The Employee Free Choice Act

The Employee Free Choice Act (EFCA), currently before Congress and endorsed by President Obama, is the most radical piece of labor related legislation in recent history. It would dramatically alter the manner in which labor unions are certified in the private sector by eliminating employees' right to a secret ballot election and making union selection akin to signing a petition urged by an aggressive gang of sidewalk canvassers. As currently drafted, EFCA would also empower a government-sponsored arbitrator--not the parties themselves--to create a collective bargaining agreement dictating the terms of a privately-owned company's relationship with its employees for a period of two years. Organized labor argues that systemic employer abuse of the labor laws and an impotent National Labor Relations Board (NLRB) necessitate such profound departure from settled American labor principles. Card check and "interest arbitration," unions contend, are needed to protect employees' "free choice" with respect to labor relations.

Those who bother to examine NLRB election data will be surprised to discover the utter absence of evidentiary support for union allegations, however. The facts reveal that employer misconduct during elections is a rare phenomenon, and the NLRB is remarkably efficient and effective in supervising union elections and remedying violations. The data expose EFCA not as a safeguard for employee free choice, but as a vehicle to increase union membership and power regardless of employee wishes.

Card Check

For all practical purposes, EFCA will eliminate government-supervised, secret ballot elections by requiring employer recognition of a labor union able to produce signed

authorization cards from a majority of employees in a defensible union-gerrymandered "bargaining unit." Currently, union authorization cards are used primarily to demonstrate support for a union sufficient to warrant an election. Although employers may voluntarily recognize a union based on the level of support reflected in the volume of signed cards, employers have the right to insist on a secret ballot election and thereby to afford employees the opportunity to express their opinion in private during a formal and regulated process. EFCA would eliminate this right by making authorization cards (at the union's option) the sole and final indication of employee choice.

In card check campaigns, paid union organizers solicit authorization cards, often at employees' homes or at organizing parties where food and beverages are served. Card-signing campaigns are often conducted in secret, and organizers may visit workers' homes in groups, employ high-pressure tactics, and seek a signature on the spot. Friends and relatives may put active or passive pressure on an employee to sign in front of them. When an employee refuses to sign, there is no way to curtail continued harassment, and organizers may visit an employee over and over until he or she tires and relents.

Labor's Rationale for Mandatory Card Check

Unions are on the decline.[1] There are myriad innocent explanations for this trend, including globalization of the economy, increased regulation of the workplace through federal legislation--rendering collective bargaining unnecessary to protect worker interests, and simple worker disinterest in labor organizations. Unions, however, place the blame for this decline on (1) a slow and ineffective NLRB election process and

[1] Although union membership has been on the decline overall over the past several decades, new data from the Bureau of Labor Statistics demonstrate a recent spike in union membership. BLS News Report, "Union Membership in 2008," USDL 09-0095 (January 28, 2009). This upward trend begs the question how much greater advantage labor unions need or deserve.

inadequate remedies for violations; and (2) widespread employer intimidation and abuse of employees. The facts soundly disprove both hypotheses.

The Facts

The NLRB is empowered to punish employers who engage in conduct that interferes with employee free choice during an election. Among other remedies, the Board may order a new election or, in extreme cases, declare the union the "winner" and require commencement of bargaining. Unions (and employers) can trigger NLRB investigation of election improprieties before the election by filing an "objection" with the NLRB within seven (7) days after the election. It is a simple process, the mechanics of which are well known to labor unions.

Given the rhetoric and anecdotal horror stories of election abuses, one would expect unions to have filed objections in the vast majority of secret ballot elections in recent years. Not so. NLRB[2] data show that objections have been filed in only a small fraction of RC cases (where a union petitions to represent employees of an employer) over the past five years. Objections were filed in only 4.6% of all RC cases closed in Fiscal Year 2003.[3] That figure includes objections filed by employers, as well as unions, and therefore even overstates the frequency with which unions availed themselves of an existing remedy to the supposed rampant election abuse by employers. The objection rate has remained fairly consistent thereafter--with objections filed in only 4.9% of RC cases in FY 2004;[4] 5.6% in FY 2005;[5] 5.8% in FY 2006;[6] and 4.7% in FY 2007.[7] An

[2] Union advocates acknowledge the validity of NLRB-maintained data by selectively citing to that data in pro-EFCA propaganda. *See*, *e.g*., "Employer Interference by the Numbers," AFL-CIO, citing to the NLRB's Annual Report for Fiscal Year 2006.
[3] Sixty-Eighth Annual Report of the National Labor Relations Board, Table 11B (2003).
[4] Sixty-Ninth Annual Report of the National Labor Relations Board, Table 11B (2004).
[5] Seventieth Annual Report of the National Labor Relations Board, Table 11B (2005).
[6] Seventy-First Annual Report of the National Labor Relations Board, Table 11B (2006).

objection rate hovering around 5% hardly reflects routine abuse of the current election process.

Of the surprisingly few objections filed, an even tinier fraction had merit. The NLRB sustained only 8.6% of objections [8] in Fiscal Year 2003--reflecting that objectionable conduct was proven to have occurred in less than one-half of 1% [does it sound better to just say less than 1%?] of RC elections conducted that year.[9] In the years since, objectionable conduct occurred in a similarly miniscule fraction of RC elections -- less than 1% for each of the Fiscal Years 2004 through 2007. [10]

One would also expect--given the alleged widespread employer misconduct during elections--to find that unions win such elections at a low and/or falling rate. But unions are currently winning a solid majority of NLRB secret ballot elections involving new organizing. If anything, in fact, unions' rate of success in secret ballot elections is on the rise. In 1995--during the Clinton administration--unions won 50.9% [CHECK THIS!!!] of elections in RC cases.[11] By 2005, under a Republican NLRB, that figure rose to 61.1%[12] and has held fairly steady thereafter--at 60.9% in 2006[13] and 59.9% in 2007.[14]

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[7] Seventy-Second Annual Report of the National Labor Relations Board, Table 11B (2007).
[8] This figure reflects the success rate of objections ruled upon and excludes those voluntarily withdrawn prior to resolution.
[9] Sixty-Eighth Annual Report of the National Labor Relations Board, Tables 11-11D (2003)(objections sustained in .4% of closed RC elections).
[10] Sixty-Ninth Annual Report of the National Labor Relations Board, Tables 11-11D (2004) (NLRB sustained 8.2% of objections resolved, reflecting objectionable conduct in .4% of closed RC elections in FY 2004); Seventieth Annual Report of the National Labor Relations Board, Tables 11-11D (2005) (NLRB sustained 7.5% of objections resolved, reflecting objectionable conduct in .4% of closed RC elections in FY 2005); Seventy-First Annual Report of the National Labor Relations Board (2006) (NLRB sustained 13.2% of objections resolved, reflecting objectionable conduct in .8% of closed RC elections in FY 2006); Seventy-Second Annual Report of the National Labor Relations Board (2007) (NLRB sustained 11.9% of objections resolved, reflecting objectionable conduct in .6% of closed RC elections in FY 2007).
[11] Sixtieth Annual Report of the National Labor Relations Board, CHECK TABLE (1995).
[12] Seventieth Annual Report of the National Labor Relations Board, Table 13 (2005).
[13] Seventy-First Annual Report of the National Labor Relations Board, Table 13 (2006).
[14] Seventy-Second Annual Report of the National Labor Relations Board, Table 13 (2007).

The facts likewise belie union claims of a sluggish and ineffective federal agency and portray the NLRB as remarkably efficient in conducting elections. In fiscal year 2006, for example, 94.2% of all initial representation elections occurred within 56 days after a union filed its petition, and the median time period between petition and election was only 39 days--barely more than one month.[15] The Agency's results in Fiscal Year 2008 were even better, with 95.1% of all initial elections occurring within 56 days of the filing of the petition and a median of 38 days between petition and election.[16]

Authorization Cards are Unreliable

Having exposed the current system as working just fine, the next question is whether card check is an even plausibly reliable method for determining genuine employee wishes with respect to unionization. Unions themselves know that a signed authorization card is a notoriously unreliable indication of employee choice. The AFL-CIO, for example, has acknowledged:

> NLRB pledge cards are at best a signifying of interest at a given moment. Sometimes they are signed to 'get the union off my back' . . . Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count towards an NLRB election.[17]

Unlike secret ballots, card check offers no opportunity for workers to vote "no" to union representation. An employee's refusal to sign a card on any given occasion does not prevent repeated contacts from paid organizers--like rouge telemarketers in a world with no "do not call" list. A former UNITE-HERE organizer who testified before a

[15] Memorandum GC-07-03, Summary of Operations (Fiscal Year 2006), p. 8.
[16] Memorandum GC 09-03, Summary of Operations (Fiscal Year 2008), p. 6.
[17] AFL-CIO Guidebook for Union Organizers (1961).

congressional subcommittee reported the following about her own experience during card check campaigns:

> I have personally heard from workers that they signed the union card simply to get the organizer to leave their home and not harass them further.[18]

Unions cite anecdotal accounts of employer intimidation, but there are plenty of horror stories to go around. Allegations of *union* intimidation and abuse during card check drives are legion. In one card check campaign, for example, a pro-union employee threatened that "the union would come and get her children and that it would also slash her tires" unless she signed an authorization card.[19] The only reliable gauge of employer misconduct is the statistical data maintained by the federal agency charged with enforcing the labor laws, and that data reveals the fallacy of EFCA premises.

Mandatory Card Check Would Exacerbate the Alleged Problem

Assuming for the sake of argument that employers routinely retaliate against union supporters--a proposition the above statistics soundly disprove-- the proposed solution bears no relationship to the claimed problem. The identity of who signed union cards will be public knowledge under EFCA. It is difficult to comprehend how card check will do anything other than make retaliation easier for law-breaking employers, who--unlike during a secret ballot procedure--may know the identity of each and every person signing/voting in favor of the union. Rather than protecting workers, this public exposure makes pro-union workers even more vulnerable to the alleged threat from their

[18] Testimony of Jen Jason Before the House Subcommittee on Health, Employment, Labor and Pensions, February 8, 2007, Washington, DC.
[19] *HCF, Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996).

employer. Mandatory card check has nothing to do with protecting workers from retaliation, and everything to do with making union organizers' jobs as easy as possible.

The Epitome of Hypocrisy

What best exposes labor's true motives is the fact that EFCA retains unions' right to insist on secret ballot elections when employees seek decertification. Unions provide no explanation how card check most accurately reflects workers' wishes when they seek to form a union, but is inadequate when workers wish to kick a poorly-performing union to the curb. The disparate treatment of employee decision-making again reveals that EFCA is intended to empower organized labor--not workers.

Interest Arbitration

Currently, private sector employers covered by the National Labor Relations Act must negotiate with union representatives in good faith over terms and conditions of employment. It is well settled, however, that neither party is obliged to accept any proposal or ultimately to reach an agreement:

> One of the[ ] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based--private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.[20]

This has been a bedrock principle of American labor law throughout the seventy-year period of government-regulated labor relations: Government ensures a fair *process*, but the interested parties remain ultimately in control of outcome and the specific terms of the contract that will govern their working relationship.

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[20] *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)

EFCA would replace this guaranteed fair process with a guaranteed outcome, regardless of the wishes--or business reality--of any employer or employees. It allows the parties only 90 days in which to voluntarily negotiate a contract, after which time either party can demand mediation. If mediation fails after only 30 days, a contract will be imposed on the parties by a government-sponsored arbitrator.

"Arbitration" is a judicial process, where a neutral party resolves disputes over the meaning of contract terms the parties themselves have previously created. Under binding interest arbitration, however, a government-sponsored arbitrator would actually create a new contractual agreement out of whole cloth. EFCA empowers such arbitrators to decide employees' wages, hours, benefits, and any other terms over which the law currently merely mandates negotiation.

Similar to the rationale for card check, unions parade anecdotal accounts of employer abuses during first contract negotiations--such as bad faith bargaining and delaying tactics. But according to data gathered by labor researcher Kate Bronfenbrenner--an EFCA proponent whose statistical analyses are routinely cited by labor advocates--almost 70% of newly-unionized workers achieved a first contract under the current system in 1998 (a year Bronfenbrenner selected as an example).[21] In other words, a solid majority were able to work out terms and conditions themselves without government interference, even according to data gathered by EFCA advocates. And unions provide no evidence that the first-contract failure rate reflects bad faith bargaining, rather than genuine stalemate or sincerely-held belief in the validity of one

[21] Kate Bronfenbrenner, Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing 51 (submitted to U.S. Trade Deficit Review Comm'n, (Sept. 6, 2000).

side's position. Nothing in the labor laws does--or should--require an employer with a strong bargaining position to succumb to unreasonable union demands.

EFCA would impose on all employers--including the presumptively law-abiding employers of almost 70% of newly-organized workers--an arbitrary deadline of ninety days in which to reach an agreement before the government steps in. Anyone who has actually negotiated a collective bargaining agreement knows the period of time is woefully inadequate for the leaders of a newly-certified union to digest the complexities of an employer's operations or for either side to flesh out details on important and complex matters. For law-abiding employers and unions who wish to bargain themselves in good faith, the artificial deadline will induce hasty and ill-informed decision-making.

As with card check, interest arbitration is aimed not at remedying any existing wrong in the collective bargaining process, but at guaranteeing to a labor union something it has not earned. Also like card check, interest arbitration erodes, rather than enhances, worker power and autonomy. Currently, dissatisfied employees have the right to reject a contract negotiated by their union representatives. Under EFCA, an arbitrator's decision is final.

EFCA as currently written places no limits on arbitrator discretion in the awarding of contract terms. An arbitrator with no experience in a particular industry--or for that matter with no business experience at all--can create contracts without having to live with the consequences. Unlike the parties to the contract, however, that arbitrator does not have to live with the consequences of any ill-advised employment terms.

Constitutional Problems

The constitutionality of the original NLRA's mandated recognition and bargaining was challenged on due process grounds in *NLRB v. Jones & Laughlin Steel Corp*[22]. The Supreme Court in that case upheld the Act's constitutionality, but in doing so emphasized:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine.[23]

EFCA destroys this basis for NLRA constitutionality and invites renewed constitutional challenges.

For example, the Fifth Amendment's "takings clause" prevents government from taking private property for public use without just compensation. EFCA as currently drafted imposes no limits on arbitrator discretion in the determination of wages, benefits, and all other terms of employment. If the terms of a particular contract prevent an employer from operating, it is arguably an unconstitutional "taking."

EFCA also unconstitutionally delegates legislative power to an administrative agency. EFCA provides arbitrators with no procedural or substantive standards, such as a list of criteria to be considered when creating terms or the subjects that must or may be included in a contract. Instead, it sweepingly delegates to FMCS unfettered discretion in setting such standards and is thereby in conflict with the "nondelegation doctrine"--a principle derived from Article I, Section I of the United States Constitution, which precludes delegation of legislative powers to an administrative agency.

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[22] 301 U.S. 1 (1937).
[23] 301 U.S. at 43-45.