

The Employee Free Choice Act ("EFCA"): Salvaging Sec. 7 Rights

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1. Why Card Check Neutrality is Necessary:

The primary goals of national labor policy, as implemented by the National Labor Relations Act, are twofold: to assure employee free choice to engage in or refrain from organizing and collective bargaining, and to maintain industrial peace.¹ The current framework of NLRB representation procedures and unfair labor practice doctrines, including remedies, was established in the decades following the passage of Taft-Hartley. The law developed at a time when employer hostility to unions was much less vehement. In the 1950s and 60s, employers did not routinely engage in the massive legal and illegal sabotage of employee Section 7 rights that are commonplace today.² Despite these changes, the NLRB has taken no serious measures to ensure that its representation and unfair labor practice procedures effectively protect employee free choice in today's context. To the contrary, the Battista Board has encouraged employers' assaults on Sec. 7 rights in any number of decisions.

The current representation process is flawed by excessive delays,³ unequal access to the workers,⁴ and routine unfair labor practices by the employer with insufficient remedies.⁵ Workers who endure these difficulties and win an election are then greeted with vehement, often unlawful, employer opposition in obtaining a first contract.⁶ In

¹ See *Fall River Dyeing and Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 38 (1987); National Labor Relations Board, *The NLRB: What It Is, What It Does*, available at <http://www.nlr.gov/publications/whatitis.html>.

² Academic studies agree that the incidence of employer unfair labor practices during organizing drives has risen dramatically over the years. See Charles Morris, "A tale of two statutes: discrimination for union activity under the NLRA and RLA," 2 *Empl. Rts. & Employ. Pol'y J.* 317, 329 (1998) (the number of workers receiving back-pay for anti-union discrimination rose from 1.2% to 9.5% in 1984-97, an increase of 800%); Compare more conservative studies by The Dunlop Commission which found a 14-fold rise in anti-union discrimination from the 1950's to the late 1980's. Even Professors LaLonde and Meltzer, who claimed that other studies exaggerated the rise in employer unfair labor practices, discovered a 600% rise in discriminatory discharges from the late 1960's to the late 1980's.

³ See Roger C. Hartley, *Non-Legislative labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 *Berkely J. Emp. & Lab. L.* 369, at 381-82 (2001); Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 *Berkeley J. Emp. & Lab. L.* 50, 53-55 n. 59 (1994).

⁴ See generally Chirag Mehta and Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, Center for Urban Economic Development, University of Illinois at Chicago, Dec. 2005 (91% of employers force employees to attend one-on-one anti-union meetings with their supervisors during organizing drives).

⁵ See Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, 51 *Lab. L.J.* 76, 76-8 (2000) (surveying numerous studies).

⁶ See Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing*, U.S. Trade Deficit Review Commission, 2000. (32% of workers lack a collective bargaining

sum, the NLRB election system is poisoned by employer coercion. The Dunlop Commission cited evidence that 59% of workers believed that they would lose favor with their employer for supporting the union and 79% agreed that workers are "very" or "somewhat" likely to be fired for trying to organize a union, with 41% of non-union workers believing "it is very likely that I will lose my job if I tried to form a union."⁷

Fears of retaliation are understandable given the increasing discrimination against workers engaged in union activity. A recent Cornell study of over 400 Board elections found that 51% of those elections had specific or veiled threats to eliminate jobs if the union won; 31% had threats to close; 35% had illegal discharges with an average of four people being terminated; 48% involved promises to improve benefits; 20% had unscheduled wage increases.⁸ According to NLRB statistics, in 1969, the number of workers who suffered illegal retaliation for exercising their federal labor law rights was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination. In 2005, according to the NLRB's Annual Report, 31,358 workers received back pay because of illegal employer discrimination in violation of the National Labor Relations Act.⁹

The massive increase in unlawful employer discrimination is not surprising considering the weakness of NLRB remedies. If for instance the employer has illegally threatened workers with plant closing, the Board will require a notice be posted, perhaps three or four years later.

The penalties for firing a worker are equally weak. If a worker is fired in retaliation for union support, after the legal process has been concluded, the employer must pay the worker for lost wages. If the worker secures a job elsewhere at the same rate of pay, the employer pays nothing. If payment is required, interest is simple interest, and there are no compensatory or punitive damages provided to account for the disruption to the worker's livelihood or the chilling effect it has on union involvement. In 2005, the average back pay amount to unlawfully terminated workers was \$2,667 and most workers never return to their jobs. Evidently, the Battista Board found this princely sum to be unfair to the employers: in *St. George Warehouse*, 351 NLRB No. 42 (Sept. 30, 2007), the Board reversed decades of precedent, put the burden of proving an adequate job search on the employee. This decision, among other pernicious results,

agreement one year after voting for union representation); *see also* FMCS Annual Report 2004 (Out of 1,586 initial contract bargaining cases closed by the FMCS during 2004, 710 (45%) were closed without a contract being reached), *available at* http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc.

⁷ Commission on the Future of Worker-Management Relations, Fact Finding Report (Dunlop Commission 1991), p. 40.

⁸ *See* Kate Bronfenbrenner, *Uneasy terrain: The impact of capital mobility on workers, wages, and union organizing. Part II: First contract supplement*. Washington, D.C.: U.S. Trade Deficit Review Commission (2001).

⁹ *See* NLRB Annual Report, 2005 *available at* www.nlr.gov/publications/reports/annual_reports.aspx.

creates a perverse incentive for employers to delay and drag out hearings so that workers' memories of their job searches will fade.

The current remedies available to workers coerced in exercising their Section 7 rights (including posting and reinstatement with back pay) are insufficient in both deterring such abuses and curtailing the deterioration of employee free choice. Postings are not likely to dissipate the effect of employer threats. Also problematic is the fact that reinstated workers often are "so scarred by the discharge experience that they do not resume union activities," and studies show most reinstated workers are gone within a year, many reporting bad company treatment.¹⁰

Illustrating the problems associated with the current system, a clear example is presented by the workers who attempted to use the NLRB process to gain union recognition at the Goya Foods facility in Miami, Florida.¹¹ Starting back in 1998, despite the workers being subjected to captive audience meetings, threats, and harassment, they voted overwhelmingly for union representation by UNITE (now UNITE HERE).¹² After the union was certified at Goya, the company embarked on a concerted campaign to frustrate the workers' desires by utilizing delays and the lack of powerful remedies in the present labor laws.¹³ In 1999, the company ceased bargaining and illegally withdrew recognition of the union.¹⁴

Through the Board's process and subsequent appeals, the company at the various levels was found to have violated the NLRA. These violations included threats of job loss, plant closings, interrogation of union supporters, discrimination in work assignments, making threats against workers who supported the union, the firing of at least four union supporters, and failing to bargain in good faith.¹⁵ The company continued to appeal, and finally in August 2006, the Board ruled in favor of the union on every important issue. In respect to reaching a collective bargaining agreement, the company was found to have withdrawn union recognition, and the Board ordered the company to resume bargaining. After beginning an organizing drive in 1998, in which the workers were seeking to bargain a contract to improve their working conditions, the NLRB, seven years later, forced the employer to put up a posting merely saying that it would bargain in good faith.¹⁶

¹⁰ See Les Aspin, *Legal Remedies under the NLRA Under 8(a)(3)*, (1970), as reprinted in Julius G. Getman & Jerry R. Andersen, 6 *Labor Relations and Social Problems* 133, 134 (1972).

¹¹ See Bruce Raynor, *What one NLRB case this year tells us about our broken collective bargaining laws*, *The American Prospect* (Dec. 21, 2006), available at http://www.prospect.org/cs/articles?article=losing_by_winning.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

2. How EFCA would be Implemented

a. How it would work

The Employee Free Choice Act would require an employer to recognize its employees' union through "majority sign-up" or "card check," a streamlined process in which workers present signed authorization cards to demonstrate their choice to belong to a union. Allowing recognition when a majority of workers has expressed its decision to form a union for collective bargaining would allow workers free choice by eliminating crippling delays and employer coercion. The legislation amends the National Labor Relations Act by providing a process by which workers can have their union certified by the National Labor Relations board if a majority has signed valid authorizations designating the union as their representative for collective bargaining.¹⁷

Using such a system is not taking a step into the unknown. Under current law, recognition based on majority sign-up is already perfectly legal and has been since the passage of the Wagner Act in 1935, when it was widely used. It has been endorsed by Congress, recognized and enforced by the NLRB and federal courts, and approved by the United States Supreme Court. Majority sign-up is widely used in the public sector where workers choose unionization, and it has increasingly been the path to unionization in the private sector.

Allowing for a recognition process with majority-sign up would also rein in the industrial strife common in organizing drives. Organizing campaigns under the current Board election procedures often produces bitterness and divisiveness. Such industrial conflict is recognized and is almost taken for granted and has been referred to as "those tensions inevitably flowing from a union organizing effort."¹⁸ After several weeks of campaigning, the final days before an election usually reach a high level of tension.¹⁹ In a typical campaign, the employer bombards employees with the message that, if the facility unionizes, the employees "may" lose their jobs, suffer reductions in wages and benefits due to collective bargaining, or face strikes and violence. The union counters with greater promises in addressing the last attack and in anticipation of the next. Under the present system, the hostility in the work-place generated a hard-fought and prolonged organizing campaign hurts employers, employees, and the general public. The process allowed for under EFCA does not eradicate the election process but instead provides an alternative to the current extremely adversarial scheme.

¹⁷ See H.R. 800/ S.1041.

¹⁸ *Hotel & Restaurant Emp.l Union v. J.P. Morgan*, 996 F.2d 561, 566 (2nd Cir. 1993) (citing *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274 (1960)).

¹⁹ Commission for Labor Cooperation, *Union Organizing Systems in the Three NAALC Countries*, available at http://www.naalc.org/english/nalmcp_7.shtml.

b. Why Mediation and Compulsory Arbitration are Necessary during First CBA Negotiations and Promote Industrial Labor Management Peace

Currently, hostile employers often respond to a successful unionization drive among their workers by simply engaging in thinly disguised surface bargaining, failing to provide information and other violations of their good faith bargaining duty. Much surface bargaining is treated by the Board as lawful “hard bargaining.” The Employee Free Choice Act attempts to prevent these abuses by providing that if an employer and a union are engaged in bargaining for their first contract and unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS has been unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration, and the results of the arbitration shall be binding on the parties for two years.²⁰

First contract mediation and arbitration is necessary. The year after initially forming a union, workers are unable to negotiate initial collective bargaining agreements 32 percent of the time.²¹ The FMCS has reported that out of 1,586 initial contract bargaining cases closed by the FMCS in 2004, 710 (45%) were closed without a contract being reached.²² Companies have become extremely effective at working within the law to avoid signing a contract. Certain companies have avoided signing contracts with certified unions for several decades.²³ Through delays and other tactics, companies undermine the union’s strength as workers see the union as powerless to improve their working conditions, negotiate wage increases or represent the workers effectively with grievances.²⁴

The current system, without contract mediation and arbitration, provides no effective remedies against the employer's refusal to bargain. If management and employees reach an impasse at the bargaining table, current labor law allows management to impose working conditions unilaterally.²⁵ The recourse for the workers is either to live with the conditions or to strike. The National Labor Relations Act prohibits

²⁰ See H.R. 800/ S.1041.

²¹ See Kate Bronfenbrenner, *Uneasy terrain: The impact of capital mobility on workers, wages, and union organizing. Part II: First contract supplement*. Washington, D.C.: U.S. Trade Deficit Review Commission (2001).

²² See FMCS Annual Report 2004, available at http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc.

²³ See John Logan, Consultants, *Lawyers and the 'union Free' Movement in the USA Since the 1970s*, 33 *Industrial Relations Journal* 197 (August 2002).

²⁴ *Id.*

²⁵ See *Unfair Advantage, Workers' Freedom of Association in the United States Under International Human Rights Standards*, Human Rights Watch 2000 (citing Ellen J. Dannin, *Legislative Intent and Impasse Resolution under the National Labor Relations Act: Does Law Matter?*, 15 *Hofstra Labor and Employment Law Journal* 11 (Fall 1997)).

bad faith surface bargaining, but this is an exceedingly difficult charge to prove and in the event it is, it takes three or four years to get an enforceable court order to require bargaining. The penalty for bad faith bargaining is typically an order to resume bargaining, and an employer who is found to have no original intention to bargain typically does not alter its behavior and resumes the bad faith bargaining practices.

NLRB General Counsel, Ronald Meisburg, has recognized that additional remedies are needed to adequately protect employee free choice in initial bargaining cases and in his recent memorandum stated, "Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante."²⁶ Unfortunately, not nearly enough can be done without a statutory change. The U.S. Supreme Court, in *H.K. Porter Co. v. NLRB*, has ruled that the NLRB has no power to impose any contract terms on an employer no matter how flagrantly it violates its duty to bargain in good faith.²⁷

First contract mediation and arbitration is not new, and it has been successfully used. It is commonly used with success in the public sector. Quebec provincial law requires first contract arbitration when the parties cannot agree on a contract. First contract arbitration is the only meaningful solution to the tragedy of tens of thousands of workers who obtained union recognition, only to have their free choice of collective bargaining savaged by employer resistance.

c. Increased Penalties and Why They are Necessary

The Employee Free Choice Act provides that the NLRB must seek a federal court injunction against an employer whenever there is reasonable cause to believe the employer has retaliated against or threatened employees during an organizing or first-contract drive. It also increases penalties, including the amount an employer must pay to triple back pay when an employee is retaliated against, and civil fines of up to \$20,000 per violation against employers found to have violated employees' rights during an organizing campaign or first-contract drive.²⁸

The Employee Free Choice Act provides guidelines for the determination of civil penalties that consider the severity of the violation and how it affects the workers and those wronged by the illegal action. EFCA additionally provides for injunctive relief against egregious illegal employer conduct when workers are trying to form a union and negotiate a first contract. The NLRA provides a discretionary process for such violations, which is rarely ever used. Injunctive relief is essential for protecting workers' rights. Posting a notice three years after illegal interrogations, surveillance, promises, or threats does not remedy the problems that are created and the chilling effect it can have on the workers' ability to engage in making a free choice. It will not dispel the fear, and

²⁶ NLRB Memorandum GC 07-08, May 29, 2007.

²⁷ *H.K. Porter Co. v. NLRB*, 397 U.S. 90 (1970).

²⁸ See H.R. 800/ S.1041.

it will not convince workers that they are really free to exercise their right to support union representation. Especially in light of the Board's recent decisions which make special remedies (such as reading notices, union access to bulletin boards and the plant; etc.) virtually impossible to obtain and gut the back pay remedy, statutory change is needed more than ever.

Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers ("RESPECT")

1. The Board's current stand on supervisors and what that means?

On September 29, 2006, the National Labor Relations Board issued three decisions which reinterpreted the definition of "supervisor" in a way that greatly expanded the number and types of workers that can be classified as supervisors and accordingly reshaped who is protected by the National Labor Relations Act. The lead case was *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006). The others were *Golden Crest Healthcare Center*, 348 NLRB No. 39 and *Croft Metals, Inc.* 348 NLRB No. 38. In *Oakwood*, the Board addressed the meaning of the terms "assign," "responsibility to direct," and "independent judgment." The Board also considered the status of nurses who arguably held supervisory duties only some of the time. In the end, the Board found that a group of nurses in Michigan were not protected by the National Labor Relations Act. These nurses and potentially thousands of others now no longer have the right to be in a union or to bargain collectively with their employers over the terms and conditions of employment.

Under the provisions of the National Labor Relations Act, an individual is a "supervisor" and not entitled to federal labor law protections if that individual has the "authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action" and the exercise of such authority is not "of a merely routine or clerical nature, but requires the use of independent judgment."²⁹ Either the authority to "assign" or "responsibly to direct," so long as either requires independent judgment, renders an employee a supervisor.

Applying new standards to the facts of *Oakwood* cases, the Board gave broad definitions to the statutory terms "assign" and "responsibility to direct." The term "assign" was defined in a way that is not limited to having a significant impact on an employees' terms of employment (for example assignment to a shift or assignment to a particular job). The Board held that the term "assign" for the purpose of determining who is a supervisor can include something as simple as assigning a patient to a nurse for only the duration of a single shift. Additionally, the Board broadly read the term "direct" to include employees who direct others in performing a single, discrete task.

²⁹ 29 U.S.C. § 152(11).

The Board also provided a new definition of the term "responsibility" that qualifies the word "direct" in the Act. The Board described that an employee responsibly directs other employees if he or she is held responsible for the performance of the other employees, for example, if the other employees are subject to discipline if their performance is inadequate.

The Board did not create a new definition of the term "independent judgment," but it made clear that, in the nursing context, assignment of patients to nurses requires independent judgment if the charge nurse considers the qualification and experience of the available nurses and the needs of the patients. The Board held that preexisting written instructions or manuals created to guide and govern how such the assignments are to be accomplished does not eliminate the exercise of independent judgment if it does not "prescribe a formulary approach" and does "not articulate all the factors" that may be considered.

The Board also set the standard of when an employee may be a supervisor even if they do not possess the above-mentioned forms of authority whenever they are at work so long as they possess them a "regular and substantial" amount of the time. The Board defined "regular" to mean according to a set schedule or pattern; "substantial" can mean as little as 10-15% of the "supervisor's" work time overseeing the work of others.

Although much of the *Oakwood* cases only described nurses, the expanded definition applies to workers in every industry and means up to 8 million workers, including nurses, building trades workers, newspaper and television employees and others, may be classified as supervisors and barred from joining unions.³⁰ Under federal labor law, workers who are classified as supervisors are not protected against retaliation for forming unions.

The dissenting NLRB members, Wilma Liebman and Dennis Walsh, expressing the grim outlook said the decision, "threatens to create a new class of workers under federal labor law—workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees." The dissenting members also stated that most professionals and other workers could fall under the new definition of supervisor, "who by 2012 could number almost 34 million, accounting for 23.3 percent of the workforce."³¹

2. What does RESPECT do?

The RESPECT bill is squarely designed to address the NLRB's new definition of supervisor established in the *Oakwood* cases, as well as address other concerns with various Board rulings regarding who is excluded from protections of the act due to being

³⁰ See James Parks, "Breaking: Legislation introduced to reverse anti-worker labor board decision," AFL-CIO website, Mar 22, 2007, available at <http://blog.aflcio.org/2007/03/22/breaking-bill-introduced-to-reverse-anti-worker-labor-board-decisions>.

³¹ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, 70 (2006).

a supervisor.³² Although modest changes would be made to the act, the potential effect to re-establish rights for numerous groups of workers is at stake. Representative Robert Andrews (D-NJ), chairman of the House Health, Employment, Labor and Pensions Subcommittee describes some of the recent Board rulings:

In the last five years, the Board has repeatedly ruled to deny or restrict the fundamental rights of entire categories of workers. These include 45,000 disabled workers who lost their right to organize, 51,000 teaching and research assistants who lost their right to organize, and 2 million temporary workers who have had their right to organize severely curtailed. This hurts workers' ability to earn decent wages and receive decent benefits. With the introduction of the RESPECT Act, we intend to restore those important rights.

Along with Andrews, the bill was introduced by Sen. Christopher Dodd (D-Con.) who has stated, "The RESPECT Act is a critical and commonsense step to help protect workers' rights." He went on to describe that "allowing employers to deny workers the right to unionize because their tasks require occasional and minor supervisory duties is unjust and frankly un-American. It is our responsibility to ensure that these hard-working individuals are treated fairly by their employers."³³

The RESPECT bill is an attempt to clarify the National Labor Relations Act to re-establish the protections recently taken away from workers and to ensure that the NLRA is not misinterpreted in the future. The bill proposes to amend Section 2(11) of the NLRA to revise the definition of "supervisor" in the following ways: 1. require the individual to have authority over employees for a majority of the individual's work time; 2. remove the requirement of authority to assign other employees; and 3. remove the requirement of authority to responsibly direct the employees.³⁴

³² See H.R. 1644/ S.969.

³³ See Chris Dodd, U.S. Senate Website, *Dodd Introduces Legislation to protect workers right to unionize: RESPECT Act would amend the definition of "supervisor" under the NLRA*, March 27, 2007, available at <http://dodd.senate.gov/index.php?q=node/3796>.

³⁴ See H.R. 1644/ S.969.