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The Employee Free Choice Act was one of the most highly publicized issues during the 2008 presidential election. This proposed legislation, if enacted, would profoundly change current labor law in the United States. The legislation consists of three sections that represent an overall policy of facilitating union organizing, and by consequence, collective bargaining. The three sections provide for streamlined union certification, guaranteed first contracts for newly certified unions, and increased penalties for employer misconduct during the process. Given the current sentiment in the United States toward unions, CEOs, and the prevailing economic uncertainty, there is no shortage of opinions on this proposed legislation. Consequently, an analysis of the legislation with special consideration of potential unintended impacts is in order.

WAGNER ACT HISTORY

The legislation that the Employee Free Choice Act (EFCA) is proposed to alter is the National Labor Relations Act (NLRA) also known as the Wagner Act. In analyzing the EFCA, it is helpful to consider the origins of the NLRA. The failed predecessor of that legislation was President Franklin Roosevelt's National Industrial Recovery Act (NIRA) of 1934, which was part of the new deal. That legislation had a number of provisions aimed at spurring economic recovery, including a provision for collective bargaining between employers and employees. Specifically, section 7(a) of that legislation mandated employers provide employees "...the right to organize and bargain collectively through representatives of their own choosing...free from the interference, restraint, or coercion of employers." Labor leaders hailed this as a Magna Carta for organized labor (Rosenzweig & Lichtenstein, 2008). An onslaught of organizing ensued with the battle cry, "The president wants you to join a union." This was the impression President Roosevelt had given working America when he stated, "If I worked in a factory, I'd join a union." The NIRA eventually failed as it had no provision for enforcement and it was ultimately determined to be unconstitutional in the United States Supreme Court Case, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

The NIRA gave way to the Wagner Act of 1935. Crafted by the Senator whose name it bears, and his advisor, Leon Keyserling, this legislation granted employees the rights to organize, bargain collectively, and engage in concerted activity. Though it is clear that is what the act was specifically intended to do, the question is why was it deemed important to do it? There are numerous theories. Kaufman, in his comprehensive work, Why the Wagner Act? indicates, "...the fundamental point behind the Wagner Act [is] that unions are to be encouraged precisely because they *do* raise wages (Kaufman, 1996)." Kaufman goes on to indicate that remarks made by Keyserling, the chief architect of the Wagner Act, indicate that it was part of a coordinated macroeconomic program intended to combat the depression through two related means: stabilization of the wage-price structure and promotion of consumer purchasing power.

Gross, in analyzing what he refers to as conflicting statutory purposes of the NLRA, interprets statements from the same source, Leon Keyserling, with more of an industrial justice theme. He advances the position that the act was designed to, "make the worker a free man (Gross, 1985). He concludes that, "[Wagner] considered the advancement of economic and social justice, rather than the reduction of industrial strife, to be the primary objective of the Wagner Act (Gross, 1985)"

It is worth noting that these two scholars, after extensive research of the same sources of material, have come to somewhat different conclusions as to what the real original intent of this legislation was. Additionally, their summations are different from the purpose of the act implied in its own policy statement; “It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions...”

In considering of the Wagner Act, it seems that its true purpose can be grouped into four possible categories:

1. Balance of employer/employee power,
2. Facilitating employee domination,
3. Facilitating employer domination, or
4. Overall positive macroeconomic impact.

Regardless of the underlying motivation, the intent of the act is clear. Senator Wagner and President Roosevelt, possibly for different reasons, wanted workers to form unions, and bargain collectively with employers.

In that respect, the Wagner Act had the desired effect. It began a period of unprecedented unionization, and by consequence, collective bargaining. Union membership and density effectively doubled in the three year period after the bill was enacted (Troy, 1985). Additionally, the United States experienced the economic recovery that may have been the underlying purpose of the act. To what extent that outcome is attributable to the Wagner Act is debatable as the recovery was proximate in time to not only the act, but also other new deal legislation, economic policy, as well as turmoil in Europe.

The Wagner Act was modified in 1947 with the Taft-Hartley Amendments, otherwise known as the Labor-Management Relations Act. These amendments put limitations on some of the successes the unions had enjoyed as a result of the passage of the Wagner Act. Certain practices by unions that were seen as inappropriately usurping control of companies were eliminated. Most notable, in light of considering the Employee Free Choice Act, these amendments eliminated previous restrictions on employers openly contesting unions' organization attempts. Additionally, the new legislation provided for unfair labor practices by unions and a process for their decertification. The Taft-Hartley Amendments and the Wagner Act have been combined with other legislation to form what is today's National Labor Relations Act. The act provides for the establishment of the National Labor Relations Board (NLRB) as its primary enforcement agency.

DECLINE OF UNIONS

In analyzing labor statistics furnished by the Department of Labor's Bureau of Labor Statistics, it is evident that there has been a steady decline in union rates since the 1950’s. There are many theories on why this is the case, but little consensus. Explanations tend to fall into one of two broad categories. First, decreased union rates have been caused by economic factors. “Labor economists typically stress economic explanations, which vary from compositional shifts in the job structure due to increased competition both domestically and internationally (Wachter, 2007).” Along these lines, globalization has been blamed for the decline in union membership by causing a decline in demand for union jobs. Additionally, the shift in the United States to a service based economy has contributed to this effect. Manufacturing jobs have been off-shored. These are the industries that were traditionally heavily unionized. These jobs disappeared and were largely replaced with service sector jobs. Jobs in this sector traditionally are not strongly unionized.

The other category that is attributed with causing union decline is legal in nature. “Labor law commentators naturally focus on labor law explanations, such as the difficulty of controlling management opposition to unions” (Wachter, 2007). Examples of this sort of management opposition are intimidation of employees for union activity, termination of employees attempting to organize unions, interfering with the union certification process, and refusing to bargain with a union.

This is the perspective that his given rise to the EFCA. It is these alleged patterns of behavior that employers have engaged in that the new legislation specifically addresses. Proponents of this school of thought believe that the way to address the problem is to adjust the existing law.

ORGANIZATION AND ELECTION PROCESS

Current Process

Years of case law from federal courts as well as the National Labor Relations Board, have put into effect the current system of union recognition that the EFCA seeks to alter. Under the current statute there are three ways for a union to form. They all essentially begin in the same manner. The associated group of interested employees and/or non employee organizers will embark on a campaign to form a union. In doing so, the fabled union recognition cards are distributed to the employees who are to be included in the new union. A "card count" of the recognition cards that are signed and returned ensues. The cards are required have language indicating that the signer authorizes the union to bargain for them in reference to wages, hours, and working conditions, or that he is requesting an election to certify the union.

The card count is an attempt to show, by cards signed by employees, that there are grounds to recognize the union as the bargaining agent for the concerned employees. If the union can demonstrate this, and convince the employer to recognize the card count, they can then assert themselves as the bargaining unit. Having been recognized by the employer, the union then would file a petition to the NLRB for certification as the employee's sole agent for bargaining.

According to the United States Supreme Court Case, NLRB vs. Gissel, authorization cards were found to not be inherently unreliable, but employers are not acting in bad faith by refusing to recognize the union on the basis of them. Consequently, if the union organizers have demonstrated over 30% employee interest through recognition cards, the employer is within its right to force an election. This is the second way a union can achieve employer recognition and NLRB certification. The union would file a petition with the NLRB for a "Certification of Representative" election. The employer then has to respond to the NLRB and file either a *consent to the election*, which provides for the NLRB regional director to settle any objections, or a stipulation, which allows ultimately for judicial remedy to any objections.

The election is then scheduled, and the employer has seven days to forward a list of names and addresses of the employees to be represented by the union to the NLRB. The election ideally commences in approximately four to six weeks.

The NLRB sends out notices of the election to the employers, which are to be posted. The NLRB will then, on the assigned date, conduct the election. This is done in the presence of representatives from both sides. In order to win the election, the union must only obtain the majority of ballots cast by employees who actually vote. If they lose, they have to wait ten months to start another organization campaign, and one year to attempt another election. In any case, if either side has an objection to the election results, they must go on record within five working days.

The final way a union can be certified by the NLRB occurs when an employer has embarked on a pattern of behavior that is so egregious against the union as to make a fair election impossible. In such cases it is within the power of the NLRB to certify the union in question against any objection offered by the offending employer. The employer is compelled to bargain by the NLRB's issuance of what is sometimes called a "Gissel Order." This name is derived from the previously cited Supreme Court case which provides for such an order.

Upon NLRB certification of the union, the employer is compelled by law to engage in collective bargaining under section 8(a)(5) of the NLRA. Failure to do so is characterized as an unfair labor practice. Committing such an act will result in penalties against the employer.

The penalties for unfair labor practices are set out in the legislation. They are modest by anyone's estimates, consisting solely of a NLRB issued order to bargain. This results in criticism

of the current law's ability to ensure that employers abide by the requirements of the NLRA in terms of not inappropriately interfering in organization campaigns, certification elections, and collective bargaining.

It's these points that the EFCA seeks to alter presumably to the benefit of workers: Streamline the certification process so that the choice of an election is in the hands of the union, Forcing the parties to interest arbitration where a first contract cannot be achieved, and increasing penalties where the employer commits unfair labor practices. Thus begins the examination of the EFCA.

Section 1 of EFCA

The first section of the new legislation relates to how union certification elections are administered by the NLRA. This is a major alteration of a process that has been in effect since the genesis of the Wagner Act in 1935. It is described in section two of the EFCA entitled, Streamlining Union Certification. That is exactly what the legislation's language provides for.

As indicated in the previous section, a card showing of 30% or more of the members of the intended union will entitle them to a NLRB administered certification election. Under the new legislation, this will not change. What the new legislation does is add a provision mandating NLRB certification in any case where the union in question can demonstrate interest by a majority of the employees. This is done by obtaining signed recognition cards from 50 % of the employees plus one. This is indicated by proponents of EFCA as the primary major benefit of the legislation (United States Congress, 2007). It is important to note the distinction that in an election under current law, it is only the majority of those who actually show up to vote that is necessary for a certification. Under an EFCA card check certification, it is necessary for a majority of the entire potential union membership to authorize the union as its bargaining agent.

In reference to this, it is important to remember that under the current legislation, unions almost never request a certification election with as few as 30 % of the potential union members signing cards (Bronfenbrenner, 1994; Ferguson, 2008). Organizers refer to what is called the “15% drop” in reference to the amount of cards they think they need to produce to have a reasonable chance at a successful election. That is, if they hold 30 % of cards, they would expect to only receive 15 % of the vote in a certification election where they have to capture 50 % plus 1 of the votes cast for a victory. Consequently, organizers indicate that they will hold out for 70 % or more of cards before considering an election. The implication is that elections do not occur as often as may have been intended under the original NLRA legislation.

By allowing for union recognition with a showing of 50 % plus 1, the election process is bypassed. It is this aspect of the legislation that provides for the biggest battleground over the EFCA. EFCA proponents assert that the election process has been so subverted by business interests, NLRB members and employees with anti-union or pro business agendas, that a valid and fair election is a near impossibility. By contrast, EFCA opponents point to peer pressure and coercive tactics used by unions and union sympathetic employees to pressure other employees to sign recognition cards, and consequently interfere with their First Amendment right of free association.

Management Tactics EFCA Attempts to Address

Undeniably, management has the capacity to profoundly affect the ability of a union to organize in their workplace. Management opposition in one form or another has been found to be a key determinant of NLRB election outcomes. Many believe that increased opposition has been a major cause of the precipitous fall in private sector union density over the past two decades (Freeman & Kleiner, 1990). Further findings indicate that “...management opposition, reflected particularly in the actions of supervisors, is a key component in union inability to organize workers in the United States” (Freeman & Kleiner, 1990)

The importance of these findings is revealed when one considers the potential impact of

EFCA on attempts, legitimate or otherwise, by employers to interfere with unionization campaigns. Freeman and Kleiner conducted a study of the use of management tactics and their effects surveys of both employers and organizers. “Supervisory opposition is the most important management action to deter unionization” (Freeman & Kleiner, 1990). The effects of supervisory opposition on union campaign success are magnified when they are able to protract the certification process.

It is the tactics that these managers use that fuel the debate for the necessity and appropriateness of the EFCA. The Taft-Hartley Amendments afforded employers rights for making a case, during an organization drive, against unionization. Specifically, it is provided that, “The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

Prior to that, *any* interference was punishable under section 8 of the NLRA as an unfair labor practice. In the post Taft-Hartley period, employers are able to enjoy almost unrestricted access to employees for the purpose of campaigning against the union. When doing so, the distinction between threats and “predictions” of adverse consequences can become a legal battleground causing a damaging delay to the organizing campaign (Drummonds, 2007).

Specific tactics include such things as mandating employees attend captive audience and supervisor “one on one” meetings. Also, employers retain lawyers and consultants to advise them on how to thwart unionization. Proponents of EFCA argue that this unrestricted access to employees during working hours constitutes an unfair advantage. In contrast, non employee union organizers are afforded limited access to workers at the workplace under United States Supreme Court case law (Lechmere Inc. v. NLRB). In addition, restrictions are placed on employee organizer's activities when on the employer's property.

This speaks to the inherent conflict between workers’ rights afforded by the NLRA and employers’ property rights under common law. Opponents of EFCA might discount arguments that employers are afforded an unfair advantage, indicating that the use of mandatory meetings and consultants are a logical counter campaign to the unions' organizing efforts. That however, does not account for the notion that the original Wagner Act never intended to make this process fair. There is the position that the purpose of that legislation was to give the employees the advantage in the union organizing campaign to counter the disproportionate power of the employer, who controls the workplace (Gross, 1985).

Employers' use of captive audience meetings and consultants is legal and would be characterized by EFCA proponents as less egregious attacks on organizing. Other, more egregious tactics are said to be employed with devastating effect. One of the most devastating tactics that has been used by employers to avoid unionization has been termination of employee organizers. Part of the problem with the existing legislation that has allowed this phenomenon is the modest penalties associated with it. If an employer employs this tactic, he could typically remove the employee organizer's influence and enthusiasm from the process, thus injuring the election. This would have the added effect of intimidating other employees.

The NLRB does not have accurate statistics on the number of employees terminated for these reasons, as many cases are settled prior to adjudication. However, the NLRB annual report for fiscal year 2007 does indicate that “alleged illegal discharge or other discrimination against employees was the second largest category [of unfair labor practice brought] against employers, comprising 6853 charges, in about 45.6 % of the total charges” (NLRB Annual Report FY2007).

Additionally, the annual report indicates that the NLRB awarded back pay of $117.3 million dollars for the year (id.). One has to keep in mind that these back pay awards may be multi year awards. Considering these factors, it seems very likely that employers are using these terminations to some extent to illegally influence the certification process. In some findings it is

estimated that, “over the current decade, illegal firings have marred over one-in-four NLRB-sponsored union elections, reaching 30 % of elections in 2007” (Schmitt & Zipperer, 2009).”

Yet in a opposing view presented by the Center for Union Facts, it is indicated that the impact of illegal terminations on the process is less dramatic. In analyzing the associated statics, that finding is that, “ ...a maximum of 3.75 % of union organization campaigns included an unlawful termination.” and, “ ...the number of employees fired during elections is insignificant (Wilson, 2009). In those findings, it is indicated that 158 cases for fiscal year 2007 did not have a significant impact on the unionization process. However, this opinion does not account for how this action impacts and intimidates employees other than those who are terminated. Also consider that in four back pay cases decided in September 2007, the discriminatory acts occurred in 1999,1996,1990, and 1997-an average of 11 years ago (Drummonds, 2007). One would have to consider what impact this had on fellow employees.

Additional employer actions alleged to have a profound impact on union success rates are any tactics that prolong the election process. One in particular is objecting to some aspect of the election so as to cause delay. The longer the employer can do this, the more time they can take advantage of their access to employees to perpetuate their position against unionization. These delays have a severe impact. In her study, Kate Bronfenbrenner illustrated that when this occurs, success rates fell from 47% to 23 % (Bronfenbrenner, 1994). EFCA proponents would indicate that this is an unfair manipulation of the system, and injecting delay in the process interferes with the intent of the NLRA. Opponents would pose that it is a legitimate tactic not precluded by law.

Elimination of Procedural Delay

By altering the legislation, the EFCA's authors are creating a system where the employer can no longer compel the union in question to a NLRA sponsored election to achieve certification. With the elimination of the election process, the authors are eliminating the period between the recognition petition, card count, and the election. This is the time during which employers are able to conduct their counter campaigns. Consequently, this is the time where most of the employer abuses are likely to occur. By minimizing this time, organizers will be subjected to less of the employer's tactics cited above.

Of concern to EFCA opponents is that union organizers would be able to conduct “blitz” campaigns. That is, they would potentially be able to organize and be certified as the bargaining agents by the NLRB before the employer has a chance to react. While this would minimize the employers ability to commit unfair labor practices, it would also prevent them from exercising rights to assert their position on unionization that they have been granted under the existing legislation and associated case law. The new legislation seeks to mitigate employer unfair labor practices in exchange for usurping the employers First Amendment right to mount a legal campaign against an organizing attempt. Employers are within their rights to hire consultants and mount an anti union campaign as long as it is not based on threats or coercion.

The specter of the “blitz” campaign is not as grievous a tool as EFCA opponents may think it is. In fact, the argument has been made previously in the NLRB v. Gissel decision that organizers could mount the secret campaign on the basis of cards, circumventing the rights given to employers under the Taft-Hartley Amendments. The convening Supreme Court indicated that this would be an unlikely occurrence. This is due to the fact that organizers would lose very important protections afforded them under the NLRA by doing this. If the employer is not aware that an organizing campaign is underway, that employer cannot be found to have committed an unfair labor practice. Consequently, in many, if not most cases, organizers would make a clear and unambiguous notice to the employer that a campaign is underway to achieve those protections.

Organizers would have to decide if they would risk forgoing the NLRA protections in

favor of a secret campaign. The advantage here would be to eliminate the negative effect of the employer's anti-union campaign. If the organizers efforts could truly be kept secret, they would clearly have the advantage because the employer would not be aware of a reason to commit any of the unfair labor practices associated with an organizing campaign.

Organizer Coercion

Critics of the EFCA indicate a belief that employee and organizer peer pressure and coercion to sign recognition cards will become routine. It is unknown to what level this will have an effect. Indeed it is alleged that this is occurring now under existing legislation. Much of the congressional testimony on the EFCA alleges that this is currently the case (Congressional Report 110-4). Testimony was given as to how organizers would harass and coerce prospective union members for the purpose of having them sign interest cards. Many witnesses indicated that they signed the cards in an effort to get the organizers to leave. Additionally the National Right to Work Committee indicates that this is a rampant practice in union organizing (Facts & Issues, 2009). As with the congressional testimony, the evidence presented to justify this is anecdotal. There is a decided absence of hard statistical data on such events from an unbiased source.

In reference to misrepresentation, similar events are alluded to. " There is extensive evidence of signatures on cards being solicited based on claims the cards are requests for information or a "showing of interest" so a meeting can be held or pizza bought for employees, or for the union organizer to show "my boss I'm doing my job," or even as lottery tickets."(Seaton & Rusham, 2009)

Again these issues are not new, and were addressed by the US Supreme Court in Gissel. In that ruling, the court indicated that "...the same pressures are likely to be present in an election.(NLRB v. Gissel)" The misrepresentation as to the intent of the cards was also addressed at that time. Employers asserting the same concern were advised that the NLRB's Cumberland Shoe Doctrine dictates "...if the card itself is unambiguous (i.e., states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.(id.)"

Here the distinction between single purpose and dual purpose cards becomes important. Currently, single purpose cards would typically indicate that the signatory authorizes the indicated union to bargain on their behalf. The issue here is that this card, under current legislation would likely result in an election. Also, a single purposes card might indicate that the employee in question wants an election. A dual purpose card would contain language to cover both contingencies.

Clearly, the current system lends to abuses by organizers in the form of misrepresentation or coercion. It is not known to what extent. It follows logically that by passing EFCA, the stakes of a card campaign are increased. As such, one would expect a greater rate of misconduct on the part of organizers, and a spike in these events as the amount of organizing campaigns increases. These sorts of events can be addresses under the existing legislation as union unfair labor practices.

Can the EFCA Fix these Problems?

All of these potential or actual abuses aside, the debate over the card check clause of the EFCA can be reduced to a very simple formula. Do employees want to be in unions? If so, do they currently have a reasonable access to unionization? If not, would this provision of the EFCA remedy that? An analysis of existing data provided by the NLRA and the Bureau of Labor Statistics may give a simple picture of what, if anything should be done to facilitate greater access to unionization and by consequence, collective bargaining.

It is not disputed that since the high point of unionization in the United States, that union rates and membership numbers have been in steady decline. Current membership rate for private sector employees in unions is 7.6% (NLRB Annual Report FY2007). This puts the rate at pre-Wagner act levels. As we have seen, the different camps have different opinions as to

why this is the case. Essentially, EFCA proponents would make the case that this condition is caused by a combination of inadequate legislation, and abuses perpetrated by employers. EFCA opponents would indicate that this decline is driven by employee preference, abuses committed by unions with an agenda to perpetuate themselves through the collection of dues, and globalization. Also put forth is the position that, ..."[Organized labor] is simply not as important as it once was, because the government has an alphabet soup of agencies dedicated to protecting the rights of American workers. Title VII of the Civil Rights Act, OSHA and the Family and Medical Leave Act make the need for unions far less acute(Goldberg, 2009)." So the first question is to try to establish to what degree the average worker in United States private industry wants access to unionization and collective bargaining.

The Worker Representation and Participation Survey (WRPS) was a yearlong study that began in 1994. It was directed by Richard Freeman of Harvard University and Joel Rogers of the University of Wisconsin. The purpose of that study was, "...to provide an in-depth survey of employee attitudes toward current work organization and human resource practices and toward different forms of workplace participation and representation (Freeman & Rogers, 1999)." To that ends a 26 minute telephone survey was conducted with 2408 employees participating. The key to the survey was, "Three big questions and their answers (id.):" Do employees want greater participation and representation at their workplaces than is currently provided? What do employees see as essential to attaining their desired level of participation and representation? What solutions do employees favor to resolve any gap between their desired participation/representation and what they currently have?

In the data collected from the answers to these questions, the WPRS indicates that most American employees want more involvement and greater say in their jobs. The majority would favor a workplace organization to provide them with group as well as individual voice. Interestingly, the majority of workers polled indicated that they would prefer to attempt this through "joint consultive committee's" with a "sizable minority" wanting a union or union like organization (id.).

The findings indicate that at least the majority of those polled indicated that they wanted to enjoy benefits associated with collective bargaining; they would prefer to achieve them without having to join a union. The survey further indicates that the benefits that workers are looking to secure are not just monetary. They are looking for greater voice and input in the workplace and the ability to choose their own representatives to achieve this.

In 2007, Richard Freeman conducted an analysis of his original WRPS results alongside some more current indicators of possible interest in unionization. His analysis incorporated data from polls conducted by Peter D. Hart Research Associates from 1993 through 1995 (AFL-CIO Labor Day Survey, 2005). The question of interest for Freeman was one asked of non-union workers. Specifically, they were asked if they would vote for or against a union. The key finding in this regard, as indicated by Freeman, is " In 2002 the proportion of workers who said they would vote for a union rose above the proportion that said they would vote against a union for the first time in any national survey: a majority of nonunion workers now desire union representation in their workplace (Freeman, 2007)." According to Freeman this indicates an increased desire for unions among workers with an ultimate goal of achieving a reduction in the "gap" between participation and representation in the workplace.

However, like every aspect of the EFCA, there are dissenting studies indicating that the American workforce has a different desire than that asserted by Freeman. Zogby International concluded a similar study in 2006. Their telephone survey asked of nonunion households, "If an election were held tomorrow to decide whether your workplace would be unionized or not, do you think you would vote [for or against] a union (Zogby, 2006)? Ultimately they report 35% of respondents voting for with a clear majority of 58% voting against. The conclusion

of that survey, and another conducted the previous year is that, "Most American workers seem more inclined to view organized labor as something that may benefit their neighbors, but is not necessarily a benefit to them personally (Peck, 2005)."

The issue of whether or not American workers want to be unions is further complicated by a recent Gallup poll. Conducted March 14-15, 2009, the poll asked respondents, "Generally speaking, would you favor or oppose a new law that would make it easier for labor unions to organize workers?" Their results indicate 53% of those surveyed as being in favor of such a law while 39% would oppose that law. The balance of 8% tendered no opinion. Gallup indicates a belief that the crisis of the current economy, along with corporate bailouts and the bonus scandal, has fostered an environment of increased sympathy for working people and unions. Consequently, they postulate that the time is right for proponents of the EFCA to win passage of the law in the House and Senate (Saad, 2009).

There seems to be a possible indication of increased interest by employees to organize into unions. Therefore, the next question would be; do they have reasonable assess to unions? An analysis of data from the NLRB's annual report would give an indication as to what degree of success employees are having at organizing under the existing legislation. This question becomes very complicated because of the number of variables involved. An initial analysis of the NLRB data initially implies that unions are doing quite well when it comes to certification elections. Over the past ten years, unions have won certification in just under half of the election staged, and maintain a positive net increase in union members (NLRB Annual Report FY2007). This, on its face, would imply a fair and equitable system in the certification process. However, this analysis omits a number of important factors. The long term trend has been for a steady decline in union density (an expression of the percent of the labor force in unions), overall numbers of union members, and the number of elections. Over the past ten years alone there has been over 200 elections per year reduction in the number of elections held. This gives credibility to the arguments that employer interference is taking its toll on the process; fewer employees are willing to submit to the process, and the fact that organizers wait until they have a super majority of recognition cards before they initiate an election. At best, the question of whether employees are getting the appropriate access to organizing and elections is inconclusive without a more detailed analysis consisting of analyzing the available statistics along with actually interviewing the stake holders.

Additionally, these statistics are not fully indicative of the state of collective bargaining in the United States. For Fiscal years 1996 to 2004, the FMCS helped settle an average of approximately 250 first contracts per year. Cases where an employer voluntarily recognized a union and reached a first contract without FMCS assistance are not tracked by the FMCS or NLRB. Consequently, there is some collective bargaining taking place in the workplace beyond the detection of the federal government (United States Cong., 2007).

For the sake of analysis, we can conclude that employees are not be afforded the access that was initially envisioned by the authors of the Wagner Act. Consequently, the next phase of the analysis is in order. The question becomes will this section of the EFCA facilitate more unionization, and consequently, more collective bargaining?

Logic would indicate that this would be the case. By all accounts, this legislation would remove many of the legal, and illegal tactics employers might employ to thwart the organizing process. Not only would the increase be due to effectively streamlining the existing process, but also from the likely increased amount of organizing campaigns that will result.

Events studied in Canada give some indication of what effect the EFCA will have on organizing campaigns and their success. Prior to 1977, all ten Canadian provinces allowed for card check recognition. The union in question would be certified as the bargaining agent if the number of cards they had met a certain threshold. This was from 50% to 55% depending on the province in question (United States Cong., 2007). In that year, five provinces

adopted new systems requiring mandatory voting consisting of a secret ballot election.

Subsequent studies comparing union success rates for the two systems were conducted. First, a broad study of nine provinces was conducted. Compiling data from those nine provinces over the period from 1978 to 1996 revealed findings that are not surprising. A success rate nine points higher was realized by card check over secret ballot elections.

Additionally, a more specific study was conducted in reference to organizing success in the Canadian province of British Columbia. That province allowed union recognition until 1984. From 1984 to 1993, they defaulted to a system of requiring a secret ballot election. Again results are consistent with most expectations. During an eleven year period where card checks were allowed, the union success rate was 91%. The success rate drops to 73% for those years where secret ballot voting was mandatory. The other effect that was realized where the card check system was used was more attempts at unionization. During the period where card checks were allowed, the average number of attempts was 531. Where secret ballot voting was mandatory, the amount of attempts dropped to an average of 242 (United States Cong., 2007).

Finally, an increased success rate for union certification should result from the mitigation of delay in the process. The streamlined, short duration process will create a condition that will allow for diminished efforts on the part of employers to thwart certification. All of the above factors considered together seem to bestow organizers with an opportunity for increased and more effective organizing campaigns. In this regard, the EFCA seems to be able to deliver what its authors intended.

Other Considerations

Consider that under the current system, there must be at least a 30% showing, through cards, that the entire prospective union members are interested in certifying the union. Then, the employer can compel an election where a simple majority of those who show up to vote will result in a union certification. In the new system, there must be a showing of interest, via cards, by a simple majority of the entire unit. It is the case now that most organizers will attempt to get significantly more than half of the unit to sign cards. Many prospective union members may be signing cards in an effort to appease a pushy organizer. Under the new system it would be incumbent upon these employees to be more sincere in their indications of union interest on the cards. Even if organizers mislead them about the purposes of the cards, without a doubt, an employer would make it known that signing the card will result in a union certification. Employees will be held more responsible for signing these cards. As with most contracts in the United States, signing these cards would become a binding issue.

EFCA proponents have taken pains to indicate that EFCA will not eliminate the certification election. It is their assertion that the legislation simply takes that choice away from the employer. The employees will have the right to call an election. The idea is that if there is a segment of the prospective union members that do not want affiliation with the union in question, they would be able to request an election from the NLRB to not have the union certified. However the problem is that this is not expressly provided for under the EFCA. There is no procedure for how this would work. The disinterested employees would seemingly have to show disinterest in the form of a card count. Having done that, they could petition the NLRB for the election. The problem for them would be at the point the new unit was certified through the simple majority card count, they would be granted protections against decertification. Specifically, they would be barred from decertifying that unit for a period of one year. This is not the same as simply shifting the right to call an election from the employer to the employees.

The employee organizers would not be likely to petition for such an election either. This is because of the 15 % drop phenomenon. If they have 50 % plus one of the cards, by these projections, they will not win the election. They have no incentive to petition for the election. If they have a guarantee of immediate recognition ,

unions will never choose the election (Seaton & Ruhsam, 2009).

ARBITRATION

Current Process

After a union is certified as the exclusive bargaining agent for employees, its position is not without peril. The real test of how effective this attempt at management and labor cooperation will be is the negotiating of the first collective bargaining agreement. It is this agreement that is the blueprint for how the company and employees will interact during future operations. This document will grant and guarantee the compensation levels of the involved employees. Even more importantly, the agreement sets the rules for how much say the employees will have in how the workplace functions. To this degree, it is the document where the company effectively surrenders a portion of their management prerogative. As such, they tend to be very deliberate in how they proceed toward this collective bargaining agreement.

Under the current law, an employer is required by section 8(a)(5) of the NLRA to bargain with a certified union. The employer and union are required to bargain on wages, hours and working conditions. Failure by either party to negotiate on these grounds constitutes an unfair labor practice. These unfair labor practices are commonly referred to as failure to bargain, refusal to bargain, and bargaining in bad faith. These infractions are punishable under the NLRA; however, this punishment generally consists solely of an order to submit to bargaining. Only in the past few years has the NLRB taken a more forceful stance on these failures to bargaining. This policy for attempting to add additional remedies has its origins in the NLRB's Office of the General Counsel. The General Counsel is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

The current General Counsel, Ronald Meisburg, has indicated a belief that when bad faith bargaining has occurred, merely ordering the parties to bargain may not return the parties to the "status quo ante (Meisburg, 2007)." Additional measures are advocated, such as seeking an extension of the certification year, allowing union access to bulletin boards, mandating periodic reports on the status of bargaining, and reimbursement of bargaining and litigation expenses by the employer. It is advocated that these remedies be sought in cases involving first contracts, as the union is at that point, still in a tenuous position in regards to its longevity. Although this is the position of the General Counsel, the Board itself seldom adds these provisions, saving them for the most egregious cases.

While it is stipulated that unions, as well as employers, engage in bad faith bargaining, clearly the General Counsel's statements on the matter indicate that it is more commonly committed by the employer. A brief analysis of the numbers of failure to bargain cases for FY 2007 gives a view of this. 8178 cases of employer failure to bargain were alleged for FY 2007. The number for unions was 290. By the NLRBs own estimates, approximately 49% of these are initial contract cases. Additionally, where initial contracts are concerned, about 28% of these *refusal to bargain* cases are found to have merit. Consequently, it can be estimated that approximately 1120 of these refusal to bargain cases effect initial contracts and have merit.

An analysis was conducted of data obtained from 118 cases where newly certified unions were seeking first contracts. In this study it is demonstrated, as with the organizing drive, that employer efforts at delaying the process will result in a decreased likelihood of an agreement. "It was shown that the NLRB delays in resolving employer objections and challenges to election results, and employer's refusal to bargain in good faith, and discrimination subsequent to election victories all substantially reduce the probability of agreement (Cooke, 1985)." Again, the issue of delay in current NLRB procedures is one of the driving forces behind proponents' insistence on the EFCA's section on forced arbitration.

Management Tactics EFCA Attempts to Address

Generally, there are several tactics that employers are alleged to use in effort to refuse to bargain with a newly established union. The most obvious is the outright refusal to bargain. This is a basic refusal to even acknowledge to existence of a bargaining relationship. The employer indicates a belief that the union, despite being certified, has no authority to bargain for the employees, and/or the employer has no duty to bargain with the union.

Additionally, one of the parties might simply refuse to meet at reasonable times, or make unmanageable requests or demands as to how the process should be conducted, in an attempt to frustrate the process. Assigning bargaining agents who do not have sufficient authority is also a tactic used by both employers and unions. Employers may refuse to provide information necessary to the bargaining process, such as financial information that they are required to provide by case law. All of these issues would be referred to by the NLRB as refusal to bargain in good faith.

Another common tactic employed by both employers and unions is "surface bargaining." This is when one or both parties meet for the purpose of bargaining. Instead of intending to make a good faith effort of coming to an agreement, the party that is engaging in surface bargaining merely goes through the motions of the bargaining process. They make no real attempt to come to any agreement on the disputed issue or issues. It is important to remember that there is a distinction between this and "hard bargaining." Hard bargaining is the right of both parties to reserve a strong position on an issue.

Ultimately standards of good faith and bad faith have been defined through federal court and NLRB decisions. The consideration that must be met to prove bad faith is the totality of the conduct involved. Consequently, it is rare for the NLRB to make a determination of bad faith bargaining on the basis of one event. An investigation is generally conducted to the ends of discovering how willing the offending party seemed to be towards coming to an agreement.

Forced Arbitration

The second section of the Employee Free Choice Act is entitled, "Facilitating Initial Collective Bargaining Agreements." What this section does is essentially compel the parties not only to the bargaining process, but also to the actual agreement. Specifically, this section provides for new recourse to establish a timely collective bargaining agreement. If after a period of ninety days from certification, the parties have not come to an agreement; either party can file for mediation and conciliation with the Federal Mediation and Conciliation Service. If an agreement is not resolved at that level, the FMCS, upon request of one of the parties, is to refer the matter to interest arbitration with the end result being a collective bargaining agreement to be in force for two years.

It is this part of the legislation which is the most radical departure from the existing provisions of the NLRA. The existing law has sought to facilitate a process. It does so with generally no power or inclination to force an agreement. Once the parties have agreed to, or been compelled to bargain, they are free to use any legal means at their disposal to condition a collective bargaining agreement on favorable terms. The parties are free to use persuasion and economic pressure in the form of strikes or lockouts to achieve their ends.

As with the election and recognition process, there are strong indications of employer and union misconduct during the negotiation of the first contract. The current system lends itself to this type of abuse by the very fact that the NLRA does not compel the parties to agree. The parties are only required to bargain. The requirement to bargain is specified in section 8(d) of the NLRA. Specifically, collective bargaining is defined as the parties' requirement, "...to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." It is the vagueness of these terms that allows for the process to be confounded.

Initial contract negotiations are often more difficult than established successor contracts negotiations, since they frequently follow contentious representation election campaigns (Meisburg, 2006). It is reported that in approximately 32% of the cases where employees do gain union representation, they are unable to achieve a first contract (Broderdorf, 2008). It is undeniable that this has to do with the parties taking inappropriate advantage of the weakness of the current legislation. Again, the spotlight seems to be on employers. According the Ronald Meisburg, "...our records indicate that the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly certified units (28%). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65%) (Meisburg, 2006)."

This is a larger problem because at this stage of events, the union is still not produced a solid foundation. The NLRA allows for a period of protection for the union of one year to establish its first collective bargaining agreement. If after the expiration of this certification bar period, the union does not have an agreement in place, the union is susceptible to decertification. It would not be unlikely that newly unionized employees would have become disenchanted with the union, having failed to achieve its goals. Consequently, they would be naturally less inclined to continue to advocate for the union, and may seek decertification or replacement by another union.

The question becomes is it appropriate to make such a radical departure from what has been the system provided for by the NLRA, and solidified in the rulings of the NLRB and various courts. That tradition has been to facilitate a process of bargaining. The NLRB and courts have been very careful to not cross over the boundary of the process to actually force any side to accept terms of an agreement. Indeed, it was held by the United States Supreme Court that, "..the [NLRB] does have the power under the National Labor Relations Act... to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement (H.K. Porter Co. Inc. v. NLRB, 1970)

The parties have essentially been protected in their rights to hard bargaining. One such way this has been done is the courts handling of cases of "Boulwarism." This is simply another name for last, best offer bargaining. The namesake for which was the Vice President of Labor Relations at General electric. "The employer's idea here is that a tortured process of give and take in which the employer is excoriated for its obstinacy and unreasonableness and gradually brought down to a modified position only enhances the prestige of the union and diminishes that of the employer (Gould, 2004)." This is not equated to bad faith bargaining because good faith bargaining does not require the parties to make proposals and counter proposals; it merely requires a good faith intent to consummate an agreement. A similar tactic that has also been constructively condoned is regressive bargaining. This is a system where one party indicates that a rejection of the proposed agreement by the other party will result in the first party's submission of a less attractive offer. The courts and the NLRB have indicated that neither of these tactics, individually, would substantiate a claim of bad faith bargaining. Though considered with other factors, they might support such a claim.

The Right to not Agree

The primary objections by opponents of the EFCA regarding arbitration do not originate from the agreement itself. The concerns are that this process will inappropriately influence the content of these agreements.

The EFCA section on mandatory arbitration would eliminate an important benefit that employers have enjoyed under the existing legislation. There has been an acknowledgement of the rights of the parties to not reach an agreement. In Chevron Oil V. NLRB, the court held that, "...If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate. Deep conviction firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the

citizen and essential to our economic system...of free collective bargaining. The Government, through the [NLRB], may not subject the parties to direction either by compulsory arbitration or the more subtle means of determining that the position is inherently unreasonable, or unfair, or impracticable, or unsound." The parties, having bargained in good faith, may be unable to reach an agreement on one or several issues. That having happened, the parties are said to have reached an impasse. Upon reaching an impasse, the employer is free to put into action provisions or an agreement that is consistent with their last, best offer to the employees. The employees are then free to put economic pressure on the employer to achieve an agreement they find more favorable.

This section of the EFCA proposes the most dramatic change to the representation and bargaining process of the EFCA. Again, it is a radical departure from the current process. The NLRB decisions and federal case law have established a system where power and economic force are essentially the mechanisms which compel agreement with the NLRA merely guaranteeing that the process takes place. The EFCA proposes to eliminate this and force agreements on the parties. Consequently, there are strong arguments against adopting such a system.

Constitutionality of Forced Arbitration

The first argument in reference to this section of EFCA is that it is too vague. This is certainly a compelling position. The wording of the clause requires the parties submit to FMCS sponsored mediation and arbitration when they are unable to achieve a first collective bargaining agreement. It further tasks the FMCS with the burden of creating a system to facilitate this. It provides no guidelines or requirements as to how this is to be accomplished. Opponents of the EFCA find this disturbing as this is a fairly complicated process that creates an agreement that both parties will be subject to for a period of two years. It has been suggested that this would be an unconstitutional delegation of authority by congress.

Article 1, Section1, of the constitution vests "all legislative powers herein granted...in a Congress of the United States." According to the Supreme Court, this "...text permits no delegation of [legislative] powers" and Congress must, at a minimum, "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." It is suggested that this is the case with EFCA. As congress has asked the FMCS to create specific standards for arbitral awards without providing any "intelligible principle" to guide the agency. Congress has provided no structure regarding the complicated and important matter of arbitral standards (Broderdorf, 2008).

The EFCA fails to provide such guidance or set forth an intelligible principle. The EFCA language simply states; "The service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the service." It directs the FMCS to compose an arbitration board but does not expressly provide whether the FMCS should merely develop the procedural aspects of convening a board or whether it should develop substantive rules on the board's decision-making power. Furthermore, it fails to constrain the FMCS' rule-making authority. For all of these reasons, it is possible that the interest arbitration provision in the current version of the EFCA would not survive constitutional scrutiny. Essentially, the opinion is that congress is delegating too much authority to the FMCS without a specific guiding principle. This principle would be necessary to for the substantive and procedural guidelines of the new process.

Clearly the authors of the EFCA intended this section to upset the power balance that occurs in first contract negotiations. Traditionally, this power has been held by the employer. It is the employer that controls the workplace, and the compensation. Forcing this arbitration is a mechanism to force the employer to surrender control in the form of management prerogative from the workplace. The intent is to try to level the playing field as the indication

from the NLRB's General Counsel is that the system is inappropriately out of balance.

Another objection to the arbitration clause of the EFCA is put forth on the basis of potentially violating the constitution. The position is that the arbitration mandated by the act is an affront to the eminent domain section of the Fifth Amendment of the Constitution. Essentially, it is posited that the current legislation compels the parties to bargain, but they retain their right to not agree, and walk away. As stated, the EFCA would force the parties to arbitration at this point. This would result in the government, through the FMCS, forcing an agreement where the employer is likely to make concessions for which it will not receive a reasonable return on capital (Epstein, 2008). This imposing costs on one party to provide non reciprocal benefits to others is a per se violation of the takings clause.

This position makes a number of assumptions. First, should the parties proceed to FMCS forced arbitration; the agreement would be disproportionately in favor of the union. With no parameters included in the legislation for the FMCS to follow, this is an assumption not based in fact. Agreements could possibly favor employers, or simply set a sparse general framework for the parties to negotiate from at the expiration of the two year initial contract. In a purely economic analysis, it may be the case that the employer will be forced to pay increased compensation, but would possibly gain increased cooperation and productivity from workers.

Proponents of this position have attempted to apply this logic to other forms of government mandated social welfare. These include minimum wage laws, unemployment, and employer's mandatory contributions to Social Security and Medicare (Gottesman, 2009). These conventions are accepted parts of American society. They have not been successful challenged as an affront to the constitution, nor are they likely to be. That being the case, it seems unlikely that should the EFCA pass, it would be successfully attacked on this issue.

Unintended Impacts

While this change may level the playing field to the benefit of unions, the possible negative effects on the process have to be considered. By forcing arbitration, the EFCA may cause bargaining behavior on the part of the parties that was not intended. The primary determinate of this will be if the parties in question think they are likely to get a better deal by negotiating, mediating, or arbitrating.

The view of opponents is that while the NLRA's original purpose was to facilitate collective bargaining relationships, this section of the EFCA would actually have the opposite effect. Two conditions are alluded to which are essentially two sides of the same issue. First is that unions, believing that the FMCS will provide a middle ground agreement, will make outrageous demands for their first contract. They would essentially attempt to gain an unreasonably favorable agreement with the worst outcome being a fair agreement compelled by the FMCS. Conversely, to avoid arbitration, employers may concede to agreements that are less than fair to them to avoid the uncertainty of arbitration (Filipini & Kopolovich, 2009).

Again, this argument presumes a position that the FMCS developed arbitration system would disproportionately benefit the unions. There is little indication that this is the case. However, the concept that the parties may not be as motivated to reach a bargained agreement is valid. This has been previously studied, and is commonly referred to as the “narcotic effect.” This is when interest arbitration creates dependency and weans employers and unions away from real collective bargaining (Singh & Dannin, 2006).

Though this phenomenon has been studied, there are contrary findings. The narcotic effect has been analyzed in the public sector bargaining venue, as that is where interest arbitration is most prevalent. In analyzing this effect in the public sector, the reliance on interest arbitration has two effects. The first was documented in 1978. It consisted of an analysis of police and fire submission to arbitration in the wake of a law the mandated interest arbitration after impasse. In that study, the unions and employers was analyzed over a period of several

successive bargaining periods and agreements. It was determined that there is a “definite pattern of re-usage (a [positive] narcotic effect) (Chelius & Extejt, 1985).” Essentially, the finding was that unions and employers who had resorted to interest arbitration in previous bargaining rounds were prone to resort to it again. However, this was only significant for the first three agreements.

This data was analyzed three times by different authors: Butler & Ehrnberg in 1981, Kochan and Baderschneider in 1978, and Chelius and Martin in 1985. Thought they did use the same data, different methodology was employed. In spite of this, the authors all came to the same results. The narcotic effect was prevalent early in the bargaining relationships. In those cases where the party had deferred to arbitration in the past, they were likely to do so again. However, this pattern only occurred early in the relationship. As the bargaining relationship matured, this effect was diminished. The tendency was away from deferral to arbitration and consequently to a bargaining agreement. Ultimately, it was asserted that, “The concern frequently expressed over the positive narcotic effect therefore appears to be exaggerated, if not groundless (Chelius & Extejt, 1985).

The implication is that parties in a mature bargaining relationship are motivated to avoid interest arbitration. This could be for a number of reasons. Hopefully, the parties are realistic and flexible in their negotiations. It could also be that the experience of submitting to interest arbitration is unsavory for the parties. This is because they are effectively surrendering control of the process to a disinterested party. The fear and uncertainty of having to accept a unfavorable agreement may be enough to motivate the parties to avoid the process altogether. Finally, it may be the case that the arbitration process itself is expensive, and the parties are inclined to avoid having to pay it.

Essentially, the narcotic effect seems to be localized to early in the relationship. This may have serious implications for the EFCA arbitration clause, since agreements bargained as a result of it will all be from an immature relationship. In light of the research, how the parties will react cannot be definitely predicted. There is a strong indication to support the position of opponents of EFCA that unions will be susceptible to the narcotic effect. Again, this presumes that the FMCS would craft a system that disproportionately rewards unions for pushing bargaining to the point of mandated arbitration. If the FMCS determined policies disproportionately benefit the employers, it may be they who submit to the narcotic effect.

Unions and employers will have to take their cues from the decisions that are made prior to their own situations. It will be incumbent on the FMCS to craft a fair and equitable system. This system must also be effective in dissuading the parties from applying for arbitration, thus facilitating bargaining. FMCS appointed arbitrators will have to work within this system to render decisions that will make the parties doubt a guaranteed positive outcome to the arbitration, and consequently have a healthy fear of this uncertainty.

Again, this assumes that the US Congress, in passing the EFCA, still intends for collective bargaining to be the primary way of attempting to ensure labor stability. There may be a dual message contained in this section of the legislation. First, the EFCA is designed to encourage bargaining by only facilitating a first, two year contract. The parties will need to bargain for the successive ones. However, the legislation allows either party to file for arbitration after a period of approximately four months after union certification. This is an extremely abbreviated period as opposed to the one year certification bar period that the currently legislation allows for. Granted, it may be Congress' position that that period is too long.

As previously stated, there is another side to the narcotic effect. EFCA opponents insist that employers who are bargaining in good faith will be punished. Consider that 68% of new unions do achieve first contracts. If this is the case, there are obvious impacts on those employers who are bargaining in good faith. As stated above, they are put under increased pressure to formulate an agreement before the matter is forwarded to the FMCS for mediation and

arbitration. The assumption is that employers, being traditionally in the position of power, will achieve less favorable agreements than they would were there no deadlines.

EFCA opponents also make the position that of the remaining 32% of cases where a first contract is not achieved, only a positron of these employers are bargaining in bad faith. The balance are likely engaged in "hard bargaining" from a position of economic superiority. Again, the idea is put forward that they will be forced by the FMCS to accept an agreement less favorable than they could have achieved otherwise (Brodedorf, 2008).

This position discounts the mediation portion of the process. It could be argued that when the matter is brought to mediation, the mediator would make a determination that the employer's position is realistic based on their level of power in the equation. Further, should the matter proceed to arbitration, it cannot be assumed that the arbitrator will act solely to the benefit of the employee. It may very likely be the case that the arbitrator will defer to a reasonable position of an employer who has submitted to the entire bargaining process in good faith.

A suggestion is made by Broderdorf to revise this section of the EFCA. As stated above, it is his position that forced arbitration is essentially an unjust punishment to employers who have shown a tradition of good faith throughout the bargaining process with the new union. In an effort to make this a more fair aspect of the act, the authors should consider changing the EFCA so that a finding of bad faith is necessary before a new contract can be referred to FMCS for arbitration. This does seem to be a vary fair way of eliminating what might be a shortcoming of the EFCA. The problem with it is that injects another possibility of delay into the process. The NLRB would have to make a determination of bad faith bargaining. This process would undoubted protract the matter, and thus not solve the problems that caused the proposal of the EFCA in the first place.

PENALTY

The last section of the EFCA is the one that has gotten the least attention, and caused the least amount of controversy. This section is entitled, "Strengthening Enforcement," as that is exactly what it does. For years critics have put forth the opinion that the NLRA did little by way of deterring illegal employer interference in organizing activity. The act itself laid out what was inappropriate, illegal conduct, but offered no significant penalty for that conduct.

Rethinking the Make Whole Approach

Authors of the new legislation have sought to remedy this, by all accounts, biggest shortcoming of the NLRA. As was stated in reference to section one of the act, the amount of employer interference in organizing does have a noticeable effect on it. Specifically, the documented tactic of termination of union activists employees in not uncommon, and is very effective. The current ramification for this is simply to reinstate the wrongfully terminated employee with back pay minus earnings. Specifically, the employee is restored to his position. He or she is then issued the money they would have been paid for the duration of the termination. This is referred to as a "make whole" approach. The employer gets to subtract from this amount what the employee earned at alternate employment during this period. Generally, this is not considered to be significant enough to deter offending employers from using this devastating tactic. It is believed that anti union consultants have advised employers to use this tactic. Little documentary evidence is available to reference this as the consultant would be advising the employer to engage in illegal activity.

Increased penalties for this have been advocated for years. Robert Reich, US Secretary of Labor during the Clinton administration asserts, "We tried to penalize employers who broke the law, but the fines are minuscule," and "The most important feature of the Employee Free Choice Act...toughens penalties against companies that violate their workers' rights (Reich, 2009)." Leonard Page served as General Counsel for the NLRB from November 1999 to April 2001. In his criticism of the current process, he stated, "...the NLRA has not been fulfilling its intended purpose of protecting workers' section 7 rights for at least the last forty

years...the essential problem is delay and ineffective remedies (Page, 2005).” Page suggests additional damages against offending employers in the form of lost equity in property such as houses and cars in wrongful termination cases. These types of damages are routinely sought under other statutes and are clearly consistent with the “make whole” approach (id.).

Triple Back Pay

The EFCA's authors have sought to make this sort of activity more costly to employers. This part of the legislation is simple enough. The illegal termination of an employee by his employer for union activity would result in the employee being reinstated with back pay, and additionally, twice that amount as liquidated damages. The sole purpose of this measure is to make the prospect of interfering with union organizing by terminating employees too expensive a prospect. The authors of the EFCA further add to the deterrent value of this section. The have added a provision for an employer to be subject to a civil penalty for willfully and repeatedly committing unfair labor practices during organizing campaigns and first contract bargaining attempts. This penalty of up to $20,000 per occurrence would be in addition to any make whole remedies ordered by the board.

Again, the purpose of this section is to dissuade employers from a certain course of action. That is terminating employee organizers and interfering in the organizing and first bargaining process in other inappropriate manners. By consequence, this could eliminate the delay associated with protracted proceedings on this matter. As previously stated, a delay in these processes works to the benefit of the employers. The delay causes the union momentum to lose speed, and the participants to lose interest. Where in the other sections, the EFCA attempts to streamline the process to eliminate delay, this section attempts to eliminate the cause of the delay.

This section of the EFCA receives the least criticism from opponents. This is because it would be hard for even the most management oriented observer to decry these measures. If one believes that these violations are occurring to any degree, it would be very difficult to support a position that the current penalties are appropriate for so overt a violation of the law. If one believes that these infractions are not significant, then the magnitude of the penalties would not be an issue, as they have no bearing on the process. Since it has been demonstrated that these complaints are made to the NLRB, and a significant percentage are found to have merit, the former position is the most likely.

No Penalties for Unions

That is not to imply that there is no criticism for this section of the EFCA. In regards to this, the following observation has been made: “At the same time, the EFCA does not provide for any increased penalties or remedies against a union that commits unfair labor practices against the employees or the employer. While proponents claim that the EFCA is meant to protect employees from intimidation or harassment in their representation choice, it fails to provide an increased deterrent against union authorization card abuses despite the heightened significance placed on cards (Filipini & Kopolovich, 2009).” This argument reverts to the position that the NLRA and the EFCA are intended to extend rights, benefits, and penalties equally to the members of the bargaining relationship. It discounts the position that those laws are in fact designed to level the playing field where the employer will almost always have a decided advantage and a pronounced position of power.

Still this position may not be without merit if the agenda is to streamline the process, and mitigate delay. A cause of this delay is misconduct on the part of both parties resulting in unfair labor practices. It would seem prudent to perhaps dissuade unions from engaging in inappropriate activities that may result in proceedings that protract the process. Of specific concern is the new organizing, or card check system. The anecdotal evidence does indicate that some abuse in the form of misinformation and coercion is occurring. To what level this occurs is debatable. What is likely though is that if the system is modified in such a way that increased inappropriate activity can occur, it will

likely occur. As organizers are put under pressure to successfully organize, some will respond to this pressure by engaging in inappropriate activity to achieve the outcome that is expected.

The addition of penalties for this may be appropriate in the case of non employee organizers. Their parent organizations could be sanctioned in some manner. The problem would be for employee organizers. If these organizers were subject to such allegations, and penalties were attached, this could be perverted into another system used to thwart union organizing attempts. False allegation against employees and organizers could intimidate them into abandoning their campaign, and frustrate the entire process with more proceedings resulting in more delays. Any attempts at crafting legislation in regards to penalties to unions and organizers needs to be very carefully considered and worded.

Unintended Impact

While these penalties will certainly offer a deterrent value to some employers, it will not likely be consistent throughout the country. The structure of the penalties under the EFCA is regressive in that it will have a greater impact on companies with less capital available. The civil penalties allow for adjustment up to the sum of $20,000 for each occurrence. However, the "make whole" remedy mandates the award of triple back pay, with the added amount representing damages to the employee. There is no discretion provided for to adjust this amount based on the employers' ability to pay. More financially stable employers will realize a lower deterrent value than ones less so under this structure, as they would be better able to weather the impact of having the wrongful termination allegation sustained.

There will doubtlessly be other impacts on these types of unfair labor practices. The question of the increased penalty's impact on the NLRB's adjudication of these matters needs to be considered. Will the increased penalties result in a higher standard of proof being sought to sustain such a case. Under the current legislation, the board can sustain the allegation of an unfair labor practice if it is shown to have occurred by a "preponderance of the evidence (NLRA Section10(c))." This is a lower standard of proof applied by courts under common law. Its meaning is that the event is more likely to have occurred than not. In a more quantitative explanation, there would be 51% or more indication by the evidence that the event has occurred. This is a very subjective standard.

The effect of increased penalties on standards of proof was considered in reference to anti-trust legislation in 1990. That study considered the impact of Congress' increasing penalties for anti-trust violations from the misdemeanor to the felony level. An analysis was conducted of pre and post legislation cases. The findings indicated that in addition to the deterrent effect that Congress intended, there were other factors that reduced the number of prosecutions. One was the more vigorous defenses mounted by the accused.

The other was in the form of unfavorable changes in conviction rules in the form of increased standard of proof (Snyder, 1990). Since the existing standard of proof is so subjective and low, it is entirely likely that the EFCA provision would meet the same result and induce a requisite higher burden of proof. The increased penalties add to the gravity of the situation, so the courts respond to a perceived obligation to be more diligent in their findings.

That study suggests that "...more attention should be focused on how higher penalties affect other dimensions of individual behavior and the enforcement process (id.)." Additional resources may have to be diverted to investigation. Ordinarily, this would be expected to result in more delay in the organization and first contract processes. This is not the case as the EFCA's authors' added language to mitigate the impact of any delay as a result of this by providing for injunctions.

Injunctions

The penalty section of the EFCA allows for injunctive relief for cases of employer interference with organizing and first contract bargaining. This is not the case under the existing legislation. Under the existing legislation, Section 10(l) allows for the NLRB to petition the local federal District court for

injunctive relief for certain employee unfair labor practices. These include secondary boycotts (A secondary boycott is an attempt by labor to convince others to stop doing business with a particular firm because that firm does business with another firm that is the subject of a strike and/or a primary boycott) and hot cargo agreements (an agreement between labor and an employer barring the employer from using or otherwise dealing with the products of another employer whose employees are nonunion).

This is a change that labor proponents have been advocating for years (Bronfenbrenner, 1994). Again, this legislation is designed to get the worker back to work, and eliminate delay from the process.

Employers would likely be concerned with how these injunctions would impact them when they attempt to terminate problem and/or disruptive employees. In considering this, it is important to remember that EFCA only applies this injunctive relief to employees during the organization and first contract process. If those processes are not underway when the allegation is made, an injunction is not available. However, it would likely be the case that during those processes, employees who do not qualify for this injunctive relief will assert a right to it. The resulting consequence would be the inconvenience of an employer having to justify the dismissal as a performance issue and not anti union activity. Further, the employer would have to defend against a false allegation of an unfair labor practice. This is another example of the authors of the EFCA crafting the legislation to strengthen the employees' ability to organize to the possible detriment of the employer. The overriding principle of disproportionately favoring the employees in an effort to level the playing field.

ECONOMIC EFFECTS

Representative Miller, the EFCA's sponsor, has made statements clearly indicating a belief that not only are workers better served by being in unions, but also that allowing workers to join unions will revitalize the US economy. "The EFCA will help rebuild our nations' middle class and make our economy work for everyone again." "In order have a fair sustainable economic recovery; workers have to be able to bargain for decent wages and benefits (Rep. Miller, 2009)." Consequently, Rep. Miller has equated this legislation to a necessary tool for producing a recovery from the current poor economic condition in the US. Similarly, Senator Edward Kennedy, a cosponsor who introduced EFCA to the senate indicates, "It's a critical step toward putting the economy back on track... (Sen. Kennedy, 2009)." The implication is that workers, particularly those in the middle class, need to be in unions, to secure better compensation, and consequently cause a US economic recovery. Based on this it becomes difficult to conceptualize the impact of the EFCA without at least exploring the debate about the large scale economic benefits of unionization. Clearly, Rep. Miller indicates that middle class workers are better served by being in unions, and he and Senator Kennedy believe that this is a necessary component of a US economic recovery.

It is clearly indicated through the statistical reference of the Department of Labor's Bureau of Labor Statistics that, on average, workers in unions are compensated at higher rates than those who are not unionized. In addition to this, it is consistently cited that workers in unions are more likely to have health insurance (Bureau of Labor Statistics, 2009).

Initially, when the Employee Free Choice Act was proposed in 2007, the impetus was to make it so that the middle class would be made better off through corresponding wage increases. The current economic turmoil of 2009 has caused the bill's proponents to modify their position somewhat. It is now presented that the EFCA will facilitate easier unionization, leading to increased wages for the middle class, resulting in an economic recovery as the middle class will be economically empowered to facilitate it.

Can the Economic Impact be Predicted?

There is very little information available to assist with a formation of a theory on what the large scale economic effect of EFCA will be in the U.S. One study has been put forward by

Anne Layne-Farrar, an economist of LECG, a private consulting group. In her research, she has studied the effect of the shift to the card check system from an election system in certain Canadian provinces. Canada was chosen for the comparison not only because of the recent shifts to card check, but also because of "...the remarkable similarities in industrial structure and the economic integration between the US and Canada allow us to use the Canadian experience as natural experiment for the US economy (Lane-Farrar, 2009)."

According to the study, An Empirical Assessment of the Employee Free Choice Act: The Economic Implications, an increase in 1.5 million union members in one year would lead to the loss of 600,000 jobs by the following year. Jobs losses directly attributed to the passage of card check legislation would be equal to the entire population of Boston or seventy-five percent of San Francisco. Dr. Layne-Farrar further notes that if Andy Stern's (National President of the Service Employees International Union) prediction were to come true then "...unemployment is predicted to rise between 5.3 and 6.2 million (Layne-Farrar, 2009)." The study indicates a basic shift in labor demand. It presumes that as the cost of an employee increases due to union induced increased compensation, the demand for workers at the higher price will be lower. Consequently, this decreased demand will manifest itself as increased unemployment.

EFCA proponents have taken to discrediting this study. The House Committee on Education and Labor has indicated that..."This is a bogus study bankrolled by the very lobbyists pumping millions into efforts to defeat this bill (EFCA Myth v. Fact, 2009)." They go on to cite that the US experienced one of its greatest economic expansions during the 50's and 60's during the highest rate of unionization. It is further indicated that during that time union density was at a high of approximately 30%, and unemployment was about 4.5%. Unfortunately, as previously stated, that United States does not exist anymore. The cold war has ended, and the US industrial base that reigned during that period has all but been completely off-shored. Additional perspective is gained by keeping in mind that that committee is chaired by Rep. George Miller, the lead sponsor of the EFCA.

There is some evidence as to the effect of recent unionization on individual employers. The study in question was an analysis conducted comparing businesses that became unionized by narrow margins and those that defeated unionization by narrow margins (Dinardo & Leep, 2004). This was done for organization attempts occurring from 1984 to 2001. Their analysis indicated that, "that in the last twenty years, newly formed unions have had very little effect on firms' "bottom line" (id.)." In the findings, this lack of impact is attributed to the diminished power nationally of unions over that period in the face of employers. However, there is a shortcoming in the study in reference to applying it to the potential effect of the EFCA. Unions have a tendency to target highly profitable employers who are likely to grow and pay higher rates of compensation. Consequently, this study does not translate well to the economy as a whole that is populated by strong and weak enterprises.

Consequently, there is no clear, objective economic analysis of the large scale effect of the EFCA. The opinions that are presented are partisan. Also, they assume that the EFCA would cause a large scale wage increase in the US. There is no basis for this assumption. Newly certified unions and employees may be able to effectively and reasonably bargain and craft agreements that allow for prosperity. If not, there is no reason to assume that FMCS appointed arbitrators will defer to a policy of increasing wages for employees. Opponents and proponents of the act together must bear in mind that financial gains and monetary benefits are not the best feature of unionization and collective bargaining agreements.

WORKPLACE STABILITY

If the potential compensation and large scale economic impacts are set aside, we can consider what many labor activists consider to be the real benefits to union organizing and first contracts. It is not increased wages and compensation. It is the job security and "basic rights" that make these agreements a significant victory for workers (Juravich et. al., 2006). Grievance

procedures provide for these basic rights and replace what is referred to as arbitrary employer control in the workplace (id). It is also by this mechanism that the employer is forced to surrender a significant portion of their flexibility to run an efficient enterprise.

Efficiency does not have to be sacrificed. It is suggested that how management reacts to the new agreements can make the determination on the productivity of the workplace in the post collective bargaining agreement period. This is indicated in a study of 6 cement plants that became organized at different periods from 1953 to 1976 (Clark, 1980). A union productivity effect was documented. It was the authors determination that the management in these locations adjusted to unionization in such a way that they were able to establish a more productive workplace in the post collective bargaining agreement period.

This change in management style is exhibited in the statement made by one manager that, before the union, the workplace was run like a family, now it is run like a business (id.). This could have many connotations. In this instance it may have been negative. But from this statement one can infer that the union created a condition where management was force to act in such a way as to take a more formal stance at the workplace. “The union wage [increase] creates incentives for management to extract more work effort from a given level of employees(id).” The employers introduced systems of production goals accompanied by performance review systems. Additionally, staff meetings were initiated which were used for communications, training, and assessment of conditions and progress.

Either way, the situation is likely to become more stable. This is because if the bargaining process is referred to mandatory arbitration, there will likely be grievance arbitration imposed. The employees will be able to have their legitimate complaints heard in whatever forum is laid out in the agreement. This will undoubtedly have a positive impact on their morale. In return, the employer automatically gets a “no strike provision” in the agreement. The employers would not be able to attempt to apply economic pressure, or contest alleged unfair labor practices by the traditional method of a strike. As is guaranteed by case law, the employees would have to submit this issues to arbitration. A more stable system is the end result of such an arrangement.

CONCLUSION

The Employee Free Choice Act, by all accounts, has the capacity to increase the rate of unionization in the United States. Central to its ability to do so is the elimination of the delay that impacts the union organization and certification processes, as well as the bargaining of the first contract. The proposed changes in certification will provide the effect that the EFCA's authors intend by streamlining the process. This will facilitate greater success rates, and encourage greater numbers of organizing drives. Additionally, the guarantee of a first contract for all successfully certified unions will provide for additional incentives for employees to attempt to organize. The increased deterrents provided for with the EFCA will help organizers to operate more efficiently in the organizing process, as much of the employer induced coercion will be removed.

Having achieved that, employers and unions in the United States would have to deal with the potential unintended consequences of the EFCA. While the prospect of employer induced threats and coercion will be mitigated, there will be increased likelihood of organizers and pro union employees exerting inappropriate pressure on their fellow workers to sign authorization cards. Additionally, there will be reduced options available to those workers who would refrain from being associated with a union.

Also, mandatory arbitration of first contracts could induce a negative impact on the collective bargaining process in the form of a narcotic effect. This measure does have some potential to adversely affect the bargaining process to the detriment of both unions and employers. The lack of clear procedural guidelines for the FMCS to conduct mandatory arbitrations results in uncertainty as to how well the EFCA will serve to maintain a stable US workplace. If a tendency

to favor one side over the other develops, collective bargaining will be subverted.

Increasing penalties for wrongful terminations is appropriate, but could have the impact of requiring a higher burden of proof to sustain such charges. This would require more comprehensive and thorough investigations of such charges. The result could be increased expense, and charges not being found to have merit that would have under the existing legislation.

Finally, the true economic impact of this legislation cannot be predicted. The assumption that mass unionization will result in universally higher wages and by consequence, facilitate economic recovery are based on supposition and not supported with facts. It is suggested, and must be considered that the opposite, negative economic impact could occur. More analysis of this potential impact is in order.

That aside, it must be kept in mind that the biggest gains for employees will come not from increased compensation, but from increased rights in the workplace. Through collective bargaining agreements employees will receive more stability and security in their employment. This will be at the cost of employers surrendering a portion of their management rights in those same agreements. Whether the impact on the workplace is positive or negative depends on how the unions and employers choose to interact.

REFERENCES

AFL-CIO Labor Day Survey. Washington, DC: Peter D. Hart Research Associates, Inc., August 2005.

Borjas, George J. Labor Economics. 4th ed. New York: McGraw Hill Higher Education, 2007.

Broderdorf, David. "Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector." The Labor Lawyer 23 (Winter 2008): 323-48.

Bronfenbrenner, Kate. "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform." ILR Collection, Articles & Chapters, Cornell University ILR School (1994): 75-89.

Chelius, James R., and Marian M. Extejt. "The Narcotic Effect of Impasse-Resolution Procedures." Industrial and Labor Relations Review 38 (1985): 629-38.

Chevron Oil Co. v. NLRB. No. 442 F.2d 1067 (5th Cir.). 1971.

Clark, Kim B. "The Impact of Unionization on Productivity: A Case Study." Industrial and Labor Relations Review 33 (1980): 451-69.

Cooke, William N. "The Failure to Negotiate First Contracts: Determinants and Policy Implications." Industrial and Labor Relations Review 38 (January 1985): 163-78.

Dinardo, John, and David S. Lee. "ECONOMIC IMPACTS OF NEW UNIONIZATION ON PRIVATE SECTOR EMPLOYERS: 1984-2001." Journal of Economics (November 2004): 1383-410.

Drummonds, Henry H. "The Union Authorization Card Majority Debate." Labor Law Journal 58 (Winter 2007): 217-27.

"Employee Free Choice Act: Myth vs. Fact." Employee Free Choice Act: Myth vs. Fact. House Committee on Education & Labor. 10 Apr. 2009 <http://edlabor.house.gov/employee-free-choice-act-myth-vs-fact/index.shtml>.

Employees' Perceptions of Labor Unions. Rep. Zogby International, September 2006.

Epstein, Richard A. "The Employee Free Choice Act is Unconstitutional." The Wall Street Journal [New York, NY] 19 Dec. 2009.

"Facts & Issues." National Right to Work Committee; Facts and Issues. National Right to Work Committee. Mar. 2009 <http://www.nrtwc.org/facts-issues/>.

Ferguson, John-Paul. "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004." Industrial and Labor Relations Review 62 (October, 2008): 1-21.

Filipini, Mark S., and Angela Kopolovich. Employee Free Choice Act. Working paper. Labor and Employment White Paper Series. K&L Gates, January 2009.

Freeman, Richard B., and Joel Rogers. What workers want. Ithaca: ILR P, Russell Sage Foundation, 1999.

Freeman, Richard B., and Morris M. Kleiner. "Employer Behavior in the Face of Union Organizing Drives." Industrial and Labor Relations Review 43 (April, 1990): 351-65.

Freeman, Richard B. Do Workers Still Want Unions? More than Ever. Rep. no. 182. Washington, DC: Economic Policy Institute, February 22,2007.

Goldberg, Jonah. "Labor's 'Card Check' Tricks." Los Angeles Times 24 Mar. 2009.

Gottesman, Michael H. "The Improbable Claim that EFCA is Unconstitutional." Weblog post. The Blog of the American Constitution Society. 4 Feb. 2009. 14 Apr. 2009 <http://www.acsblog.org>.

Gould IV, William B. A Primer on American Labor Law. 4th ed. Cambridge, MA: The MIT P, 2004.

Gross, James A. "Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making." Industrial and Labor Relations Review 39 (1985): 7-18.

H. K. Porter Co., Inc. v. National Labor Relations Board. No. 397 U.S. 99. United States Supreme Court. 1970.

Juravich, Tom, Kate Bronfenbrenner, and Robert Hickey. "Significant Victories: An Analysis of Union First Contracts." Justice on the Job; Perspectives on the erosion of Collective Bargaining in the United States. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2006. 87-114.

Kaufman, Bruce E. "Why the Wagner Act? Reestablishing Contact With Its Original Purpose." ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 7 (1996): 15-68.

Layne-Farrar, Anne. An Empirical Assessment of the Employee Free Choice Act: The Economic Implications. Rep. March 3, 2009.

Lechmere, Inc. v. National Labor Relations Board. No. 502 U.S. 527. United States Supreme Court. 1992.

Meisburg, National Labor Relations Board General Counsel. "Memorandum GC 07-08 Additional Remedies in First Contract Bargaining Cases." Letter to All Regional Directors, Officers-in-Charge, and Resident Officers. 29 May 2007.

Meisburg, National Labor Relations Board General Counsel. "Memorandum GC 06-05 First Contract Bargaining Cases." Letter to All Regional Directors, Officers-in-Charge, and Resident Officers. 19 Apr. 2006.

Miller / Chairman, George. "Employee Free Choice Act: Helping Workers Bargain for a Better Life." Employee Free Choice Act: Helping Workers Bargain for a Better Life. House Committee on Education & Labor. 15 Mar. 2009 <http://edlabor.house.gov>.

National Labor Relations Board v. Gissel Packing Co., Inc. No. 395 U.S. 575. United States Supreme Court. 1969.

Page, Leonard R. "The NLRA at 70: Perspectives from the Office of the General Counsel." Labor Law Journal 56: 186-91.

Peck, Christian W. The Attitudes and Opinions of Unionized and Non-Unionized Workers Employed in Various Sectors of the Economy Toward Organized Labor. Rep. Zogby International, August 2005.

Reich, Robert B. "More Unionization Good for Economy." The Providence Journal 2 Feb. 2009.

Rosenzweig, Roy, and Nelson Lichtenstein. Who Built America? Working People and the Nation's History. 3rd ed. Vol. 2. Boston: Bedford/St. Martin's, 2008.

Saad, Lydia. Majority Receptive to Law Making Union Organizing Easier. Rep. Gallup, Inc., Arch 17, 2009.

Schechter Poultry Corp. v. United States. No. 295 U.S. 495. United States Supreme Court. 1935.

Schmitt, John, and Ben Zipper. Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007. Rep. Washington, D.C.: Center for Economic and Policy Research, March 2009.

Seaton, Douglas P., and Emily L. Rusham. "The Employee Free Choice Act: No Choice for Employer or Employee." Employee Relations Law Journal 34 (Spring 2009): 3-15.

Singh, Gangaram, and Ellen Dannin. "Law and Collective Bargaining Power." Justice on the Job; Perspectives on the erosion of Collective Bargaining in the United States. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2006. 191-211.

Snyder, Edward A. "The Effect of Higher Criminal Penalties on Antitrust Enforcement." Journal of Law and Economics 33 (1990): 439-62.

Troy, Leo. Union sourcebook membership, structure, finance, directory. West Orange, N.J: IRDIS, 1985.

United States. Cong. Congressional Research Service Report to Congress, Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks. By Gerald Mayer. Cong. Rept. RL32930. Library of Congress.

United States. Cong. House. Subcommittee on Health, Employment, Labor and Pensions. Strengthening America's Middle Class Through the Employee Free Choice Act. 110 Cong., 1 sess. H. Rept. 110-4. Washington: U.S. Government Printing Office, 2007.

United States. Department of Labor. Bureau of Labor Statistics. Union Members Summary. January 2009.

United States. National Labor Relations Board. Seventy Second Annual Report of the National Labor Relations Board. FY 2007.

"U.S. Senate and House Introduce Employee Free Choice Act." U.S. Senate and House Introduce Employee Free Choice Act/Press Release. 10 Mar. 2009. Office of Senator Edward Kennedy. 15 Mar. 2009 <http://kennedy.senate.gov/newsroom>.

Wachter, Michael. "The Rise and Decline of Unions." Regulation 30 (Summer 2007): 23-29.

Wilson, J. Justin. An Analysis of Current NLRB Data on Unlawful Terminations During Union Organization Campaigns, 2007 to 2008. Rep. Center for Union Facts, February 26, 2009.