THE CONTROVERSIAL "CARD-CHECK" BILL, STALLED IN THE UNITED STATES CONGRESS, PRESENTS SERIOUS LEGAL AND POLICY ISSUES

RAYMOND J. LAJEUNESSE, JR.*

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* Raymond J. LaJeunesse, Jr. is Vice President and Legal Director of the National Right to Work Legal Defense Foundation, Inc.

I. Introduction

On March 10, 2009, a controversial bill misleadingly entitled the "Employee Free Choice Act of 2009" (EFCA) was introduced in the 111th Congress.[1] Although a previous version of the bill failed in the 110th Congress, EFCA is strongly supported by organized labor and just as strongly opposed by the vast majority of Americans,[2] including business, conservative, and libertarian organizations, and some liberals, such as former Senator George McGovern.[3] Unlike President George W. Bush, who threatened a veto,[4] President Barack Obama has promised to sign EFCA if Congress sends it to him.[5] This controversial measure has drawn strenuous and widespread criticism on legal, constitutional, and policy grounds. As of this writing, proponents have been unable to obtain the votes needed in the Senate to invoke cloture on a threatened filibuster and thus obtain a vote on the bill itself.[6] Nor, apparently, have they been able to agree upon an alternative version on which cloture might possibly be invoked, because no alternative has yet been introduced in the Senate.[7]

EFCA is the most far-reaching revision to the National Labor Relations Act (NLRA)[8] to be given serious consideration in Congress since the 1970s.[9] It consists of three major provisions:

1. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

2. McLaughlin & Associates conducted a poll of 1,000 likely voters in the United States from January 7 to 11, 2009. The poll found that 74% of all voters oppose EFCA, and even in union households 74% oppose the bill while only 20% support it. Mclaughlinonline.com, New Poll: Union Members Oppose Big Labor's Card Check (Jan. 26, 2009), http://www.mclaughlinonline.com/6?article=8.

3. George S. McGovern, *The "Free Choice" Act Is Anything But*, Wall St. J., May 7, 2009, at A15.

4. *Cheney Says Bush Would Veto Employee Free Choice Act If Passed*, Daily Lab. Rep., Feb. 15, 2007, at A-7.

5. Kris Maher, *President Tells Unions Organizing Act Will Pass*, Wall St. J., Mar. 4, 2009, at A4. Then-Senator Obama was an original co-sponsor of EFCA in the 110th Congress. S. 1041, 110th Cong. (2009). *Id.*

6. Derrick Cain, *Harkin Says He Does Not Have Enough Votes to Approve EFCA*, Daily Lab. Rep., May 14, 2010, at A-8.

7. *Id.*

8. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

9. *See generally* William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 La. L. Rev. 1 (2009) (providing a history of revisions to the NLRA).

"card check," compulsory interest arbitration, and increased employer penalties for unfair labor practices.

II. "Card Check"

Under the NLRA, if a union presents evidence that a majority of its employees in an "appropriate bargaining unit" want the union to represent them, the employer has two options: it can either voluntarily recognize the union as the exclusive bargaining representative of all employees in that unit, including employees who oppose the union;[10] or it can ask the National Labor Relations Board (NLRB) to conduct a representation election in which the employees can vote by secret ballot as to whether they wish the union to be their exclusive bargaining agent.[11]

EFCA would effectively eliminate secret-ballot elections for choosing exclusive bargaining representatives.[12] Under EFCA, if union organizers presented authorization cards or a petition signed by 50% plus one of the employees in a bargaining unit, the NLRB would be required to certify the union and could not schedule a secret-ballot election.[13] Consequently, neither the employer nor individual employees who oppose unionization could request a secret-ballot election.

Opponents assert that the absence of a formal election process works an obvious unfairness, facilitates intimidation and deception of workers, and runs contrary to the American tradition of secret ballots and the freedom to vote in privacy.[14] The United States Supreme Court has already spoken to the issue, recognizing that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[15]

10. 29 U.S.C. § 159(a).

11. 29 U.S.C. § 159(c)(1)(B).

12. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 655, 658 (2010).

13. H.R. 1409, 111th Cong. § 2 (2009); S. 560, 111th Cong. § 2 (2009).

14. H.R. Rep. No. 110–23, at 51 (2007).

15. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969); *accord* Dana Corp., 351 N.L.R.B. 434, 438 (2007) ("[B]oth the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 [of the NLRA, 29 U.S.C. § 157,] is better realized by a secret election than a card check") (citing cases) (3–2 decision). In *Dana Corp.*, the Board majority explained the four reasons why secret-ballot elections are more reliable than card checks: (1) "unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice"; (2) "union card-solicitation campaigns have been accompanied by

There also is a serious question whether EFCA will unconstitutionally deny employers and employees their free speech rights. During an open election process under current law, employers and employees who are in favor of or opposed to unionization are free to debate their views on the merits of unionizing. Because there would be no open campaign leading up to a secret-ballot election, EFCA would eliminate open debate, thus curtailing the speech rights of employers and individual employees opposed to the union. The Supreme Court has also recently made this point. The Court explained that NLRA section 8(c),[16] expressly protecting the right of employers to engage in "noncoercive speech"[17] against unionization, "'merely implements the First Amendment.'"[18] Moreover, the Court held that the employees' "right to refrain from" union activities guaranteed by NLRA section 7,[19] "calls attention to the right of employees to refuse to join unions, *which implies an underlying right to receive information opposing unionization*."[20]

III. COMPULSORY INTEREST ARBITRATION

Under the current NLRA, an employer is not required to enter into a labor contract with a union exclusive bargaining agent, only to bargain in good faith.[21] Moreover, once an agreement is reached between an employer and union, the union members in the bargaining unit usually have the opportunity to vote whether to ratify the contract or not.[22]

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misinformation or a lack of information about employees' representational options"; (3) "a Board election presents a clear picture of employee voter preference at a single moment," while "card signings take place over a protracted period of time" during which "employees can and do change their minds about union representation"; and, (4) "the Board will invalidate elections affected by improper electioneering tactics, and an employee's expression of choice is exercised by casting a ballot in private," but there "are no guarantees of comparable safeguards in the [card-check] process." 351 N.L.R.B. at 438–39.

16. 29 U.S.C. § 158(c) (2006).

17. Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2413–14 (2008).

18. *Id.* at 2413 (quoting *Gissel*, 395 U.S. at 617); *see* Thomas v. Collins, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

19. 29 U.S.C. § 157 (2006).

20. *Chamber of Commerce*, 128 S. Ct. at 2414 (emphasis added).

21. 29 U.S.C. § 158(d) (2006).

22. DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 78 (Simon and Schuster, 1970).

EFCA, however, would mandate government–imposed contracts by requiring that when a union is certified or recognized as an exclusive bargaining agent, and the parties fail to reach agreement on a first contract after 120 days of bargaining and mediation, the Federal Mediation and Conciliation Service (FMCS) would appoint an arbitration panel.[23] That panel, which would not necessarily take into consideration the necessities of the employer's business, would then decide on the contract to establish the terms and conditions of employment that would be binding on the employer and employees for two years.[24] Union members in the bargaining unit thus would have no opportunity to vote on ratification of the contract even if, in states not having a "right-to-work" law,[25] the contract requires all unit employees to become members or pay union "agency fees" as a condition of employment. Moreover, under an existing NLRB-created rule, unit employees could not obtain a decertification election until the end of that contract.[26]

One of the NLRA's "fundamental policies is freedom of contract."[27] The Supreme Court has held that "allowing the [NLRB] to compel agreement when the parties themselves are unable to agree would violate th[is] fundamental premise."[28] A fortiorari, EFCA's mandatory arbitration provision is inconsistent with that same underlying premise of the NLRA, because it takes away from all parties the freedom to cease dealing and simply walk away if they cannot reach a mutually acceptable agreement.

Mandatory governmentally-imposed binding interest arbitration also runs afoul of various provisions of the U.S. Constitution. In 1937, the Supreme Court held, by a margin of one vote, that the original NLRA was not an arbitrary or

23. H.R. 1409, 111th Cong. § 3 (2009); S. 560, 111th Cong. § 3 (2009).

24. *Id.*

25. NLRA § 14(b), 29 U.S.C. § 164(b), authorizes states to prohibit "agreements requiring membership in a labor organization as a condition of employment." The Supreme Court has construed this provision as also allowing states to prohibit agreements requiring payment of union "agency fees" as a condition of employment. Retail Clerks Intl. Assn., Local 1625 v. Schermerhorn, 373 U.S. 746 (1963). Such statutes are commonly called "right-to-work" laws. *Id.* at 750. These laws have been enacted by twenty-two states. 2 John E. Higgins, Jr. et al., The Developing Labor Law: The Board, The Courts, and the national Labor Relations Act 2150 (5th ed. 2006).

26. 1 Higgins et al., *supra* note 24, at 567.

27. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

28. *Id.*

capricious restraint on an employer's right to conduct its business within the due process clause and other constitutional restrictions only because, the act "does not compel any agreement whatever"[29] and "does not prevent the employer 'from refusing to make a collective contract.'"[30] EFCA does precisely that. Moreover, in requiring governmentally-imposed arbitrators to dictate contract terms, EFCA would unconstitutionally take the property of employers and give that property to their employees (as wages, for example) for a non-public use, in violation of the takings clause, as Professor Richard Epstein has charged.[31]

Finally, a serious argument can also be made that in providing absolutely no standards, guidelines, criteria, or limitations for the FMCS in prescribing regulations for the arbitrators who would unilaterally impose wage, hour, benefit, and other contract provisions on employers and employees, the statute is impermissibly vague, violates due process, and is an unconstitutional delegation of legislative powers. In contrast, the NLRA was held not to violate "the constitutional requirements governing the creation and action of administrative bodies," because it "establishes standards to which the [NLRB] must conform."[32]

IV. INCREASED EMPLOYER PENALTIES

EFCA would also impose three new penalties for employer—but none for union—unfair labor practices committed during union organizing campaigns or in bargaining for a first contract. Those penalties are:

- liquidated damages equivalent to triple back pay for employees fired in violation of the NLRA;[33]

29. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (5–4 decision).
30. *Id.* (quoting Virginian Ry. Co. v. System Fed'n No. 40, Ry. Employees Dep't. of the Am. Fed'n of Labor, 300 U.S. 515, 549 n.6 (1937)).
31. Richard Epstein, *The Employee Free Choice Act Is Unconstitutional*, WALL ST. J., Dec. 19, 2008, at A15.
32. Jones & Laughlin Corp., 301 U.S. at 46–47.
33. H.R. 1409, 111th Cong. § 4(b)(1) (2009); S. 560, 111th Cong. § 4(b)(1) (2009).

- fines of up to $20,000 for each unfair labor practice committed by employers who "willfully or repeatedly" engage in unlawful conduct;[34] and

- mandatory expedited investigations and injunction proceedings when an employer is alleged to have committed unfair labor practices.[35]

These drastic new penalties for unfair labor practices that apply to employers but not to unions raise concerns under the Equal Protection Clause of the Fourteenth Amendment[36] and may violate the Seventh Amendment[37] right to a jury trial.[38]

These one-sided changes in the NLRA's remedial scheme would adversely affect employees as well as employers. With the Damoclean sword of punitive remedies looming, employers faced with union organizing campaigns will be more likely to gag themselves to avoid unfair labor practice charges by unions, thus depriving employees of the "information opposing unionization," which they have an implicit "right to receive" under NLRA section 7,[39] and which is necessary to make an informed and free choice about whether to support unionization or not.[40]

V. CONCLUSION

The many serious policy issues presented by each of the three parts of EFCA—"card check," mandatory interest arbitration, and increased employer penalties—are undoubtedly why this controversial bill has not been enacted in the last two Congresses. Moreover, should the bill nonetheless be enacted,

34. H.R. 1409 § 4(b)(2)(B); S. 560 § 4(b)(2)(B).

35. H.R. 1409 § 4(a); S. 560 § 4(a).

36. U.S. CONST. amend. XIV, § 1.

37. U.S. CONST. amend. VII.

38. *Cf. Jones & Laughlin*, 301 U.S. at 48–49 (upholding NLRA against a Seventh Amendment challenge because statutory remedies were limited to reinstatement and back pay).

39. *Chamber of Commerce*, 128 S. Ct. at 2414.

40. *See* Excelsior Underwear, 156 N.L.R.B. 1236, 1240 (1966):

> Among the factors that undoubtedly tend to impede [employee free choice] is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.

it is certain to face significant legal challenges that it may well not survive.