed an OSHA complaint because the women had to use harsh chemicals and were not provided protective gear. They filed an EEOC complaint, but were worried that discrimination would be difficult to prove, since some women who had not acted with the group were also immigrants. Finally, a recent graduate from the University of New Mexico law school who had begun to practice labor law reviewed the case and realized that the women had technically gone on strike. They had not clocked in that morning, and refused to do so until the manager agreed to speak with them.

The Santa Fe Hilton housekeepers had—without knowing it—mobilized their Section 7 rights, which states that workers can “engage in other concerted activities for the purpose of collective bargaining or *mutual aid or protection*.” When they were fired, it was in direct violation of Section 8 of the NLRA which prohibits employers from retaliation for protected concerted activity. The Section 7 provision is well known for its ability to protect workers who are attempting to organize or to obtain a collective bargaining agreement, yet its implications for nonunion workers who are acting concertedly to improve their working conditions has largely gone unnoticed by both

academics and activists, although a few legal scholars have written on the subject (Morris 2005; Summers 1990). Finally, very few workers or employers seem to be aware that nonunion workers are protected in their collective efforts to alter their own working conditions (DeChiara 1995; National Employment Law Project 2011).

Surprised at the lawyer's finding, Somos staff immediately spoke with the local NLRB office in Albuquerque. After they were encouraged to file a charge, the next step was to have one of the women come forward to sign their name as the main complainant. Since all of the women were undocumented, this was considerable cause for concern, but one woman stepped forward, and from that point on acted as the main representative of the group. The NLRB investigated, found that there had likely been a violation of the Act and filed a complaint against the Hilton. Somewhat unexpectedly, the letter that the workers had written to the Hilton management was a key piece of evidence in the investigation. At this point, the group began publicizing the case. They held protests outside of the Hilton, during which the women taped their mouths shut and wore signs which stated that they had been fired for speaking up about their working conditions. Director Marcela Diaz stated that the publicity resulted in a wellspring of support for the workers and increased donations to Somos.

Once an NLRB complaint has been issued, parties can come to a settlement with the aid of the Regional Director, and most cases end in settlements. In the case of the Hilton workers, they did not come to a settlement until the day of the hearing in front of the Administrative Law Judge. The workers and Somos staff had struggled with the thought of settling. Because they were uncertain of the amount they should push for, the staff reached out to a contact they had with UNITE HERE, and asked for help. He

explained that the usual remedies for a violation of Section 8 are back wages (the wages the workers would have received had they not been fired in the first place) and reinstatement. After the years of poor treatment, most of the women were not interested in reinstatement, and many of them had already found other jobs, or had left the state. Yet, the contact at UNITE HERE encouraged them to push for reinstatement. In these cases, because the employer rarely wants to hire back workers they view as troublemakers, they will fight to pay a higher settlement in lieu of reinstatement. In the Hilton case, the amount was \$32,000, which the women agreed to divide between themselves (Baltazar Martinez 2008).

In the wake of the settlement, having followed the union leader's advice, the Hilton workers and Somos members discovered another advantage to the NLRB process. While employers may use the reaching of a settlement to show that there had been no wrongdoing on their part, another typical NLRB remedy is to require the employer to post a notice in the workplace, which states that they violated the rights of their employees. It lists the names of the individual victims, and then it lists all of the employee rights under the NLRA. Again, Somos was ready to publicize. They blew up a copy of the notice and had another press conference to share the workers' victory.

Somos and Santa Fe after the Hilton Case

Somos now argues that immigrant workers have little to lose and much to gain by organizing. Yet it was the Hilton workers themselves, after experiencing worsened conditions in the workplace that sparked the new recognition of rights—and subsequently, the ability to claim them. This is consistent with the literature on legal mobilization, which has shown how changes in conditions can spark changes in rights-

consciousness and subsequently, the decision to claim certain rights (Zemans 1982). In this case, combining rights-claims with previously mastered publicity tactics led the group to a powerful new strategy. The show of support from the community at large emboldened the Hilton workers, and the organization. According to Director Marcela Diaz, until the Hilton case,

We didn't know that we could organize. I mean we always would say 'you have the right to organize,' but what did that mean? We didn't know what that meant. You know, even in our little pamphlets, it would say 'You have the right to organize without being retaliated against,' but we didn't know what the recourse was, we didn't know that that actually meant something. We just figured that it meant with a union. After Hilton, we would explain it to people by saying, 'these women were acting like a union without even knowing it.'

The Hilton case, therefore, led the organization to realize what it *meant* to be able to organize. No union necessary, workers can act together and know that they are protected in doing so. It was not only Somos and its members that were bolstered by the case. The group reports that it was a "moment for immigrant workers" and that the Hilton experience encouraged many workers who previously were afraid, and felt that any sort of resistance to their conditions was futile. Drawing from the wide press coverage, some workers in other hotels reportedly used the Hilton example to gain leverage with their employers. Somos was contacted by new donors, and some unions which were interested in the case, resulting in an increased sense of legitimacy as an organization helping workers.

Perhaps the most important outcome of the Hilton case is that Somos began helping workers who came to them with problem in their workplace by encouraging them to form small "workers' committees" with their coworkers. Guided by their experience

with the Hilton workers, Somos helps newly formed committees to immediately send a letter to their employer stating that they had formed a committee, that they are acting collectively and that they would like to meet to address X, Y and Z working conditions. If the employer retaliates by terminating the committee members, or subjecting them to unfair treatment, Somos now knows the NLRB procedures. What started as a process of organizational search and a trial-and-error strategy became a honed method. After all, organizations learn from direct experience and Somos is clearly learning by doing (March and Olsen 1976; Levitt and March 1988). Ad-hoc techniques which had successful outcomes—such as writing employers to voice concerns, and thereby documenting the workers’ concerted activities—are now efficiently applied to every case. Somos has a formula for the letters which declare the committees’ collective nature, while stating the specific working conditions that they wish to address. The organization has learned through their cases that demonstrating these two elements are crucial aspects both for cases to be considered by the NLRB, and for successful outcomes.

Since Hilton, there are now 20-25 Somos-affiliated workers’ committees operating in Santa Fe. While Somos continues to engage in other issues, the formation of workers’ committees has become central to the organization’s operations. On May 1st, 2012, the organization opened the United Workers’ Center of New Mexico, giving a formal name to what they had been doing for years, and beginning an effort to extend Somos’s organizing and service work to non-immigrant workers as well. The Workers’ Center has a standing workers’ committee which serves to support the workplace-based committees throughout Santa Fe, and to encourage the formation of new ones. Members of the worker committee frequently tell their own stories about workplace organization to

potential new members, help newly formed committees with letter-writing and strategies, and in the case of an NLRB suit, help prepare them for testimony and for publicity. Somos insists that all workers who accept their help agree to speak in front of the press. The cases themselves, they argue, will not result in broader change if the larger community remains unaware of them. The meetings include discussions and reminders of workplace rights, and often include the videotaping of a “*derecho del día*,” in which a committee member speaks about a specific workplace right.

Somos staff and members report that sometimes committees are successful without going through the NLRB process. Success means that the conditions in the workplace are improved, and that the employer does not retaliate against the workers who have formed a committee. If the employer does retaliate, then Somos helps them to file a case. There have been eight different NLRB cases, and six of those have been successful, although not without challenges. While many employers seem eager to avoid any discussion of the workers’ legal statuses, one case that is still open has wound its way through the NLRB process, and has now been heard by the Board itself. This case involves the company that provided janitorial services to the Santa Fe Public School District. After female janitors had been subject to sexual harassment by a male supervisor, the workers organized to voice their complaints. When the supervisor was dismissed and conditions improved, the workers thought they were successful. However, when the time came to renew the workers’ contracts for the next school year, the company did not renew any of the workers who had joined the workers’ committee. The Administrative Law Judge (ALJ) and now the Board itself found that the reason the workers’ were not instated for the new school year was in retaliation for their collective

action. The employer, however, insists that they were not asked back because of their legal statuses. The employer has asked the Board to rehear the case, and the workers are still awaiting their remedies.

This case is the first one in which the Supreme Court's decision in *Hoffman Plastics* and the NLRB's subsequent *Mezonos Maven Bakery* have played a role. *Hoffman Plastics* is a 2002 decision in which the Supreme Court ruled that undocumented immigrant workers whose rights are violated under the NLRA may not be eligible for the standard remedies of back wages or reinstatement if they had presented fraudulent documents to obtain the work in violation of the 1986 Immigration Reform and Control Act (IRCA). In 2011, the Board issued their decision in *Mezonos Maven Bakery* and followed—although not without critical commentary—the Supreme Court's ruling and clarified that back pay cannot awarded to undocumented immigrant workers, even if it was the employer, rather than the employee, who violated the IRCA. While the group is aware that typical NLRB remedies may no longer be available to immigrants without documentation, they also point out that it is the employers who must prove that a worker was in the US illegally, and that they are frequently hesitant to delve too deeply into their own hiring practices.

Although this case remains open, Somos staff frequently use this case as an example of the empowering nature of the actual legal process. To date, this is the only case in which the parties did not settle, and had to go before an ALJ. Despite the fact that the case remains open and its outcome is uncertain, the hearing process was elating for the workers who testified: The CEO and other managers were flown in from California,

and the workers were able to tell their stories in front of them, with the government there representing their interests.

Despite the group's clear beliefs regarding workplace rights, they do not cross the line into naiveté. The group is well aware that passing worker and immigrant friendly legislation does not mean that it will be enforced, or that rights—in the NLRA or otherwise—are unlimited. There are limits, and just as they found creative ways to use the law, so too will employers. In another recent case, a worker in a restaurant was fired after complaining to his boss about working conditions generally. When he went to the Somos office, they found they could not help him through the NLRB process because he had acted alone. Yet, when they probed more and discovered years of wage violations, they helped the workers who were still employed to form a workers' committee. They initially helped the workers file a complaint with the New Mexico Department of Workforce Solutions. Yet, in the meantime, the workers were fired and the case stalled in the agency. The owner of the restaurant then filed for bankruptcy, and opened a new restaurant under a different name. While the bankruptcy proceedings stayed the case that the workers filed with Workforce Solutions, it could not stay the NLRB proceedings. Thus, while the workers' wage claims remain tied up in the bankruptcy proceedings, they have already received settlements from the NLRB case. Determined the workers receive the back wages from the wage violations as well, Somos found a lawyer with a specialty in bankruptcy proceedings to help with the wage violation case.

While Somos has had more NLRB cases than those described here, these cases have become part of the group's organizational narrative. Through the successful Hilton case, the group found a powerful new tool for organizing. Aside from this, the case

brought Somos publicity and legitimacy in the labor world, and emboldened the Santa Fe immigrant community. The janitorial company case is the first case to go all the way to Board, and was the first in which the workers were able to testify in front of their employers. Both this case and the restaurant case are examples of how employers may fight against workers' organization. Employers use immigrants' legal statuses as a reason for discharge and it is likely that Somos will continue to deal with the repercussions of the *Hoffman Plastics* decision. Other employers find different tactics—such as filing for bankruptcy—that add complications to cases. Yet, *Somos* continues to organize, and every year more workers' committees are formed throughout Santa Fe.

Somos's use of Section 7 of the NLRA to help non-unionized, immigrant workers form workers' committees was due to a strong belief that immigrant workers have little to lose, and much to gain by acting collectively. Workers at one committee meeting voiced their opinion that fearing discharge is no reason not to act: Most of them are treated so poorly that an arbitrary discharge seems likely at almost any moment. Complementing this view is the conviction that problems in the workplace affect workers of all stripes, and that immigrants should be incorporated into the labor movement because of their status as *workers*, irrespective of their immigration status. Somos acts on this belief often, and seems to take it for granted that community members and other workers will react with solidarity when the plights of immigrant workers are publicized. Press conferences and other forms of publicity are a key component of the group's strategy. As the Hilton case showed, the people of Santa Fe often react with donations and vows to cease giving service to unscrupulous employers.

The belief that workplace rights apply equally to all workers, including immigrants, motivated Somos's drive to help the Hilton hotel workers. While the group felt that the women may have been legally discharged, they also continued searching for legal recourse. This search led them to Section 7, which the group now views as a powerful organizing tool, not least of all because workers are informed that "they don't need a union to organize and act together." Most importantly, the organization views this tactic as a separate tool from their earlier years when they helped workers on a case by case basis. Because of the publicity tactics, and the proactive formation of workers' committees, Somos believes that the use of Section 7 is beginning to change the workplace dynamic throughout Santa Fe, and they recount stories of the way that workers' mentions of the Hilton case, or other ongoing cases provide leverage for workers who are beginning to organize in their workplace, or the way that powerful people in the community write to say that they are no longer patrons of the business that is currently being publicized as a bad employer.

Practical and Theoretical Implications

Outside of New Mexico

While Somos seems to be one of only a handful of organizations which encourages the proactive organization of workers into workers' committees, other organizations around the country have helped workers who have acted together—without knowing their right to do so, much like the Hilton workers—and have been subsequently discharged. For example, in 2008, Austin Texas's Equal Justice Center helped workers in a countertop factory file an NLRB complaint after they had complained about not being

paid overtime wages for years. The workers—all Mexican immigrants—successfully received their back wages. Aside from immigrant workers, and workers' centers and legal clinics, the NLRB itself seems to be encouraging this use of the Section 7 provision for non-unionized workers. On June 18th, 2012 the Board launched an outreach initiative with the purpose of educating more workers' (and employers) about the rights of non-unionized workers.

The use of Section 7 by other non-union groups and the recent actions of the NLRB raise the questions of whether Somos's strategies are generalizable or scalable to other parts of the country in any broad sense. Are these cases isolated events that may help the workers directly involved but will stop short of any sustained movement-building? At first glance, many of these cases seem to be ad-hoc and separated from any broader movement. Yet, there is evidence that the common denominator among organizations that have utilized the Section 7 strategy is a direct or indirect connection to the traditional labor movement. Somos received advisory support from contacts in unions, and other workers' centers which have used Section 7 similarly had connections to the traditional labor movement through former union officials who had left in order to try and help nonunion workers. Moreover, in a separate paper I used the NLRB's online topical index to identify all of the Board's nonunion Section 7 cases from 1992 through 2010, and a longitudinal Poisson analysis showed that these cases were associated with union density. This suggests that workers file protected concerted activities cases where there is sufficient knowledge of the Act and its applications for both union and nonunion workers (Garrick 2012).

The cases affiliated with Walmart that are briefly described above provide further examples. In September 2012, workers in a Los Angeles warehouse company which contracts with Walmart—many of whom are immigrants (Harris 2012)—walked out to protest substandard working conditions and retaliation for voicing concerns (Miles 2012). Supported by the union-affiliated Warehouse Workers United, the workers staged a 50 mile walk to publicize their plight. The NLRB is currently investigating charges that workers had been retaliated against for voicing their grievances.

Shortly thereafter, workers employed by another Walmart contractor at a warehouse in Elwood, Illinois followed suit and also engaged in a strike. These workers—also supported by a union backed organization, Warehouse Workers for Justice—went back to work after 21 days with full pay for the time that they were on strike, and pledges from the employers that retaliation would end. Finally, workers in 11 Los Angeles area Walmarts went on strike to demand that the company stop retaliating against activist workers. These workers were members of OUR Walmart, a network of Walmart employees that is backed by the UFCW (Moberg 2012), and these actions set off strikes by Walmart workers in other parts of the country as well (Eidelson 2012). OUR Walmart has been helping employees improve their working conditions in the absence of any sustained progress toward unionization. The spread of the Walmart cases—initiated by contract warehouse employees in California, followed by similar workers in Illinois, and finally by Walmart employees—shows how the publicity of these cases may inspire workers throughout the country and especially in areas and industries where unionization has failed.

Taken as a whole these examples from around the country suggest that the shared, yet varied links to the traditional labor movement may be helping to boost the use of the Section 7 tactic. These connections to unions also suggest that the strategy is being used for diverse purposes, with potential for mixed outcomes. In areas where union activity is largely absent, these cases seem to be an alternative to unionization. The staff of Somos state that they have to organize in this way, because no one else will do it. In these areas, widespread publicity of the workers' collective actions may lead to a loose institutionalization of the tactic: Workers who are aware of their rights will be more willing to make demands on employers who—in the face of real legal consequences—may be less willing to retaliate.

Yet, in other parts of the county and with employers who are known to be aggressively antiunion, Section 7 cases may complement unions' strategies. The financial support given by unions to organizations like Our Walmart and Warehouse Workers United suggests that unionization is the eventual goal, and indeed in the fall of 2011, the union that backs the Illinois Warehouse Workers for Justice had taken preliminary steps toward unionizing (Slaughter 2011). In the short run, however, the collective actions of the warehouse and retail store employees helps workers make demands on their employers, while the publicity constrains employers' ability to crack down on worker activism. The solidarity clearly present between the Walmart employees and contract workers illuminates how potentially disruptive these group actions can be: As Nelson Lichtenstein points out, a sustained work stoppage by workers in one Walmart store would only motivate the corporation to close the store. However, monthly walkouts that lasted three hours or so by workers in multiple stores could have a truly disruptive effect

with real consequences (quoted in Eideslon 2012). Thus, another possible outcome to widespread use of nonunion Section 7 strikes is that once employers become more exposed to the unpredictable and disruptive nature of workers utilizing their Section 7 rights, they will cease to view contract unionism as such a source of antagonism. While US corporations have shown few signs of easing their hostility to unions, it may be that a glimpse of a more volatile system of labor relations could influence their perceptions.

Theoretically, this follows from Erik Olin Wright's (2000) framework of class compromise. He suggests that the strength of the working class has a reverse J-shaped relationship with capitalists' interests. Capitalist power is greatest when the working class is completely atomized and workers are in competition with each other. Advances in worker association initially have an adverse effect on capitalists' interests, but there is a point when greater worker association can contribute to capital's well-being. Higher wages that result from worker organization result in higher demand for business's products, for example, but working class organization can also result in more predictable labor markets, and can help employers solve a wide range of coordination problems within the workplace. The actions of groups of workers mobilizing their rights to concerted activities, especially as exemplified by the Walmart cases, undoubtedly can result in increased worker power as groups have been successful in gaining concessions from their employers. Yet, these movements are volatile, unpredictable, and are not sustained enough to result in any benefits to employers. Thus there are few advantages that capital can glean from greater worker association that is characterized by its loose and spontaneous nature. In the face of widespread Section 7 organizing, employers may well prefer the far more predictable institution of collective bargaining.

Theoretical Implications

Regardless of the potential of the Somos model to scale up to more widespread use, the actions of Somos and the organization's immigrant members are breathing new life into an old law. The debate on immigrants in the labor movement has largely focused on whether immigrants are bolstering union density. However, as Cobble (2010) points out, the labor movement has never been synonymous with the collective bargaining regime (pg. 18), and workers historically have organized with or without the protection of labor laws. Somos un Pueblo Unido and other organizations which work with immigrants have shown that the lack of union activity in some regions of the country does not mean that workers necessarily stay unorganized. Through self-organization and the assistance of outside groups with knowledge of the Section 7 provision, workers can make demands on their employers, and in the face of retaliation, have access to recourse. While it is not yet clear if these experiments are simply ad-hoc responses to grievances in the workplace, the Santa Fe experiments suggest that there is at least the potential for the Section 7 strategy to contribute to the transformation of the labor movement. This may be in the form of more widespread, institutionalized use of the tactic in lieu of unionization. Alternatively, the tactic's disruptive nature could provide the impetus for greater employer acceptance of traditional unionism.

While the Section 7 rights under the NLRA are by no means unlimited, the actions of immigrant workers indicate that an important contribution to the revival of the labor movement lies in their ability to experiment with alternative systems of labor relations. Many labor activists express the need to rebuild the labor relations system, yet the actions of the Somos workers suggest that new systems may be constructed with the

remains of the old, rather than upon its ruins. Revitalization may occur through the unearthing of new potential in an old law, rather than in the ability of unions to “get around the NLRB,” or to pass reform legislation such as the ill-fated 2009 Employee Free Choice Act.

The idea that older institutions may contain other possibilities and potential is not a new one. While the passing of the NLRA seemingly resulted in a path dependent labor relations system bound to contract unionism, there were provisions that contained other possibilities. This insight follows from Marc Schneiberg’s (2007) concept of “paths not taken,” in which he showed that seemingly path-dependent institutions are not always one way streets. Rather, institutions sometimes hold the remnants of alternative paths that were at some point abandoned or overlooked for other paths. Those remnants may provide the resources for the institution’s own transformation. After the passage of the NLRA, contract unionism is seemingly path dependent, yet its repurposing by immigrant workers and workers’ centers shows hints of the more disruptive labor militancy of the nineteenth century rather than the twentieth. While the NLRA may have initially channeled labor unrest into a more stable and institutionalized route, the law contained within it another option for workers.

The history of New Deal labor legislation does suggest that other forms of employer-employee bargaining were written into the NLRA. Beginning in the 1990s, Clyde Summers (1990) argued that Section 9—which makes a majority union the ‘exclusive representative’ of all employees in a bargaining unit—had obscured the more sweeping and basic rights in Section 7. Summers, along with law professor Charles Morris argues that the NLRA still allows for minority unions, but that the utility of

minority unions was eventually overlooked and forgotten during the heyday of the union election and majority unions. Morris (2005) argues convincingly that employers may be required to bargain with the small groups of workers that demand to have their grievances addressed.

Nor are legal scholars alone in identifying other possibilities for worker collective action. Economists Michael J. Piore and Sean Safford (2006), and legal scholar Alan Hyde (1993), for example, have both identified worker collectives that they refer to respectively as “identity groups” and “employee caucuses,” which share some elements with unions, but are much more spontaneous, issue-driven, and flexible, much like the immigrant-led committees proliferating in Santa Fe. Thus, while the new forms of worker organization are not fully identified or articulated, the actions of immigrant workers and workers’ centers mirror other forms of worker collectives which have been identified by other scholars.

It is immigrant workers that seem to be at the forefront of illuminating potential other paths to revitalize the US labor movement. Just as Ruth Milkman and others have argued that the unions organizing immigrants are among the most innovative, workers’ centers and similar organizations that work with immigrant workers but do not sign contracts with employers are pushing these experiments in unexpected ways. By combining publicity with a repurposing of the NLRA, Somos un Pueblo Unido and its immigrant members are actively working to transform the workplace dynamic in Santa Fe, and in so doing are demonstrating the potential for transformation that may exist within traditional labor laws. This undoubtedly is an important component of Cobble’s (2010) “other labor movement,” and as demonstrated by the Walmart employees and

warehouse contract workers, the tactic may be useful even in the face of aggressively antiunion companies in other parts of the country.

Thus, while the long term implications of the use of Section 7 by non-union workers is still indeterminate, it is clear that the absence of unions does not necessarily mean the absence of organization. With the aid of groups such as Somos, workers' collective efforts to act in their own defense on the job can be transformed into more systematic and sustained movements. Whether these experiments continue to be local affairs that occur on the margins of the mainstream labor movement or to complement traditional unionism, their contribution should not be overlooked. By repurposing the National Labor Relations Act to help small groups of workers, Somos and their members have shed light upon another potential path to labor movement renewal, using the very law that has too often served as an obstacle to unionization. Given the heightened vulnerability of workers today, and especially immigrant workers, experiments like Somos un Pueblo Unido's are all too important, and all too timely.

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