The Employee Free Choice Act
The Biggest Change in Labor Law in Years

by Robert Quinn and John Leschak

One of the most contentious proposals of the 2008 Presidential campaign and of the current Congressional season in Washington is the Employee Free Choice Act (EFCA). Supported by President Obama and opposed by Senator John McCain and most other Republicans, EFCA would be the most significant change to federal labor law in over sixty years. First, EFCA would allow the National Labor Relations Board ("NLRB") to certify a union without an election if a majority of w

The Supreme Court majority disagreed with the union, holding that the NLRA confers virtually no rights

are among those "non-employees" excluded by Taft Hartley. The Bush Board has not only narrowed the definition of employee, it has also expanded the definition of "supervisor."[27]

Dissatisfied with the election process and the Board, organized labor is increasingly relying on card check agreements as the preferred means of organizing. A card check agreement between the union and an employer generally provides that the employer will voluntarily recognize the union, if the union can present signed authorization cards from a majority of workers.

From 1998 to 2003, the AFL-CIO organized nearly three million workers, but less than one-fifth of those employees' unions were certified through NLRB elections. At the same time, between 1998 and 2003, the number of NLRB elections held annually declined by 30%.[28] Union success-rates are higher under card check agreements than during elections. Although the most recent NLRB statistics show that unions won 67 % of elections held in the first six months of 2008,[29] organizing campaigns in which parties entered card check agreements ended with union recognition 78% of the time.[30]

These agreements, also known as "majority sign-up agreements," were approved by the NLRB in ***Keller Plastics*** in 1966.[31] However, the Board modified ***Keller*** in the 2007 ***Dana*** case, holding that when an employer recognizes a union voluntarily, the employer must post a notice in the workplace and that the Board will continue to process any employee-filed decertification o

The Board can also order injunctions under section 10(j) of the NLRA. Section 10(j) injunctions allow the NLRB to temporarily intervene in a labor dispute to stop an employer's unlawful actions. The issuance of 10(j) injunctions can be essential to unions since the traditional enforcement process can take several years. However, since 2001, the Board's has issued an average of only 16 injunctions per year – a 388 % decline from the prior eight years! [40]

A union's primary means of putting economic pressure on an employer is to engage in a strike. However, workers' ability to strike was severely limited by the Taft-Hartley and Landrum-Griffin amendments, which prohibited jurisdictional strikes, wildcat strikes, solidarity or political strikes, secondary boycotts, and "common situs" picketing. Unions also face various other obstacles in inducing employees to strike. The biggest of these obstacles is the employer's right to hire replacement workers to fill in for striking employees. If the union is engaged in an "economic strike" (one for better wages or benefits), the employer has no duty to rehire the strikers at the conclusion of the strike, although it must offer former strikers any available positions in the future. Thus, the consequences of replacement generally are as harsh as actually losing your job.[47]

The law has expanded the arsenal of economic weapons a

by any *bona fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'"[56] Whereas under *Linden Lumber* an employer can insist on an election for no reason other than to gain time to undermine the union, *Joy Silks* conditioned an employer's election request on

Canada and Great Britain have both adopted card-check. Canada's national labor code and four provincial labor codes permit card-check certification.[66] Labor boards investigate to ensure that no fraud or coercion has occurred, and the statutes require card signers to complete a membership application and make a small payment to the union to show that their choice was voluntary. Furthermore, some provincial boards will order an election when card signers are a relatively narrow majority, or where the outcome is closely contested.

Great Britain's Employment Relations Act of 1999 also encourages voluntary recognition, rather than elections.[67] Under this Act, if an employer refuses to recognize a union, the union can apply to the Central Arbitration Committee ("CAC"), a state agency that determines whether or not the union has majority support. The CAC can certify the union without an election, except: (1) when an election is in the interest of good industrial relations; (2) when a significant number of workers inform the CAC that they do not want the union; or (3) when "evidence" regarding the circumstances in which union members became members creates sufficient doubts about whether a significant number of workers really want the union to bargain for them.[68]

While developing procedures for majority sign-up under EFCA,

which may be scheduled in which the Union was a participant.[76] All of these special remedies were upheld by a federal court after the employer challenged the decision, except for the 5.5 % wage-increase.[77]

Opponents of EFCA are concerned about the scope of arbitration, claiming it would undermine private business decision-making. FMCS could appease these critics by adopting regulations based on NLRB case law that distinguish between mandatory and permissive bargaining terms and limit the scope of arbitration to mandatory subjects.[92] Such regulations may be necessary to uphold EFCA's explicit limitation of arbitration to establishing initial agreements. Federal court decisions show that the method of negotiating contract succession is a permissive subject.[93] Thus, extending arbitration to permissive subjects could possibly create a loophole in EFCA, allowing the use of initial arbitral decrees to extend arbitration to the negotiation of successor contracts.

However, limiting the panels' scope to mandatory subjects would still leave them with broad discretion. For example, contracting out of unit members' work is generally considered a mandatory subject,[94] so the panel could prevent the outsourcing of work. And pension plans for current employees is another mandatory subject,[95] so the panel could also require an employer to modify pension benefits.

4. Conclusion

The need for reform of American labor law has increased as a result of the evisceration of long-standing NLRB precedent by the Bush-appointed Board. Although the Obama Board may reverse many of these

[3] Since 1959, all attempts to enact major reform of the NLRA have failed. *See*

[21] See Logan, John. "How 'Anti-Union' Laws Saved Canadian Labour: Certification & Striker Replacement in Post-War Industrial Relations." *Industrial Relations*, vol. 1 (2002): 129 – 158 ("When the U.S. Congress enacted the Taft-Hartley Act in June 1947, which included an employer free speech provision, [Canadian employer groups] campaigned for an identical provision in Canadian law. … But the Liberal government categorically rejected its demands for a Canadian Taft-Hartley, insisting that a free speech provision was unnecessary.").

[22] In *Eastex v. NLRB*, 437 U.S. 556 (1978).

[23] "The Silent War: The Assault on Worker's Freedom to Choose a Union and Bargaining Collectively in the United States." Retrieved March 28, 2009. http://www.aflcio.org/joinaunion/how/ upload/vatw_issuebrief.pdf.

[24] In *Orchard Park Health Care*, 341 NLRB 642, 643 (2004), two nurses reported to a State agency that the nursing home was intolerably hot, without an air condition, and without bottled water for the staff and patients. The employer suspended one of the nurses and terminated the other. *Id.* The Court held that calling the hotline was concerted activity bu250]TJ -341.76 -10.

[93] For example, in *NLRB v. Columbus Printing Pressmen Union No. 252*, 543 F.2d 1161 (5th Cir. 1976), the court held that a union violated 8(b)(3) by insisting on a provision mandating interest arbitration for negotiation of the extension of the original collective bargaining agreement.. And in *American Metal Products v. Sheet Metal Workers Local 104*