THE LITTLER REPORT

The Employee Free Choice Act: A Critical Analysis

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We hope that you will find the information in this Littler Report useful in understanding the issues raised by the Employee Free Choice Act. This Report is not a substitute for the advice of legal counsel and does not provide legal advice or attempt to address the numerous factual and legal issues that may arise in any labor relations matter.

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The Employee Free Choice Act: A Critical Analysis

PREFACE AND ACKNOWLEDGMENTS

This Littler Report analyzes the Employee Free Choice Act of 2007 (EFCA). The EFCA was introduced in the 110th United States Congress and passed the House of Representatives, but stalled in the Senate. The EFCA, if enacted, would result in the most sweeping changes to the National Labor Relations Act (NLRA) since the original Wagner Act was passed in 1935. It would amend the NLRA to: (1) require the National Labor Relations Board (NLRB or "the Board") to certify a labor union as the exclusive bargaining representative of employees through union authorization cards signed by employees, without the benefit of a government-supervised, secret-ballot election; (2) require mandatory interest arbitration if an employer and a newly certified union are unable to reach a first contract within a specified number of days; and (3) expand the NLRB's remedial power for employer unfair labor practices during union organizing campaigns and during bargaining for first labor contracts, including the authority to award civil penalties.

Organized labor has publicly stated that one of its top priorities in the 111th Congress, which begins in January 2009, is passage of the EFCA. That stated objective, coupled with the election of a new President and members of Congress, lead to the inescapable conclusion that the EFCA will, in some form, be re-introduced in the next Congressional session. The election of a Democratic majority in the House and Senate, and of Democratic Presidential Nominee, Senator Barack Obama (D IL), one of the co-sponsors of the EFCA in the Senate, would virtually guarantee passage of the EFCA, and signature by the President, in some form. It is, therefore, appropriate, at this particular juncture, to engage in a thoughtful and thorough analysis of the EFCA — its practical and legal effects, and its impact upon the American worker and employers.

This Report will briefly describe the current process for certification of unions and the negotiation of collective bargaining agreements; the ways in which the EFCA, as it is now written, would change those processes; the legislative history of the EFCA and its prospects for passage; the positions taken by the presidential candidates and other organizations regarding the EFCA; the stated rationale for the EFCA and the real causes of low union representation in the United States; the lessons to be learned from similar legislation in Canada; and the potential for constitutional challenge of the EFCA if it becomes law.

This Report is the product of the attorneys of the law firm of Littler Mendelson, P.C., who practice in the area of labor relations, representing management. It is admittedly written from a management perspective, but we have attempted to present a factual, not emotional, critique of the proposed legislation. Many of our attorneys formerly worked for the NLRB or represented unions. As a law firm, we are firmly committed to the principles enunciated in the NLRA, which have served this country well for 73 years — the rights of employees to organize and bargain collectively with their employer, and to engage in other concerted protected activities, with or without a union, or to refrain from such activity; and the right of employers and unions to engage in good faith collective bargaining without the imposition of contract terms by a third party. It is our collective opinion that the EFCA is based on false premises and would do serious harm to the principles of free debate and free choice that are now protected by the NLRA.

We sincerely thank the attorneys of Littler Mendelson, whose names are listed in this Report, for their many hours of work and important contributions to this endeavor.

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I. CURRENT NLRA ELECTION AND BARGAINING PROCESSES

One cannot appreciate the magnitude of the changes that the Employee Free Choice Act (EFCA) would make to the National Labor Relations Act (NLRA) without an understanding of the NLRA as it exists today, and as it has existed for over six decades. The two central purposes of the NLRA are:

- To ensure that employees in the private sector can engage in concerted activity, particularly through labor organizations, with respect to their wages, hours and working conditions, or to refrain from engaging in such activity; and
- To regulate the processes by which employers and unions can negotiate collective bargaining agreements.

The NLRA is neutral concerning whether employees should or should not be represented by labor organizations, but the NLRA protects the right of employees to make such decisions without coercion by either employers or unions. With respect to the negotiation of collective bargaining agreements, the NLRA is similarly neutral concerning the content of such contracts, and is even neutral as to whether the parties will be successful in such negotiations. Rather, the NLRA prescribes procedures to ensure the fair negotiation of such contracts.

The National Labor Relations Board (NLRB) is the federal agency created by Congress to administer the NLRA, and it has two primary functions:

- To conduct secret ballot elections among employees to determine whether or not the employees wish to be represented by a union; and
- To prevent and remedy statutorily defined unfair labor practices by employers and unions.

A. The NLRA Secret Ballot Election Process

The NLRA contains few details regarding the election process, but over the course of approximately 73 years, the NLRB and the federal courts have developed an elaborate process, which is overseen by the NLRB, in which employees have the opportunity to cast an informed vote in a secret ballot election that determines a union's representation status.

The representation process under Section 9 of the NLRA is triggered by the filing of a representation petition with the NLRB's regional office where the bargaining unit is located. Once the petition is filed, the Regional Director investigates the petition to determine whether the Board's jurisdictional requirements have been met and whether the bargaining unit is appropriate.[1] The Regional Director also requires that any petition filed by a union or individual be supported by a showing of interest — signed and dated authorization cards — which must accompany the petition or be furnished within 48 hours from the time of filing. In order to be adequate, the showing of interest must demonstrate support from at least 30% of the employees in the appropriate unit.[2] The determination of the appropriateness of a bargaining unit may be made in a hearing conducted by the NLRB's regional office or by agreement of the parties. Over 90% of the elections held by the Board are pursuant to a stipulated or consent election agreement.[3] An election place and date are then determined by mutual agreement of the parties or by order of the Regional Director.

An employer is required to furnish a list of eligible voters' names and addresses to the Regional Director within seven days after an election is directed or a stipulated or consent election agreement is approved. In order to ensure that the labor organization(s) involved in the election have access to the eligible voters, the Regional Director makes the list available to all parties to the election.[4] The date of the election is normally at least ten days after the date the list of eligible voters' names and addresses is to be furnished to the Regional Director.[5] In Fiscal Year 2007, the median period from the filing of the petition to the date of the election was 39 days.[6]

The campaign leading up to an election and the conduct of the election itself are carefully regulated by the Board, which requires that "laboratory conditions" prevail. For example, the following conduct by an employer is prohibited: making promises of benefits or threats of harm; implying that selection of the union in the election would be futile; surveilling organizing activity or creating the impression of such surveillance; conducting campaign meetings within 24 hours of the election; campaigning in the polling area; and misusing sample ballots in such a way as to compromise the Board's neutrality. The foregoing is only a very small sample of the conduct regulated by the Board in the election process. Over the years, the Board and the federal courts have struck a careful balance between the free speech rights guaranteed to employers under Section 8(c) of the NLRA and the right of employees to self-organization under Section 7 of the NLRA. Indeed, in only the last month, the Supreme Court re-emphasized the right of employers to provide employees, in a noncoercive manner, with facts and opinions regarding organizing.[7]

The election is by secret ballot and the polling is conducted and supervised by a Board Agent.[8] Any party may be represented at the election by an observer.[9] In order to prevail at the election, a union must receive a majority of the votes cast.[10]

If a union wins the election, it is certified as the exclusive representative for bargaining of all of the employees in the appropriate unit.[11] If a union fails to garner a majority of the votes, the results of the election will be certified showing no union gained sufficient votes to become an exclusive representative of the employees.[12] In such a setting, no election may be held in that same unit for one year following the date of the election.

If the union is certified, the Board will refuse to conduct another election for a period of one year from the date of certification.[13] During the year following the date of certification, the Board irrebuttably presumes the union's majority status in order to foster collective bargaining and to stabilize industrial relations.[14] Accordingly, the Board will not entertain a rival union petition or a decertification petition during the certification year.

While under current law the majority of bargaining relationships are achieved as a result of Board-conducted certification elections, recognition can occur without an election.

B. Recognition Without an Election Under Current Law

Under current law, an employer can reject a union's demand for recognition based on its examination of signed authorization cards or a union-sponsored card check by a neutral party, provided the employer has not committed unfair labor practices. In such a setting, the union's only alternative to resolve the issue of representation is to file an election petition with the NLRB.[15] However, if a union obtains signed authorization cards from a majority of employees in an appropriate bargaining unit, the employer may recognize the union as the exclusive representative of the employees, but, as noted above, is not required to do so.[16]

Where an employer recognizes the union without an election, the Board does not issue a certification,[17] and there is no one-year certification bar.[18] However, in the case of voluntary recognition, the Board has created a recognition bar to rival union petitions or decertification petitions to permit the parties to negotiate for a "reasonable period of time."[19] The recognition bar does not apply at a time where the employer recognizes one union while another is attempting to organize its employees.[20]

In September 2007, the Board in the *Dana Corp.* and *Metaldyne* cases modified the recognition bar doctrine.[21] Following a grant of voluntary recognition, the employer or union involved must notify the appropriate Regional Office of the Board in writing of the grant of recognition. Upon being so apprised, the Regional Office will send an official NLRB notice to be posted in conspicuous places at the workplace throughout the 45-day period, informing employees of the recognition and of their right to file an election petition within the 45-day period. If 45 days pass from the date the notice is posted without the filing of a validly supported petition, the recognized union's majority status will be irrebuttably presumed for the "reasonable period" of the recognition bar in order to enable the parties to engage in negotiations. Any properly supported election petition filed within the 45-day period will be processed according to the Board's normal procedures. If no notice of recognition is given to the Regional Office, no recognition bar will be in effect until the notice has been posted for 45 days without a petition being filed. The failure to file a notice of recognition will affect a contract bar[22] in the same manner.[23]

As seen above, the NLRA permits voluntary recognition of labor organizations with certain limitations, but favors certification through Board-regulated secret ballot elections. Indeed, federal courts have described card checks as "inherently unreliable" because of the "natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."[24]

C. The NLRA Bargaining Process

With respect to the negotiation of collective bargaining agreements, the NLRA requires only that the parties engage in a good faith effort to reach a contract. The NLRA does not require a successful outcome to negotiations, nor does it dictate the terms of a collective bargaining agreement. As stated by the U.S. Supreme Court, "[T]he fundamental premise on which the act is based [is] collective bargaining under governmental supervision of the procedures alone, without any official compulsion over the actual terms of the contract."[25]

The EFCA would reject that premise completely and place in the hands of a government-appointed arbitrator, who has no familiarity with the needs of the employer or the employees, complete power to dictate the terms and conditions of the initial collective bargaining agreement, while giving that person no guidance as to the procedures governing the process, no guidance regarding the subjects to be included in the collective bargaining agreement, and no guidance as to the factors to be considered in dictating the terms and conditions of employment.

II. THE EFCA'S PROVISIONS

The EFCA contains three substantive sections that would materially change the NLRA by adding provisions concerning: (1) certification by card check; (2) initial collective bargaining agreements (including a provision requiring interest arbitration); and (3) the remedies against employers who commit unfair labor practices during an organizing drive or before a first contract is entered:

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1. The card check certification provisions would require the Board to certify a union upon finding that "a majority of employees in a unit appropriate for bargaining has signed valid authorizations designating [the union] as their bargaining representative." Under these provisions, the Board would also be required to develop model card authorization language and procedures for establishing the validity of signed authorizations.[26]
2. The provisions to facilitate initial collective bargaining agreements, which would apply irrespective of whether a union is certified through an election, or is voluntarily recognized, would:
   - Require an employer and newly certified or recognized union, within ten days of the employer's receipt of a written request for bargaining from the union, to "meet and commence to bargain collectively" and "make every reasonable effort to conclude and sign an agreement;"
   - Give either party the right, 90 days after the date bargaining commences, to "notify the Federal Mediation and Conciliation Service (FMCS) of the existence of a dispute and request mediation;" and
   - Require FMCS to refer the dispute to an arbitration board, if it is unable to bring the parties to agreement within 30 days, and require the arbitration board to render a decision settling the dispute that is binding upon the parties for a period of two years.[27]
3. The provisions strengthening the remedies against employers which commit unfair labor practices during an organizing drive or before a first contract is entered would:
   - Amend Section 10(1) of the NLRA to require the Board to give priority to, and to seek appropriate injunctive relief upon a finding of reasonable cause to believe, a charge that an employer, during those periods: (a) discharged or discriminated against an employee in violation of Section 8(a)(3); (b) threatened to discharge or discriminate against an employee in violation of Section 8(a)(1); or (c) engaged in any violation of Section 8(a)(1) that significantly interfered with, restrained, or coerced employees in the exercise of their Section 7 rights;
   - Require the Board, upon finding that an employer discriminated against an employee in violation of Section 8(a)(3) during either of those periods, to award the employee back pay and two times that amount as liquidated damages; and
   - Authorize the Board, upon finding that an employer willfully or repeatedly violated Sections 8(a)(1) or (3) during either of those periods, to impose a civil penalty against the employer of up to $20,000 for each violation.[28]

A. Ramifications of the EFCA

The national labor policy the NLRA is intended to promote is described in the last paragraph of Section 1 of the NLRA. That paragraph declares it "to be the policy of the United States" to: (1) protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing;" and (2) encourage "the practice and procedure of collective bargaining."[29] Although the EFCA would not amend this description of national labor policy, the EFCA's provisions are antithetical to it.

The card check certification provisions would hinder, not promote, employee free choice by depriving employees of their long-established right to a secret ballot election. The interest arbitration provisions would undermine, not promote, collective bargaining by taking out of the parties' hands, and giving to a government-appointed arbitrator, the power to dictate both economic and noneconomic terms and conditions of employment. And the remedial provisions, while superficially faithful to the policy of protecting employee free choice, would redress employer conduct that the card check certification and interest arbitration provisions are intended to deter.[30] Indeed, what would be needed to protect employee free choice, but is missing from the EFCA, are remedial changes that address union abuses in obtaining authorization cards and a process for employees to object, *e.g.*, file a decertification petition, after a union is certified without an election.

The EFCA, if passed, would dramatically change the legal landscape and shift the balance of power in organizing campaigns and negotiations for first contracts in favor of unions. Unions are fully aware that they will be more successful in increasing their numbers through the card check process, and the mandatory arbitration process will protect them from failing to gain a first contract.[31] That is why unions see the EFCA as the most important legislation that has been before Congress in years.[32]

B. The Card Check Certification Provisions

In permitting unions to obtain certification by presenting the Board with signed authorization cards from a majority of employees in a proposed bargaining unit, the EFCA would radically change the historic preference for secret ballot elections. In much of the debate about the EFCA, proponents have extensively relied on

the U.S. Supreme Court's decision in *NLRB v. Gissel Packing Co.* as support for this proposed change.[33] In that seminal case, the Supreme Court discussed whether authorization cards are "reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside."[34] Although the Court concluded that "where an employer engages in conduct disruptive of the election process, cards may be the most effective — perhaps the only — way of assuring employee choice," it found that cards are "admittedly inferior to the election process."[35]

Five years after it issued its decision in *Gissel*, the Supreme Court reiterated in *Linden Lumber Division, Summer & Co. v. NLRB* that "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure."[36] More recently, the NLRB emphasized that "both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check."[37] It noted also that Congress implicitly expressed a preference for secret ballot elections by limiting, in the 1947 Taft-Hartley amendments to Section 9 of the NLRA, "Board certification" and "the benefits that inure from certification, to unions that prevail in a Board election."[38]

The EFCA, thus, would have the dual effect of depriving employees of the right to a secret ballot election and making mandatory the "inferior" card check procedure that employers have long had the right to reject. It would also do more than that.

As a practical matter, the card check certification provisions of the EFCA would often result in employees hearing only a union's unregulated message before deciding whether to sign an authorization card — a message that could involve threats, coercion, misrepresentations and the like. In a card check certification environment, employers would effectively be denied their right of free speech under Section 8(c) of the NLRA to share their views on unionization with employees. Recently, in *Chamber of Commerce v. Brown*, the Supreme Court emphasized the role that employer free speech rights play in connection with employees' exercise of their organizational rights under Section 7. The Court noted that the enactment of Section 8(c), which was part of the Taft-Hartley Act:

> … [M]anifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word … has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974).[39]

By effectively denying employers their free speech rights under Section 8(c), the card check certification provisions of the EFCA would deprive employees of information enabling them to make a fully informed decision on whether or not to support a union.[40] Stated differently, what the secret ballot election process does, that a card check system would not, is allow employees to filter the information they receive from both sides, decide for themselves whether they wish to be represented, and express their views in private when they enter the voting booth.

C. Card Check

The EFCA relaxes the current requirements and allows unions to attain certification by obtaining a simple majority of signed authorization cards from employees in the proposed bargaining unit.

Under current law, in order to be valid, an authorization card must have a signature and date and demonstrate the signatory's intent to be represented.[41] There is no existing requirement that an employee sign an official authorization card document — the card can be a petition, a union membership application, a union membership card, a dues check off authorization, or a card indicating that the union is the employee's bargaining representative.[42] Historically, NLRB Regional Directors have been able to exercise discretion with respect to cards and the sufficiency of a card showing.[43] However, there was an underlying assumption that a secret ballot election would eventually resolve certification issues, which obviously would not be the case under the EFCA. Under the EFCA, the Board will be required to issue regulations that address the adequacy of authorization cards to reflect employees' true desire to be represented.

The process by which unions collect authorization cards may change as well. Unions may face greater scrutiny with respect to their methods of securing signatures. Prior to the passage of the EFCA, the Board has generally permitted a union to make various promises to employees, based upon the assumption that the union

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is not able to exert undue influence over the proposed bargaining unit.[44] Any employees pressured into signing authorization cards have the ability to vote their true intent in the privacy of the voting booth. Post-EFCA, authorization cards will have the same effect as an election, and further safeguards may need to be created by the Board to guard against coercion and deception.

D. The Interest Arbitration Provisions

Principles of freedom of contract are embedded in the NLRA, as reflected by the declaration in Section 1 that "encouraging the practice and procedure of collective bargaining" is the "policy of the United States," and by the language in Section 8(d) that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[45] Interpreting these provisions to mean what they say, the Supreme Court has held that national labor policy favors free and private collective bargaining,[46] that the purposes of the NLRA are "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves,"[47] and that "it was never intended that the Government," in cases in which agreement was impossible, would "step in, become a party to the negotiations and impose its own views of a desirable settlement."[48] Under the current structure of the NLRA, which reflects a compromise "on the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests,"[49] if collective bargaining fails, the union may call a strike or engage in other economic coercion, and the employer may implement its last offer or lock out its employees.

The EFCA would shift the balance of power in negotiations for a first contract to unions by limiting to potentially as little as 120 days the historically unrestricted freedom a party has had to decide the terms to which it will agree — after 90 days of negotiations, mediation may be required, and 30 days later binding interest arbitration. Under the EFCA, binding arbitration is conducted by an arbitration board charged with responsibility for rendering a decision setting final terms of a contract. The decision is binding on the parties for a period of two years, unless the parties agree otherwise in writing.[50] The EFCA, however, is silent on the process to be used in the arbitration, the criteria to be considered by the arbitration board, or even the subjects to be included by the board in the contract. It leaves unanswered the following essential questions:

- Should the arbitration be "baseball style," where the arbitration board is required to select one party's complete contract offer, without modification of any component parts; should it be "modified baseball style," where the arbitration board must select one of the parties' proposals on each subject; or should the arbitration board be given *carte blanche* to write the entire contract as it sees fit?
- In determining the contract terms, what criteria must the arbitration board consider? The economic condition of the company? Cost of living increases and their impact on employees and the company? Competitors' contracts, and, if so, which ones?
- What subjects must be included in the contract and in what detail? Should the collective bargaining agreement contain subcontracting limitations, and, if so, under what conditions? Should the contract contain drug testing requirements, and, if so, under what limitations and penalties?

With no past bargaining history between the parties, the arbitration board would have no guidance to make these decisions, except its own predilections.

Without any guidance, it can be fairly assumed that arbitrators will reach different conclusions in similar settings. The reason that the NLRA applies uniformly throughout the United States is to ensure uniform treatment of labor issues. On the one hand, by giving literally hundreds or thousands of arbitrators the power to write collective bargaining agreements without any guidance, there will almost certainly be no uniformity of treatment. On the other hand, if arbitrators attempt to impose uniform treatment — say, for example, requiring all employers in the same industry to adhere to a master contract — such treatment would not take into consideration such individual factors as local costs and pay scales, or even more importantly, a particular employer's ability to pay "master" rates. Marginal companies would, therefore, likely be driven out of business, and the employees of those companies put out of work, by the imposition of master contracts. And where will the hundreds or thousands of arbitrators come from who are required to negotiate the contracts in question? How will they be trained? An entire new bureaucracy, with its attendant costs and delays, would need to be established.

Historically, interest arbitration has been limited primarily to the public sector as a means of resolving contract disputes involving public employees who do not have the right to strike in support of their bargaining position. Because the NLRA protects the right of private sector unions to use the full panoply of economic weapons to achieve their bargaining goals, interest arbitration is seldom used in the private sector. Indeed, under current federal law, interest arbitration is a non-mandatory subject of bargaining and cannot be forced on an unwilling employer or union.[51]

Over the years, unions have effectively wielded their economic weapons (including strikes, picketing, boycotts and, most recently, corporate campaigns) to further their bargaining goals. When federal legislation was introduced in 2002 that would have made interest arbitration mandatory in resolving contract disputes in the airline industry, the airline unions denounced such legislation as an attempt to take away the unions' right to strike and the employees' right to vote on collective bargaining agreements.[52]

Why then are unions such as the SEIU now taking a different position with respect to the EFCA? The answer can only be that the airline unions concluded that they were well entrenched in the airline industry and had sufficient economic clout to obtain their bargaining demands, while unions such as the SEIU are today primarily focused on increasing union membership and feel that they do not have enough economic strength to obtain their bargaining goals. But such a lack of bargaining strength is no justification for destroying a system that allows the parties to negotiate their own collective bargaining agreements. The Dunlop Commission, a group established by the Department of Labor and comprised of prominent labor and management representatives, as well as academics, concluded in 1994 that in the private sector, interest arbitration should be mandatory only in rare instances of recalcitrant behavior, because such a system would reduce the incentive for parties to negotiate on their own.[53] The EFCA would force virtually every employer that did not immediately accept union bargaining demands, no matter how outrageous or unrealistic those demands might be, to have its collective bargaining agreement written by a government-appointed arbitration panel.

Those seeking to justify the radical change represented by the EFCA's mandatory arbitration provisions cite statistics showing that fewer than one-third of first-time negotiations result in a collective bargaining agreement within one year, and one-third of first-time negotiations result in no contract.[54] These advocates assume that the length of time it takes to negotiate first contracts, or the failure to achieve first contracts, is due to unlawful activity by employers. There is no real statistical evidence to support this assertion, however. The EFCA's requirement that mandatory arbitration occur as early as 120 days after negotiations begin establishes an incredibly short time within which even employers with the best of intentions are unlikely to be able to negotiate a contract. Therefore, unions will be able to force virtually every first contract to mandatory interest arbitration, regardless of whether or not the employer engaged in good-faith negotiations.

The notion that interest arbitration will necessarily result in the quicker achievement of a first contract than leaving the parties to work out an agreement on their own is undercut by actual experience. For example, Michigan law provides for a three-member panel to set the terms of the initial collective bargaining agreement for public safety workers.[55] Under Michigan law, binding arbitration was intended to be resolved expeditiously. However, in the early 1990s, only one out of every six binding arbitration cases was resolved within 300 days of a petition's filing.[56] The pace of arbitration has slightly improved since then — on average, binding arbitration takes almost 15 months from the date that a request is filed to the date that a decision is reached.[57]

A further flaw in the EFCA is that it does not provide a method for employees to terminate the binding arbitration process. Regardless of how long arbitration drags on, the bargaining unit will be forced to wait out the process. Nor does the EFCA give employees the right to vote down a contract, or the right to strike if they are unhappy with the terms imposed by an arbitration board. And under the contract bar doctrine, they would not have the right to decertify the union during the two-year period of an arbitrator-imposed contract.

E. Increased Penalties

The final section of the EFCA significantly increases the financial and injunctive relief available against employers for certain unfair labor practices conducted during an organizing drive. The EFCA further requires the NLRB to prioritize investigation of those cases. Current remedies include the use of injunctive relief at the option of the NLRB and financial penalties including remedial back pay. The EFCA would require the employer to provide treble back pay[58] and would add a civil penalty of up to $20,000 for most unfair labor practices committed by employers during organizing drives.[59] It would also require the NLRB to give preliminary investigation of those unfair labor practices "priority over all other cases." However, the EFCA does not increase penalties for unfair labor practices committed by unions against either workers or businesses. The EFCA would, therefore, establish a card check procedure that would give unions great incentive to put undue pressure on employees to sign cards, without creating an enforcement structure to deter such conduct. The EFCA's new provisions would significantly raise the stakes for employers and require employers to evaluate the additional costs associated with the EFCA's enhanced penalties in deciding whether to refuse to bargain in order to test certification.

III. LEGISLATIVE HISTORY OF THE EFCA AND SIMILAR LEGISLATION

The EFCA has been pending in Congress for over a year and a half. An examination of the history of the legislation will shed

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light on where the legislation may be headed in the next Congress and under the next President.

On February 5, 2007, Representative George Miller (D-CA), Chairman of the House Committee on Education and Labor, introduced the EFCA in the House of Representatives.[60] Shortly thereafter, late-Representative Charlie Norwood (R-GA) introduced the Secret Ballot Protection Act (SBPA).[61] Representative Norwood's legislation, in counterpoint to the EFCA, would make it an unfair labor practice for an employer to recognize or bargain collectively with a labor organization that had not been selected by a majority of employees in a secret ballot election conducted by the NLRB.

The legislative duel between these two contrary proposals to amend the NLRA was not new to Congress. However novel the EFCA seemed to the labor-management community in February 2007, the House and Senate considered nearly identical legislation twice before in the 108th and 109th Congresses without the same fanfare raised in 2007. The earlier proposals, however, never emerged from Republican-controlled committees. Congress also considered the SBPA in the 108th and 109th Congresses, but, like the EFCA, those bills never emerged from committee. With the shift from a Republican to a Democratic majority in the House and Senate in the 110th Congress, the EFCA was primed for legislative action. If the Democrats retain majorities in both the House and Senate in the 111th Congress, the EFCA debate will continue into 2009.

A. The 108th Congress (2003 & 2004)

Representative Miller introduced the initial EFCA legislation in the House on November 21, 2003, with 209 co-sponsors.[62] Simultaneously, Senator Edward Kennedy (D-MA) introduced identical, companion legislation in the Senate, with 37 co-sponsors.[63] Both bills were immediately referred to the chambers' respective committees.

On April 22, 2004, the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce conducted a hearing on the merits of secret-ballot elections versus card-check recognition as methods for determining whether employees desire union representation.[64] Management attorney Charles I. Cohen, a former Member of the NLRB, testified on behalf of the U.S. Chamber of Commerce. He testified that using authorization cards to determine majority support was a method of "last resort" and that a secret ballot election was the "preferred method" for determining a union's majority support among employees.[65] In contrast to Mr. Cohen's position, AFL-CIO Associate General Counsel Nancy Schiffer testified that elections take place in an "inherently coercive environment — the workplace" where employers "have the power to threaten, intimidate, and discharge workers who seek unionization."[66]

On September 23, 2004, in a hearing of the Senate Appropriations Committee's Subcommittee on Labor, Health and Human Services, and Education, chaired by Senator Arlen Specter (R-PA), labor and management witnesses again testified concerning the EFCA.[67] William Messenger, a representative from the National Right to Work Legal Defense Foundation, testified that voluntary recognition "deprives the Board of the best way to determine whether employees support unionization."[68] Echoing her previous comments before the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce in April 2004, the AFL-CIO's Schiffer again testified in support of the EFCA. Her testimony focused on, however, the potential impact of the NLRB's then-pending decision in *Dana/Metaldyne* on the continuing viability of the recognition bar doctrine.[69] She likened the NLRB's allowing a secret ballot election following voluntary recognition to life in Florida following a hurricane: "We don't know the impact, but nobody's building new homes and nobody's planning a trip."[70]

Representative Norwood introduced the initial SBPA legislation in the House on May 12, 2004, with 57 co-sponsors.[71] Senator Lindsey Graham (R-SC) introduced identical, companion legislation in the Senate on July 9, 2004.[72] Representative Norwood chaired a hearing by the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce on the SBPA on September 30, 2004.[73] Former NLRB Member John Raudabaugh testified that a secret ballot election allows employees to exercise their free choice in a "highly regulated" environment, while "solicitation of authorization cards is virtually unregulated."[74] Brent Garren, Senior Associate General Counsel of UNITE-HERE, testified in favor of the EFCA and complained about the NLRB's delay in resolving election disputes: "Delay in obtaining the right to bargain means effectively denying the right to bargain."[75]

From the beginning of the card-check (EFCA) versus secret-ballot election (SBPA) debate in the 108th Congress, the opposing viewpoints deeply split the labor-management community, as well as legislators. Neither piece of legislation garnered enough support to emerge from Republican-controlled committees during the 108th Congress, however.

B. The 109th Congress (2005 & 2006)

Representative Norwood re-introduced the SBPA in the House of Representatives on February 17, 2005, with 109 co-sponsors.[76] The legislation was identical to that introduced in the 108th Congress. Representative Miller and Representative Peter King (R-

NY) re-introduced the EFCA in the House of Representatives on April 19, 2005, with 214 co-sponsors.[77] Senators Kennedy and Spector simultaneously re-introduced the EFCA in the Senate, with 44 co-sponsors, including one Republican (Senator Spector) and Senator Barack Obama (D-IL).[78] Senator Jim DeMint (R-SC) re-introduced the SBPA in the Senate on June 7, 2005, with eight co-sponsors.[79] These bills were referred to the respective chambers' committees, but Congress took no further action on either the EFCA or the SBPA during the 109th Congress.

C. The 110th Congress (2007 & 2008)

Representative Miller re-introduced the EFCA in the House of Representatives on February 5, 2007, with 233 co-sponsors, including seven Republicans.[80] Representative Norwood re-introduced the SBPA in the House of Representatives on February 7, 2007, with 70 co-sponsors.[81] Both proposals were identical to legislation introduced in the 109th Congress, and both were immediately referred to the House Education and Labor Committee. On February 6, 2007, Department of Labor Secretary Elaine Chao released a statement saying, "A worker's right to a secret ballot election is an intrinsic right in our democracy that should not be legislated away at the behest of special interest groups."[82]

The Subcommittee on Health, Employment, Labor, and Pensions of the House Committee on Education and Labor conducted a hearing on the EFCA on February 8, 2007.[83] Ms. Schiffer again testified on behalf of the AFL-CIO in favor of the EFCA. She testified that the NLRA is now "a sword which is used by employers to frustrate employee freedom of choice and deny them their right to collective bargaining."[84] By contrast, she stated, "The Employee Free Choice Act is aimed at removing the obstacles workers face when they want to be able to bargain with their employer."[85] Ms. Schiffer then extolled the virtues of card check certification, first contract mediation and mandatory interest arbitration, and increased civil penalties for employer violations as necessary to "assure that workers who want collective bargaining are able to have it."[86] Mr. Cohen also testified again on behalf of the U.S. Chamber of Commerce. His testimony echoed his previous comments made before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee in 2004. In addition to challenging the virtues of card check agreements praised by the supporters of the EFCA, Mr. Cohen took issue with the mandatory interest arbitration provisions of the legislation.[87] He said that NLRB-conducted elections are generally fair, despite what some unions say, citing NLRB statistics showing unions' election win rate to be in excess of fifty percent.[88] Regarding the EFCA's mandatory interest arbitration provisions, Mr. Cohen said that this provision would "eviscerate another tenet of U.S. labor law: voluntary agreement."[89] "Our present system has it right, and . . . the employer must retain the power to determine whether the terms of the agreement are acceptable to it. In the end, that will work to the benefit of not only the employer, but of the employees as well."[90]

On February 14, 2007, Secretary Chao issued another statement saying, "It is a worker's fundamental right in a democracy to be able to vote in a private ballot election without outside pressure or public disclosure. If this bill were presented to the President, I would recommend the President veto it."[91]

On February 16, 2007, the EFCA was reported favorably out of the House Education and Labor Committee following a straight party-line vote, 26-19, held on February 14, 2007.[92] The House Committee, however, never acted on the SBPA. On February 28, 2007, the Executive Office of the President released a "Statement of Administrative Policy" on the EFCA, echoing Secretary Chao's earlier recommendation, saying, "If H.R. 800 were presented to the President, he would veto the bill."[93]

The House debated the measure on the floor on March 1, 2007.[94] Republican representatives proposed several amendments to the bill, but the House Rules Committee allowed debate only on three amendments.[95] Representative Steve King (R-IA) proposed an amendment to add language to the bill indicating that an employer could lawfully refuse to employ a worker who sought employment in furtherance of that individual's other employment status.[96] The House voted down this amendment, which aimed to discourage the practice of "salting" as a union organizing tactic, 264-164.[97] Representative Virginia Foxx (R-NC) proposed an amendment that would allow employees to place their names on a "do not call or contact" list to avoid solicitation by unions.[98] The House voted down this amendment as well, 256-173.[99] Finally, Representative Howard "Buck" McKeon (R-CA) proposed an amendment to replace the entire text of the EFCA with the text of the SBPA.[100] The House also voted down this amendment, 256-173.[101]

Representative McKeon then moved to recommit the bill to the House Education and Labor Committee with instructions that the Committee report the bill back to the House with an amendment specifying that in addition to an employee's signature, a valid authorization card must also include an attestation that the employee is a lawful citizen or legal resident alien.[102] The House, however, voted down the motion, 225-202.[103] Following this vote, the House approved the EFCA as reported out of the Education and Labor Committee in a largely party-line vote, 241-185.[104] Approximately 99% of Democratic representatives

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supported the measure and approximately 94% of Republican representatives opposed it. Thirteen Republican representatives (from Alaska, Connecticut, Michigan, New York, New Jersey, Ohio, and Pennsylvania) voted in favor of the EFCA, while only two Democratic representatives (from Oklahoma and Mississippi) opposed the measure. The bill was then referred to the Senate, and placed on the Senate's legislative calendar on March 2, 2007.

On March 27, 2007, the Senate Health, Education, Labor, and Pensions Committee conducted a hearing on the EFCA.[105] The testimony, from both management and labor representatives, focused on whether the NLRB's existing remedies effectively deterred violations of the NLRA, whether the NLRB's "secret-ballot" election process was truly a "secret" process, and whether the EFCA's mandatory arbitration procedures would eliminate good faith collective bargaining.[106] Senator Kennedy re-introduced the Senate version of the EFCA (H.R. 800) on March 29, 2007, with 46 co-sponsors, including Senator Obama.[107] It was then referred to the Senate Health, Education, Labor, and Pensions Committee. Senator DeMint re-introduced the SBPA in the Senate on May 7, 2007, with 27 co-sponsors, including Senator John McCain (R-AZ), but the Senate took no action on the measure.[108]

On June 19, 2007, the Senate considered H.R. 800 on the floor. Senator Harry Reid (D-NV, Majority Leader) moved to proceed to consideration of the bill, but he withdrew the motion later that day.[109] The Senate again took up the measure on June 25, 2007,[110] but the next day the Senate failed to invoke cloture, and end debate on the bill, by nine votes, 51-48.[111] Only one Republican, Senator Specter, voted to end debate on the measure. By failing to garner the 60 votes needed to end debate in the Senate, the EFCA was effectively dead for the remainder of the 110th Congress, which will end when Congress adjourns in late 2008.

D. The 111th Congress (2009 and 2010)

The AFL-CIO has publicly stated that one of its top priorities in the 111th Congress, which begins in January 2009, is passage of the EFCA.[112] AFL-CIO head John Sweeney has committed his organization to spending $200 million leading up to the November 2008 elections, with receipt of union contributions likely tied to support of the EFCA.[113] In late 2007, the Change to Win Coalition added a surcharge onto its members' dues to raise approximately $14 million earmarked specifically to help pass the EFCA and has committed to "electing candidates that will help pass EFCA."[114] Even if Democrats retain a majority in both houses of Congress, passage of the EFCA is not necessarily assured, however. Depending upon the results of November's elections, Senate Democrats may not have a filibuster-proof majority (*i.e.*, a majority in excess of 60 Senators), which would allow Senators opposed to the EFCA to block further consideration of the measure for the remainder of the 111th Congress, in the same manner as occurred in the 110th Congress.

Additionally, the EFCA must be re-introduced in the 111th Congress, after which each chamber's respective committees must consider the legislation, and each chamber must debate and vote on the bill. Each step in this process will provide avenues for legislative advocacy in opposition to the EFCA. Each committee will conduct hearings on the merits of the EFCA. Experts on the "EFCA versus SBPA" debate will have the opportunity to continue to attack the basic assumptions relied on by supporters of the card-check certification provisions of the EFCA.[115]

Employer advocacy groups will also have the opportunity to shape the debate on the mandatory interest arbitration process called for by the EFCA. By ensuring that congressional committees have been exposed to both empirical and anecdotal evidence of the difficulties of interest arbitration in mature collective bargaining relationships, as well as the difficulties parties in new collective bargaining relationships would probably face, these committees will be more likely to fashion rational interest arbitration processes for consideration by Congress. Employers and employer organizations, such as the U.S. Chamber of Commerce and other employer-sponsored political action committees, may continue their grassroots lobbying efforts against the EFCA so that when it is introduced in Congress in 2009, representatives and senators will know and understand the importance of the EFCA debate and the potential adverse economic impact should the EFCA become law, before the measure gets to the House and Senate committees for mark-up and to the floor for debate.

IV. POSITIONS TAKEN BY THE PRESIDENTIAL CANDIDATES AND VARIOUS ORGANIZATIONS AND PROSPECTS FOR PASSAGE IN THE NEXT CONGRESS

As noted in the previous section, the EFCA is certain to be placed on the legislative agenda in the next Congress. Therefore, it is important to consider the positions of the presidential contenders and possible changes in the composition of Congress to determine the likely prospects for the EFCA.

A. Barack Obama

Senator Obama is an original co-sponsor of the bill and he voted in favor of invoking cloture. His presidency would mean a possible dramatic change in the labor landscape.[116]

When he accepted the endorsement of the SEIU, Senator

Obama vowed to pass the EFCA if elected, stating, "We will pass the Employee Free Choice Act. We may have to wait for the next President to sign it, but we will get this thing done."[117] Senator Obama has also pledged to stand by recently re-elected SEIU President Andrew Stern and organized labor by ushering in a union-friendly administration. In turn, the AFL-CIO and most of the country's largest unions, including the International Brotherhood of Teamsters and the United Steelworkers, have endorsed Senator Obama's presidential campaign.[118] One can expect that, with Senator Obama as President, labor issues, and particularly the EFCA, are likely to be a priority on his agenda.

B. John McCain

A Republican win, on the other hand, would make passage of the bill a more challenging endeavor. Senator McCain voted to block the vote on the EFCA and he co-sponsored the SBPA, a Republican opposition bill that seeks to eliminate the use of the currently optional card check procedure.[119] Senator McCain has said, "I am strongly opposed to H.R. 800, the so-called Employee Free Choice Act of 2007. Not only is the bill's title deceptive, the enactment of such an ill-conceived legislative measure would be a gross deception to the hard-working Americans who would fall victim to it."[120]

C. Congress

Even if a Republican wins the White House, however, Democrats may hold enough seats in the House and Senate to make the bill veto proof during the next congressional term. If the Democrats maintain their dominance in the Senate and can secure a handful of new seats in the upcoming Senate race, there is a strong likelihood that the EFCA will pass.

Currently, Democrats, and the Independents who caucus with them, maintain a 51-49 advantage in the Senate. Of the 35 Senate races that will be contested in 2008, Republicans will defend 23 seats: Colorado, Minnesota, New Hampshire, New Mexico, Alaska, Maine, Oregon, Virginia, Alabama, Georgia, Kansas, Kentucky, Mississippi (2), Nebraska, North Carolina, Oklahoma, Tennessee, Texas, Idaho, South Carolina, and Wyoming (2).[121] In contrast, Democrats will defend only 12 seats: Louisiana, New Jersey, Arkansas, Delaware, Illinois, Iowa, Massachusetts, Michigan, Montana, Rhode Island, South Dakota, and West Virginia. Five Senators, all Republicans, will retire from their seats this fall. If the Democrats win six or seven new seats in the Senate, giving them 57 or 58 seats, and at least two or three Republicans[122] vote to stop a filibuster, which is not unlikely considering past voting patterns, the EFCA will pass through the Senate.[123]

Additionally, all House seats (435) are up for election this fall. Those closely following the elections predict that Democrats will pick up at least two House seats and possibly as many as eight seats.[124] In 25 of the most hotly contested House races, Democrats are favored to win 20 seats. Thus, with a high rate of success in November, Democrats may obtain two-thirds of House and Senate seats necessary not only to pass the EFCA, but to make the EFCA veto proof, should Senator McCain become President.

There are several close Senate races to watch that may shift the balance of power in the next Congress. These contest include: Minnesota — where the Democratic candidate is favored (Norm Coleman (R) v. Al Franken (D)); New Hampshire — where the Democratic candidate is favored (John Sununu (R) v. Jeanne Shaheen (D)); Colorado (Bob Shaffer (R) v. Mark Udall (D)); Maine (Susan Collins (R) v. Tom Allen (D)); and New Mexico (Steve Pearce (R) v. Tom Udall (D)).[125]

D. Pro-EFCA Organizations

Not surprisingly, labor unions are at the forefront of the movement in favor of the EFCA, but the list of supporters is much broader and more diverse. Political leadership groups (Democratic National Committee), religious groups (Pax Christi USA), civil rights organizations (NAACP), and even an environmental group (Sierra Club) are among the host of supporters of the EFCA. The inclusion of some of the names on the list of supporters has the tendency to raise some eyebrows and leads to the inevitable question, "What's in it for them?" According to David Robinson, Executive Director of Pax Christi USA, most faith-based organizations support workers' rights to organize. Indeed, his organization's support of the EFCA comes via an endorsement of a campaign orchestrated by the National Interfaith Committee for Worker Justice. Another supporter, National Council of La Raza, which like the NAACP is a civil rights organization, believes that the EFCA is an important step toward strengthening the prospects of Hispanic Americans by helping them out of low-wage jobs.

Although many groups have pledged their support of the EFCA, perhaps none have done so as vigorously as the labor unions. The AFL-CIO is in the midst of a campaign to collect one million signatures in support of the EFCA and plans to present them to the newly elected President and Congress during a rally in Washington, D.C. in 2009. And the unions are flexing their financial muscles in this election year in an effort to make sure that the President and a majority of the members of Congress whom they will greet during their 2009 rally support the EFCA. The unions are determined to keep the EFCA on the forefront and see it enacted into law. But, to get there, they will have to wade through some stiff resistance.

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E. Anti-EFCA Organizations

The number of organizations that have publicly stated their opposition to the EFCA is smaller than the number of groups that have announced their support, but they are every bit the equal in terms of their zealousness. Most of the opponents are business groups, including such well-known organizations as the U.S. Chamber of Commerce, the National Right to Work Committee, and the Coalition for a Democratic Workplace. Several of the business groups opposing the EFCA are more narrowly focused on particular industries that are perhaps disproportionately prone to the changes that would be wrought by passage of the EFCA. The National Restaurant Association, the International Foodservice Distributors Association, the American Hotel & Lodging Association, and the Associated Builders and Contractors fall into this category. The Coalition for a Democratic Workplace is launching a television advertising campaign opposing the EFCA. In addition, in a move possibly designed to counter the AFL-CIO's one-million signature goal, the Coalition for a Democratic Workplace is also collecting signatures of EFCA opponents on its website, www.myprivateballot.com.

F. Forecast for the EFCA

Only time will tell what the future holds for the EFCA, but it is a virtual certainty that it will be reintroduced in the new Congress and will face less opposition when that occurs. The Senate's voting on the EFCA was largely along party lines, and the breakdown of the Senators by party is prone to change in the upcoming elections. If there is a numerical shift in the Senate this November, it will likely tilt in favor of the Democrats. Twenty-three Senate seats held by Republicans are up for reelection, compared to only 12 held by Democrats. To the extent that incumbents have a leg up on their opponents in elections, that advantage also goes to the Democrats. Five of the Republican Senators whose seats are at stake this November are retiring, whereas no Democratic Senators have announced retirement plans.

Despite the potential for Democrats to add to their ranks in the Senate, it would be premature for EFCA supporters to plan their victory celebrations at this time. Most prognosticators estimate that the Democrats will pick up approximately enough seats in the November election[126] to prevent another filibuster of the EFCA. But if Senator McCain wins the White House and if the November elections do not generate enough Democratic seats to get past a filibuster, the EFCA proponents will likely modify the legislation to lessen the opposition. It is unclear which of the three key provisions of the EFCA — the card check election procedure, mandatory mediation and arbitration of first-contract disputes, or the enhanced penalties for employers who violate the EFCA — would be most likely to be scaled back or eliminated altogether. What is clear is that the EFCA's supporters on Capitol Hill and beyond intend to continue their quest for its passage.

Furthermore, even if the Democrats win the White House and win control over both houses of Congress, passage of the EFCA in its present form is not necessarily certain. Since becoming the presumptive Democratic presidential candidate, Senator Obama has seemed to soften his stance on certain positions, including free trade and withdrawal of troops from Iraq. It is not impossible that a President Obama would be willing to modify certain provisions of the EFCA, although is it virtually certain that he will support it in general. One should remember that the flood of pro-labor legislation that was expected to follow Bill Clinton's election as President never materialized.

V. THE CLAIMED RATIONALE FOR THE EFCA AND THE REAL CAUSES FOR LOW UNION REPRESENTATION IN THE UNITED STATES

A. Alleged Deficiencies in the NLRB Election Process and Alleged Employer Misconduct

Organized labor and other proponents of the EFCA advance two primary arguments in support of the legislation. They contend that lengthy NLRB representation election procedures and alleged employer misconduct frustrate employees and deny them the right to form unions. For example, in its September 2005, *Issue Brief "The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States,"* the AFL-CIO states:

> [E]mployers can and do avail themselves of interminable administrative and procedural delays. According to Human Rights Watch, "these long delays in the U.S. labor law system confound workers' exercise of the right to freedom of association."
>
> - There can be long delays between the filing of a petition and the holding of an election.
> - Employer maneuvering over which employees should be allowed to vote in the election frequently causes further long delays.
> - Post election employer objections introduce another element of delay, first at the NLRB and then in the courts if the NLRB rules against the employer.

In the AFL-CIO "NOW" Blog, Tula Connell wrote:

> Big Business has launched a nationwide campaign to stop workers from exercising their freedom to form

> unions through this simple 'card check' or majority-verification process. They've even introduced a bill in the U.S. House of Representatives to *force workers to endure the lengthy and bureaucratic NLRB process because they know far fewer workers will join unions if they have to face years of NLRB plodding.*[127] (emphasis supplied).

Given these claims, one could improperly conclude that there has been a steady deterioration in the quality and timeliness of the NLRB election process and increased employer misconduct, resulting in fewer election wins and reduced membership rolls for organized labor.

However, the claim that long delays occur between the filing of a union's petition with the NLRB seeking an election, and the holding of the election, is not supported by the evidence. Official statistics issued by the Office of the NLRB's Executive Secretary on the processing of election petitions show that the NLRB has consistently reduced the median time it takes to proceed from the filing of a representation petition to the holding of an election.[128] There was a 24% improvement in that median time in the 25-year period from 1980 through 2005. In Fiscal Year 1980, it took 50 median days from the filing of a petition to the date an election was held. That figure dropped to 47.9 median days in Fiscal Year 1985, rose slightly to 48.1 median days in Fiscal Year 1990 before falling to 44 median days in Fiscal Year 1995, improved to 41 median days in Fiscal Year 2000, and improved further, to 38 median days, in Fiscal Year 2005.[129] While it rose slightly to 39 median days in Fiscal Year 2007 (the last year for which statistics are available), that is still 22% below the median time, from petition to election, that existed in 1980.[130] And, during 70% of this 27-year period, appointments to the Board were made by Republican Presidents.

Analyzing election statistics from a different perspective, in Fiscal Year 2007, 94% of NLRB-supervised elections were held within 56 days and 78.9% of all representation cases were closed by the NLRB within 100 days from the filing of a petition.[131] Thus, in the vast majority of representation cases, the time that elapsed from the filing of the petition until the last appeal was exhausted and the case closed, was slightly over three months.

In many cases, a company is unaware of union organizing activity until a representation petition is filed by the union with the NLRB. In those situations, employees have, prior to the filing of the petition, been exposed only to the union's rhetoric. As a result, the first (and only) opportunity that an employer often has to present its views to its employees occurs during the "campaign" — that period between the filing of the petition and the election. Based upon Fiscal Year 2007 statistics, the median employer has only 39 days, less than six weeks, in which to present its views, to correct any misinformation being disseminated by the union, to explain the election process, and to provide employees with information enabling them to make an informed decision. Given that 92.5% of the private, nonagricultural sector of the workforce in the U.S. does not belong to unions[132] (the NLRB does not have jurisdiction over public sector or agricultural workers), it is fair to conclude that the vast majority of employees voting in NLRB elections have not previously participated in such an election, or worked in a unionized environment. As a result, 39 days is a relatively short period of time in which to gather information upon which to make an informed choice on union representation, which could be the most important decision of the employee's work life. When considered against the many months the American voter is exposed to the views of the candidates for political office, 39 days is a very short period of time for an employee unsophisticated in unionization to make such an important decision.

A card check system, such as that presented by the EFCA, would deprive employees not only of the right to vote in a secret ballot election, but of the benefit of their employers' views. That, of course, is precisely the objective of that portion of the EFCA requiring an employer to recognize and bargain with a union based solely upon a card check majority. It gives the union the opportunity, when soliciting employee card signatures, to disseminate its propaganda, regardless of accuracy, truthfulness or legality, while, at the same time, precluding employees from accessing opposing views from the employer and violating an employer's statutory right of free speech.[133] The denial of information to employees becomes even more pronounced in those situations where employees do not have the resources (such as the Internet) to access data against which to test the union's claims. In short, proponents of the EFCA have no interest in allowing employees to make an informed decision based upon hearing both sides of the story — a concept that is as fundamentally abhorrent to our democratic institutions as depriving individuals of the right to vote.

Organized labor and other proponents of the EFCA also support their advocacy for this legislation by claiming that the NLRB's process is delayed by "[p]ost election employer objections first at the NLRB and then in the courts if the NLRB rules against the employer."[134] The official statistics issued by the NLRB's Office of the Executive Secretary show this not to be the case.

The NLRA was drafted in such a way so as to make decisions of the NLRB in representation cases final and not directly reviewable by the federal courts.[135] Thus, the only method by which an

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employer can "appeal" the NLRB's ruling in a representation case is to refuse to comply with the Board's decision certifying the union and refuse to bargain with the union.[136] The union will then file an unfair labor practice charge against the employer with the NLRB, which will find that the employer unlawfully refused to bargain. It is from that NLRB decision that the employer will seek review in the appropriate U.S. Court of Appeals. These cases are typically referred to as "technical refusal to bargain cases," because the employer is utilizing the only method available to it to obtain court review of an NLRB representation decision that it believes to be incorrect. These technical refusal to bargain cases are distinguished from those situations in which an employer has, for example, committed the unfair labor practice of engaging in bad faith bargaining at the negotiating table or refusing to provide the union with information to which it is legitimately entitled. However, only a very small percentage of employers pursue such an appeal, and NLRB statistics show a steady decline in the number of those who do so.

In the 16-year period between 1991 and 2007, the number of cases in which employers contested a union's certification in the courts declined in both absolute numbers (by 68.3%) and as a percentage of the number of elections won by unions (by 50%). In Fiscal Year 1991, employers contested 41 certifications.[137] That figure represented just 2.8% of the 1,490 representation elections won by unions in that year.[138] In Fiscal Year 2005, unions won 1,341 representation elections.[139] The 24 tests of certification by employers in that year[140] represented a mere 1.8% of the elections unions won. Finally, in 2007, only 13 cases involved a technical refusal to bargain by the employer in order to test the union's certification,[141] or 1.4% of the 903 elections that unions won.[142] Thus, very few union certifications are actually challenged by employers in the courts.

Another aspect of employer action erroneously cited by proponents of the EFCA as allegedly preventing employees from exercising free choice in NLRB elections is alleged unfair labor practices and claimed objectionable conduct committed by employers during organizing campaigns. Certain types of conduct by employers can result in an employer's election victory being set aside. These consist of: (1) unfair labor practices (*i.e.*, conduct that is unlawful), such as threatening or discriminating against employees for engaging in union activities, interrogating them about those activities, or promising them benefits not to support the union;[143] or (2) objectionable conduct — that which does not rise to the level of being unlawful, yet is sufficiently serious that it undermines the laboratory conditions upon which the NLRB insists for its elections and warrants setting aside the election.[144]

While some employers do commit unfair labor practices or engage in objectionable conduct, the statistics show that only a very small percentage of union election victories are affected by improper employer conduct. For example, in Fiscal Year 2006, the NLRB conducted 1,850 representation elections, but objections to elections were filed in only 177 cases (9.6%).[145] And these 177 cases in which objections were filed include those filed by employers against union campaign misconduct. As to those objections filed by unions against employers, there is no indication in the NLRB's statistics as to what proportion were found to be meritorious, resulting in the election being set aside and a new election conducted. The reality is that unions file objections to elections in only a very small percentage of cases, and an even smaller number of elections are set aside based upon employer misconduct. If employer misconduct were truly an impediment to the NLRB election process, as claimed by proponents of the EFCA, one would expect to see unions contesting a far greater percentage of elections won by employers. However, that is simply not the case.

In any event, a remedy already exists for employer behavior that prevents a free and fair election. The U.S. Supreme Court, in *NLRB v. Gissel Packing Co.*, has held that an employer can be required to recognize and bargain with a union, based upon authorization cards signed by a majority of the employees, where the employer has engaged in such extensive unfair labor practices as to prevent the holding of a fair election or even if the union has lost the election.[146]

Against this backdrop of misinformation disseminated by proponents of the EFCA, and hearing their vigorous criticism of the NLRB's election process, one would assume there has been a steady decline in union success rates in NLRB elections over the years. However, that has not been the case. Since 1980, unions have steadily *increased* their percentage of victories in NLRB elections. In 1980, unions won 47.9% of the representation elections held that year. The percentage of union victories increased to 49.5% in 1990, to 50.4% in 1995, to 51% in 2000, and to 60.4% in 2005.[147] In Fiscal Year 2007, the NLRB conducted 1,526 representation elections,[148] of which 59.2% were won by unions.[149]

The foregoing leads to the inescapable conclusion that, while admittedly the percentage of union-represented employees in the private nonagricultural sector workforce has steadily declined over the years,[150] a variety of reasons other than the NLRA, the NLRB, or employer misconduct are responsible for this decline.

B. Reasons for the Overall Decline of Unions in the Private Nonagricultural Sector Workforce in the United States

Having demonstrated that neither the NLRB's election process

nor alleged employer misconduct are the causes for declining union membership, we must look elsewhere. As an initial matter, the decline in union membership is not universal. From 1973 to 2007, membership among public sector workers increased by 56%, from 23% to 35.9%.[151] The SEIU has been particularly effective in organizing healthcare and other service sector workers: between 1996 and 2008, its membership doubled, from one to two million members.[152] From January through September 2007, for example, SEIU won 80% of the NLRB elections in which it participated,[153] demonstrating that the NLRB's election process is certainly not hobbling the SEIU. Part of the reason for SEIU's success in the private sector is that it has adopted more cutting-edge organizing tactics, rather than relying upon the same approaches that unions have employed in the past. In a successful organizing drive of janitors in Texas in 2005, for example, the SEIU enlisted the support of religious leaders, pension funds, and the mayor of Houston in its campaign.[154]

One of the private sector industries that has been an especially fertile ground for unionization efforts is healthcare. Unions have traditionally made inroads at hospitals, but they have recently been adding members at nursing homes and rehabilitation hospitals at a prolific rate.[155] One reason is the growth of the industry itself — healthcare has been one of the fastest-growing sectors of the economy, with 4.5 million new jobs having been created in the past 15 years, and 12 of the 30 fastest-growing occupations being in health care.[156] Neither the NLRB's election process nor claimed employer conduct has dampened these unionization efforts.

On the contrary, and what proponents of the EFCA conveniently ignore, is that the NLRB's election campaign rules are slanted very much in favor of unions. Employers that decide to assert their right of free speech during a campaign find themselves on an uneven playing field. For example, union organizers can make promises of increased wages and benefits to employees in order to win their votes and can visit the homes of employees to persuade them to vote in favor of the union — things that are unlawful if done by an employer.[157]

What, then, have been the causes for the decline in union membership in certain sectors of the U.S. economy? The issue is far more complex than proponents of the EFCA wish to admit. The decline is based on factors either caused by, or outside the control of, organized labor and include:

- A decline in some industries, and changes in others, that have been traditional union strongholds, such as manufacturing, steel, automotive, transportation, utilities and communication;
- Globalization of the world economy, including off-shoring of work historically done in the U.S.;
- The enactment of legislation and court rulings creating additional rights for employees, hence, a diminished need for collective action;
- Unions' diminished emphasis on organizing, and their failure to adopt new organizing methods;
- Diminished worker interest in unions;
- Improved management policies and practices, and the manner in which companies view their employees, which diminish the need for third party intervention in the employment relationship; and
- The growth of new industries, such as technology, and a more diverse workforce, where unions have not been effective in organizing workers.

This Report does not present an exhaustive analysis of all of the reasons for the overall decline in union membership in the private nonagricultural sector of the U.S. economy. But as discussed below, there are numerous social, societal, legislative, judicial/legal, and economic changes, unrelated to the NLRB's election process and employer conduct, that have caused the decline. Passage of the EFCA will not stem the decline in industries that have been traditional union strongholds any more than it will reverse globalization of the world economy. Those unions that are able to bring their message effectively to the workforce will continue to be successful, regardless of whether the EFCA becomes law. Those unions in industries that have dramatically declined, or no longer exist, will never see a resurgence of their membership, regardless of whether the EFCA is enacted.

1. A Decline in Some Industries, and Changes in Others, that Have Been Traditional Union Strongholds, and Globalization of the World Economy

The economic environment in which industries that were traditional union strongholds, such as manufacturing, steel, automotive, transportation, utilities, and communication, has changed considerably. In just one recent 8-year period, from 1994 to 2002, the percentage of jobs held by blue-collar workers — defined as "precision production, craft, and repair" workers and "operators, fabricators, and laborers" — declined by 7.5%, from 25.5% to 23.6%.[158] Globalization has had a profound effect on manufacturing, sending many jobs once held by U.S. union members to foreign countries. It has also introduced into the marketplace non-U.S. companies that construct facilities in areas of the country where unions historically have not been as prevalent.[159]

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From 1994 to 2003, the percentage of workers increased in those regions that historically have had smaller rates of unionization: the mountain states (6.0% to 6.7%) and the south-Atlantic states (18.0% to 18.5%).

Substantial deregulation in certain industries has made it more difficult for management to pay premium union scale, which reduces unions' appeal to workers.[160] Unions prospered in a regulated economy. Trucking companies, the "legacy" airlines, and other industries could in that regulated environment pay generous union wages and benefits (including substantial retiree pensions and healthcare), and pass those costs on to consumers, through rate increases approved by the governmental agencies regulating them. There was no incentive to reduce labor costs to meet competition. These formerly regulated companies now find it extremely difficult to compete, because they are burdened with a labor cost structure far exceeding that of new entrants into the market.[161] In some cases, they have resorted to filing bankruptcy petitions seeking to void their labor contracts.[162] Similar pressures have been brought to bear upon the auto industry, with heavily-unionized General Motors, Ford and Chrysler having difficulty competing with lower-cost Japanese automakers.[163] In the vast majority of cases, the lower-cost companies entering the market are nonunion, and unions have been unsuccessful in organizing them.

2. The Enactment of Legislation and Court Rulings Creating Additional Rights for Employees

The labor movement has been at the forefront of legislation and litigation, on both the federal and state levels, that have greatly expanded the individual rights of employees. This has included a myriad of federal laws, such as the Fair Labor Standards Act (establishing an 8-hour work day and overtime pay), the Equal Pay Act (prohibiting unequal pay based on gender),[164] Title VII of the Civil Rights Act of 1964 (prohibiting race, color, national origin and other forms of discrimination),[165] the Age Discrimination in Employment Act (prohibiting age discrimination),[166] the Family and Medical Leave Act (requiring leave in certain situations),[167] the Americans with Disabilities Act (prohibiting disability discrimination),[168] the Employee Retirement Income Security Act (regulating retiree benefits),[169] the Occupational Safety and Health Act (regulating workplace safety),[170] the Worker Adjustment and Retraining Notification Act (requiring notice of certain plant closings and mass layoffs),[171] and the Employee Polygraph Protection Act (prohibiting polygraphing of employees in certain situations),[172] to name just a few. In 1959, there were only 25 federal laws affecting the workplace, a number that swelled to more than 125 by 2000.[173]

Individual employee rights have been further expanded by the willingness of the courts to circumvent the employment at-will doctrine to create common law causes of action for various employment claims, such as wrongful discharge, breach of implied and express contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and public policy wrongful discharge.[174]

The labor movement has, thus, become a victim of its own success, thereby contributing to its decline. It has created an environment in which employees no longer require collective action through union representation in order to pursue grievances against their employers. Employees now have the courts and a myriad of governmental agencies — federal, state and local — through which to do so, and a cadre of plaintiffs' lawyers more than willing to assert these claims in both individual and class action contexts. One must question, then, why an employee would incur the cost and restrictions of union representation, and the risk of a strike, when the employee now has so many avenues available to advance grievances if the employer is unresponsive to employee needs.

3. Unions' Diminished Emphasis on Organizing and Their Failure to Adopt New Organizing Methods

As the U.S. economy has evolved, unions' organizing methods have failed to follow suit. One shortcoming is that much organizing has taken place without the involvement of unions' most important allies — the workers themselves. Corruption, scandals, contract concessions, job losses, strike defeats, and other factors have conspired to create a lethargic attitude among many union members, which has limited their involvement in organizing.[175] Another weakness is that many unions failed to cultivate a new generation of organizers. Perhaps resting on their laurels from previously robust membership levels, unions for a long time did not place a great deal of importance on grooming organizers. The failure of the AFL-CIO to place an emphasis on organizing led to the 2005 defection of the SEIU, UNITE-HERE, the Carpenters Union, and the Laborers' Union, later joined by the International Brotherhood of Teamsters and United Food & Commercial Workers Union. Prior to their exodus, these unions had lobbied the AFL-CIO to make organizing new members a much higher priority.[176] The defecting unions have placed a far greater emphasis on organizing, and ironically the AFL-CIO has, as well, after their departure.

Unions, like SEIU and UNITE-HERE, have, unlike many of their brethren, been able to develop new organizing methods, like the corporate campaign, which can be particularly effective at forcing employers to recognize and bargain with a union based

upon a card check. A corporate campaign exploits a company's vulnerabilities, by targeting its stakeholders, such as the investment community, shareholders, lenders, politicians, religious and other community leaders, and by forcing the target company to spend considerable amounts of time and money in public relations efforts and for legal fees to defend against numerous lawsuits and governmental agency charges instigated by the union.[177]

Unlike SEIU and UNITE-HERE, many unions have been slow to adapt their organizing methods to new industries, new jobs and changes in the demographics of the workplace and have slowed the pace of their organizational efforts. The number of representation elections conducted by the NLRB has been on a gradual and dramatic decline, dropping by 79.1% over the past 27 years: from 7,296 elections in 1980, to 3,623 in 1990, to 2,988 in 2000, and falling to 1,526 elections in 2007.[178] The drop in elections has been accompanied by an equally dramatic decline in the number of employees eligible to vote in those elections: from 478,821 in 1980, to 231,069 in 1990, to 235,857 in 2000 (a slight increase), and falling to 100,406 in 2007.[179]

The sharp decline in the number of elections can also be attributed in part to unions' increased emphasis on picking their battles more carefully, so that they are not expending resources on organizing efforts that are unlikely to succeed. Unions have been forced to adopt a more cost-conscious approach because they are spending less resources overall on organizing. Union spending on organizational activity in proportion to their membership levels has remained relatively constant since the 1970s.[180] Thus, as membership levels have dwindled, so too have expenditures on organizing. Unions have shown little interest in shifting funds from political contributions toward organizing efforts. During the 1996 presidential campaign, unions' contributions to Political Action Committees (PAC) totaled nearly $100 million.[181] During the 2004 presidential campaign, three unions alone — the AFL-CIO, SEIU, and AFSCME — contributed $80 million.[182] These staggering contribution levels divert resources that could otherwise be earmarked for organizing.

4. Diminished Worker Interest in Unions

Another factor contributing to the decline in union membership is increasingly ambivalent or even negative perception of unions by the workforce. One study revealed that worker interest in unionization decreased by 8.5% from 1977 to 1991.[183] During the height of unionism, many workers saw unions as the panacea for the problems that confronted them in the workplace. In recent years, while employee problems certainly have not disappeared, the perception that the unions are the sole solution for those problems has strongly diminished.

The erosion of worker confidence in unions has been fueled, in part, by the enhancement of individual rights through legislation and court action, as discussed earlier. But it has also been caused by numerous examples of unions' limited power to prevent employers from eliminating jobs, outsourcing and off-shoring work, and reducing wages and benefits in an increasingly competitive marketplace. Thousands of unionized airline workers have lost their jobs or seen their wages and benefits reduced as the industry has been battered following the September 11 attacks, rising fuel prices, and the entry of low-cost, nonunion carriers into the market, with unions virtually powerless to act. Even the strike weapon has become less of an effective tool in the unions' arsenal. According to the Bureau of Labor Statistics, from 1947-1980, the number of labor stoppages was consistently over 200 per year. Since the early 1980s it has been below 50 per year. Finally, the public perception of unions as being corrupt, violent and infiltrated by organized crime certainly does not engender worker interest in them.[184]

5. Management Policies and Procedures

Management has also become far more sophisticated in dealing with employee issues. Whether driven by a recognition of the needs of their employees, by a need to attract and retain talent in a competitive marketplace, by a fear of unionization of the workforce, by a need to deal with a myriad of workplace laws and litigation, or other reasons, companies have adopted policies and procedures that give workers less incentive to join organized labor. In many workplaces, management has blurred the distinction between hourly and salaried employees, whether in equalizing fringe benefits, encouraging similar styles of dress at work, or putting all employees in open working areas. Management has become much more sensitive to the differing needs of a diverse workforce, whether by permitting prayer time for Muslim employees, permitting employees with childcare considerations to work from home, or accommodating other employee needs. Where an employer is partially unionized, management has often learned to confer upon the nonunion portion of its workforce the same economic package given to unionized employees,[185] thereby further causing the nonunion employees to question why they would incur the cost and possible risk of unionization for the same pay and benefits.

Management has also become more attuned to the employment of human resources professionals, not merely to ensure compliance with company policies, but to be more responsive to employee needs, ensure proper training, and provide wage and fringe benefit packages competitive in the marketplace. By the same token, companies have learned to rely upon labor and employment

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lawyers, consultants and others to ensure legal compliance and to prevent problems before they spin out of control.

6. The Growth of New Industries and a More Diverse Workforce Where Unions Have Not Been Effective in Organizing Workers

The U.S. economy is far different from the one that existed in 1935 when the original Wagner Act was passed. We have experienced an explosive growth in technology companies and in the service sector. While unions were particularly effective in organizing workers in manufacturing, they have been equally ineffective in attracting the attention of workers in jobs that have emerged in only the last two decades. Today's employee does not, for the most part, work on an assembly line — he or she may work from home, may work part-time, or may have a job requiring individual (rather than collective) attention. These factors, when combined with the large influx of females and individuals from diverse backgrounds into the U.S. workforce, mean that unions now have a far more challenging time finding collective issues appealing to employees who have more individualized needs.

VI. LESSONS TO BE LEARNED FROM SIMILAR LEGISLATION IN CANADA

While the United States Congress has been debating what action to take with respect to the EFCA, employers, employees and unions have lived under legislation similar to the EFCA in our next-door neighbor, Canada. Before abandoning our current system that encourages free speech and protects free choice through secret ballot elections, it would be wise to consider the Canadian experience under EFCA-like legislation. As will be seen below, that experience has been far from positive in many instances and has caused more than half of the Canadian provinces to abandon card check recognition in favor of secret ballot certification.

In Canada, each province maintains its own separate labor statute, which governs the law in that province. At the present time, the ten Canadian provinces are split between those that permit card check certification and those that require secret ballot certification.[186] Significantly, up until the late 1980s, all Canadian provinces (except for Nova Scotia after 1977) had card majority certification procedures.[187] Since then, there has been a gradual shift to a secret ballot election certification procedure, with Saskatchewan becoming the most recent supporter of the secret ballot election procedure in May 2008.[188] Currently, six Canadian provinces, British Columbia, Alberta, Ontario, Nova Scotia, Newfoundland and Labrador, and Saskatchewan, all utilize secret ballot elections to certify a union, although Ontario and Nova Scotia allow card majority certification in their construction industries only.[189]

The following Canadian provinces currently utilize card majority as the process for union certification: Quebec, New Brunswick, Prince Edward Island, and Manitoba.[190] In addition, the Canadian federal jurisdiction also provides for a card majority certification process.[191] Under these codes, a union will be certified by the relevant labor board if a majority of employees, which is defined differently in each province, in the unit have signed cards authorizing a union to represent them.

Among the provinces that utilize a card check procedure, the definition of "majority" differs greatly between the provinces. For example, New Brunswick and Manitoba provide that a supermajority of union membership cards is needed to achieve automatic certification of the bargaining unit. New Brunswick requires 60% + 1 and Manitoba requires 65%. However, Quebec, Prince Edward Island, and the federal jurisdiction all provide for a simple majority of 50% + 1 to attain automatic certification. The EFCA seeks to define "majority" consistent with the definition used in Quebec and Prince Edward Island.[192]

In those Canadian provinces that utilize card check recognition, if a union fails to reach the appropriate "majority," the statute generally provides that a secret ballot election can be held at the discretion of the appropriate Labour Board where a lower threshold is met. Again, the threshold for obtaining such a vote varies between the provinces: 35% of the employees in the proposed bargaining unit in Quebec and the federal jurisdiction must have signed membership cards, 40% in Manitoba and New Brunswick, and 50% + 1 in Prince Edward Island.[193]

In the Canadian provinces that support card check recognition there have been a variety of problems and, as noted above, provinces that initially used card check certification have converted to a secret ballot election process. Some of the problems encountered under card check legislation are discussed below.

Employers in Quebec have struggled with a card check procedure in which cards that have been signed by an employee are deemed to be valid unless, and until, the signing employee writes to the Labour Commission asking that his card be withdrawn. For example, in 1999 the United Transportation Union filed an application for certification to unionize the employees of the Quebec-Gatineau railway. The union presented evidence, in the form of certification cards, that it had over 35% of employee support. Nine months after a secret ballot election, which the union lost, the union sought to obtain automatic certification. In order to reach the statutory threshold for automatic certification,

the union used the cards that had been signed during the first, unsuccessful, organizing attempt. The employer objected to the use of the cards which were signed some nine months prior. However, the Commission held that unless an employee requested that his or her card be cancelled, the union was permitted to use the card in its card check count. The union was subsequently certified.[194]

Similar factual circumstances have resulted in the certification of the United Food and Commercial Workers at Wal-Mart stores in Janquiere, Quebec. In that case, the union produced authorization cards on which an election was ordered. In the election, the union was defeated by a significant majority. Thereafter, the union reapplied for certification, this time using the cards that were signed during the initial campaign and additional cards that had been signed subsequent to the election. Although it was obvious that the application for automatic certification was based on some cards that had been signed by employees who voted against the union and no longer supported it, the Labour Board held that the union had the required support and certified the union.[195]

Supporters of the EFCA contend that a card check system will allow employees' voices to be heard, but experience shows the opposite result in Canada. For example, in British Columbia, during a time when the province utilized a majority system, union organizers supported their application for automatic certification with an authorization card that had been signed by a different employee while the supposed signator was on vacation. When the employer found out the circumstances surrounding the falsified card, it filed a motion to cancel the union's certification before the British Columbia Labour Relations Board. The Labour Relations Board found that the union fraudulently submitted the membership card, with knowledge of its fraudulence, and withdrew the union's recognition.[196]

Also in British Columbia, in 2001, after a union threatened four employees with disciplinary action if they attempted to cross a picket line, the four employees notified their employer that they had never signed union membership cards during the certification campaign four years earlier, although their names had appeared on the membership cards. Without the cards signed by the four employees, the union would not have been certified. The Labour Board subsequently scheduled a hearing regarding the union's representation status. A week before the hearing, the union's president, during a newspaper interview, asserted that the four employees had definitely signed the cards and that they were now alleging fraud simply because they wanted to cross the picket line. However, during the hearing, at the conclusion of the employer's case, the union conceded that the four employees in question had not signed cards, but that someone else had signed for them. The union nevertheless argued that the certification should not be cancelled because of the bargaining history between the parties in the intervening years. In its decision, the Board cancelled the union's certification while criticizing the union for its actions both in obtaining the fraudulent cards, and for denouncing those who spoke out against the fraud.[197]

Finally, in another reported case, union organizers in Quebec made repeated unannounced evening visits to employees' homes to solicit their signatures on union membership cards. The organizers were exceedingly aggressive — even remaining in the employees' residences after being asked to leave. Despite the unwelcome nature of the union's tactics, the Federal Court of Appeal found that they did not amount to intimidation or coercion. The Canadian Industrial Relations Board had, in fact, earlier held that this conduct was simply persistent, overly enthusiastic persuasion. Not surprising, the union was successful in its organizing attempt after utilizing these "persuasive" tactics."[198]

The problems noted above, plus the fact that employees in the Canadian provinces that support card check recognition account for 66% of the days not worked because of strikes and lockouts, while accounting for only about 33% of the workforce,[199] explain the continuing shift away from card check certification in Canada. It would be unfortunate if the U.S. were to adopt a system that has been discredited in Canada and from which over half of the Canadian provinces have fled.

VII. POTENTIAL CONSTITUTIONAL CHALLENGE TO THE EFCA

Other than requiring an arbitration board to "render a decision settling [a] dispute" that "shall be binding upon the parties for a period of 2 years,"[200] the interest arbitration provisions of the EFCA do not include any procedural or substantive standards that an arbitration board is required to follow in hearing or deciding an interest arbitration case. Nor do they provide for review of an arbitration board's decision in either an administrative or a judicial forum. All the EFCA says, with no further guidance, is that "the [Federal Mediation and Conciliation Service] shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."[201]

Omissions like these are rare in an act of Congress and are of such a nature that they call into question whether the interest arbitration provisions of the EFCA pass constitutional muster. In particular, the omissions, together with the unfettered discretion granted to the FMCS in establishing arbitral standards for resolving first contract disputes, give rise to an argument that the interest

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arbitration provisions are constitutionally infirm under the so-called nondelegation doctrine — a doctrine derived from Article I, Section 1 of the United States Constitution.

Article 1, Section 1 of the Constitution vests "[a]ll legislative Powers herein granted … in a Congress of the United States." This language "permits no delegation of those powers."[202] In a delegation challenge, the "constitutional question is whether the statute has delegated legislative power to the agency."[203]

Analysis of a statute under the nondelegation doctrine involves separation of powers principles. Congress is not permitted to delegate its legislative authority to another branch of government. As a result, "when Congress confers decisionmaking authority upon agencies, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[204] Stated differently, the Constitution bars Congress from delegating legislative authority to an agency without first giving that agency standards and guidelines (an "intelligible principle") by which it is to perform the legislative function.

The Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes."[205] In *Panama Refining Co. v. Ryan*,[206] the Court struck down Section 9(c) of the National Industrial Recovery Act (NIRA), which granted the President the power to "prohibit the transportation in interstate and foreign commerce of petroleum … produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation…"[207] According to the Court, Congress's ability to delegate power to the President was limited to "the power to make regulations,"[208] and such regulations "are valid only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined."[209] The Court held that Section 9(c) was an unconstitutional delegation of legislative power to the President because it failed to provide to the President an "intelligible principle" for carrying out the NIRA's mandates. In the words of the Court, "Congress has declared no policy, has established no standard, has laid down no rule … no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[210]

Less than five months after its decision in Panama Refining, the Supreme Court was faced with another constitutional challenge to a different section of the NIRA. In *A.L.A. Schechter Poultry Corp. v. United States*,[211] the Court held that Section 3 of the NIRA violated the nondelegation doctrine because it granted such broad legislative authority to industry trade groups as to render them virtually self-regulating. According to the Court, "[s]uch a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[212] Again, it was the lack of an "intelligible principle" within the statute that troubled the Court:

> [The statute] supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.[213]

While *Panama Refining* and *Schechter Poultry* were decided over 70 years ago, the Supreme Court still requires Congress to provide an "intelligible principle to which the … [agency] authorized to [act] is directed to conform."[214]

Congress recently provided such "an intelligible principle" in drafting an interest arbitration provision. In 2001, it considered the Airline Labor Dispute Resolution Act (ALDRA), a proposed amendment to the Railway Labor Act, which would have forced airlines and the unions representing their employees to participate in mandatory and binding arbitration to resolve any labor disputes.[215] As written, the bill would have granted the Secretary of Transportation the authority to send airline disputes to binding arbitration. Although the amendment did not pass Congress, it expressly articulated standards that an arbitration panel would have had to consider in resolving a dispute. Specifically, it would have required any arbitration panel tasked with resolving an airline labor dispute to consider, among other things: the financial condition of the airline; the airline's ability to incur changes in labor costs and still be competitive and survive as a business; the rates of pay and working conditions of similar employees working for comparable airlines; the existing collective bargaining agreement and the history of negotiations between the parties; and any other factors "as are normally and traditionally taken into consideration in the determination of rates of pay, rules, and working conditions through collective bargaining, mediation,

fact-finding, arbitration or otherwise between the parties."[216] The inclusion of the constitutionally required standards in this interest arbitration provision, but none in the EFCA's interest arbitration provisions, highlights that Congress overlooked its obligations in drafting the EFCA's provisions and that those provisions have no "intelligible principle" to which the FMCS is required to conform.

Support for the argument that the interest arbitration provisions of the EFCA violate the non-delegation doctrine may also be gleaned from cases in which state interest arbitration statutes were challenged on the same grounds. Although the challengers in these cases were unsuccessful, the statutes, unlike the EFCA, contained, to varying degrees, criteria for an arbitrator to follow in resolving a dispute.

In a case arising in the private sector, the California Court of Appeal upheld the constitutionality of provisions of California's Agricultural Labor Relations Act (ALRA) that require growers and unions to participate in mandatory first contract arbitration.[217] Initially, the statute did not contain any standards for an arbitrator to follow when presented with a first contract dispute. However, the Agricultural Labor Relations Board adopted implementing regulations that set forth a variety of factors that are to be considered when resolving the dispute, and those standards were incorporated into the statute. Accordingly, because the criteria set forth in the statute were "sufficiently concrete to provide lawful guidance," the California Court of Appeal concluded that legislative power had not been unconstitutionally delegated.[218]

Similarly, in a case involving Washington's public sector interest arbitration statute, the Washington Supreme Court held that the statute was not an unconstitutional delegation of legislative power because it set forth the "composition and duties of the arbitration panel" and contained "explicit standards and guidelines for its decision."[219] The statute also provided procedural safeguards "in the form of superior court review of the decision of the arbitration panel upon the question of whether its decision was arbitrary or capricious."[220]

Finally, in a case out of Maine, a public school committee was unsuccessful in challenging the constitutionality of a provision of Maine's Municipal Public Employees Labor Relations Law that granted private arbitration panels the authority to resolve issues between parties to a labor dispute.[221] The committee argued that the statute was unconstitutional because "it delegates power to private arbitration panels without adequate standards or safeguards to protect against unfair and arbitrary decisions."[222] The Supreme Judicial Court of Maine dismissed that argument, holding that the statute "affords the bargaining parties certain inherent standards as well as [provides] them with procedural safeguards that meet the constitutional tests."[223]

Courts in a number of other states have also rejected claims that mandatory interest arbitration statutes are constitutionally infirm under the non-delegation doctrine. The reason the courts upheld the statutes in those cases is the same as in the foregoing cases — unlike the EFCA, the statutes provided standards for arbitrators to follow in resolving contract disputes.[224]

The Supreme Court's decisions in *Panama Refining* and *Schechter Poultry*, together with the state court decisions addressing the constitutionality of state interest arbitration statutes, support the conclusion that, because the EFCA fails to include any procedural or substantive standards for hearing and deciding an interest arbitration case, the interest arbitration provisions of the EFCA, as last introduced, reflect an unlawful delegation of legislative power under Article I, Section 1 of the Constitution. Stated differently, the broad delegation of legislative power to the FMCS, giving it unfettered discretion to establish regulations for adjudicating interest arbitration cases, does not withstand constitutional scrutiny based upon Congress' failure to "lay down ... an intelligible principle" to which the FMCS must conform. If Congress neglects to amend the interest arbitration provisions of the EFCA to add the requisite standards, those provisions should, therefore, suffer the same fate as the statutory provisions at issue in *Panama Refining* and *Schechter Poultry*.

VIII. CONCLUSION

Proponents of the EFCA contend that low increases in workers' wages have been caused by the decline of union membership as a percentage of the workforce, and that the decline of union membership has been caused by unlawful actions by employers and delays in NLRA election processes. According to those proponents, the solution is to bypass the NLRA's secret ballot election process — a process in which both the union and the employer have an opportunity to communicate information to employees on the advantages and disadvantages of unionization — in favor of a card check system in which only the union has an opportunity to express its views regarding unionization. In essence, the EFCA's proponents contend that the very premises of the NLRA are wrong — that employees should not be entitled to secret ballot elections, or the opportunity to hear criticism of union representation before they commit to exclusive representation.

There are many factors causing the stagnation of workers' wages — most of which have nothing to do with the presence or absence of unions. Similarly, the secret ballot election process,

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with its extensive protections against coercion and its protection of free speech, is not to blame for the decline in the percentage of unionized employees in the United States. Therefore, there is no justification for throwing out the secret ballot election process in favor of a system that is intended to prevent employees from gaining access to competing views that would enable them to make an informed decision concerning representation.

There is even less justification for instituting a system that would take negotiations out of the hands of the employer and the employees' representative, and give a government-appointed arbitrator the absolute power to determine the wages and benefits of its employees, as well as the survival of the company. Instead of the current level playing field on which the NLRA takes a neutral position on whether employees should or should not organize, the EFCA's proponents seek a biased system intended to foster union organization and limit the employees' opportunity to hear the full story regarding such organization. Instead of the current level playing field on which unions and employers negotiate privately to hammer out collective bargaining agreements that will fit the unique needs of the employees and employers, and in which the parties are free to exercise their economic weapons to support their positions, the EFCA's proponents seek a system that will enable a union to force every negotiation to be decided by a government-appointed arbitrator who has no real stake in the outcome of negotiations and no familiarity with the needs of the parties.

The EFCA is based on the simplistic notion that unions are inherently good for employees and the country and that employers are not. It is also based on the simplistic notion that government-appointed arbitrators are more capable of fashioning effective and fair collective bargaining agreements than are unions and employers through the private negotiating process.

To justify the radical change in U.S. labor law as sought by the EFCA's proponents, there should be strong evidence that the current system is fundamentally wrong or is irreparably broken. But there is no such evidence. Secret ballot elections are being held more quickly than ever, and union election victories are being contested less frequently. Indeed, the percentage of elections that unions win has increased steadily from 47.9% to 59.2% over the past 27 years. The decline in the number of employees who choose union representation can easily be explained by a myriad of societal factors, none of which have anything to do with the structure of the NLRA or the actions of the NLRB or employers. Similarly, there is no evidence that unions are unable to negotiate first contracts because of widespread unlawful activity by employers, nor is there evidence that arbitrators are better able to understand the relative needs of employees and employers than are the actual parties.

Employers who are concerned about the impact that the EFCA would have on them and the economy may consider taking various steps:

1. Encourage trade associations and other organizations to engage in lobbying and education efforts regarding the EFCA. Many organizations such as the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace have campaigns well underway to defeat or modify the EFCA and have posted information about these campaigns on their websites.
2. Let their representatives and senators know that they oppose the bill. Employers can learn how their representatives voted on the EFCA in 2007 through the website for the Library of Congress, and use this information to express their support or disappointment.
3. Communicate their position on this issue to candidates running for House and Senate positions in the 2008 elections and let them know that their position on this important legislation may influence the way in which employers may vote.
4. Draft letters to the editors of local newspapers and find other opportunities to promote public awareness of the impact of the EFCA.

An alternate way of dealing with the EFCA is to amend it so that a more palatable version is ultimately enacted into law. Including safeguards to balance the potential for union abuse of the card check procedure, and removing the binding arbitration provision, would likely result in a bill that could be more easily tolerated by most employers.

One example of a safeguard that could help curb union abuse of the card check procedure would be a "reconsideration period" of a certain number of days after unions have filed for recognition but before they may be certified as the collective bargaining representative based on card check authorizations. During this period, employees could be given the right to revoke their card check authorizations or be required to confirm their selection in a communication made directly to the Board, to lessen the likelihood of union interference.

Alternatively, the EFCA could be amended to allow decertifications by card check authorizations whenever a union is certified through such authorizations, with no certification bar prior to the execution of an initial contract. Currently, a decertification

petition is generally barred for a 12-month period after the Board has certified a union as the bargaining representative of a unit of employees.[225] Allowing decertification during the period prior to an initial contract would provide employees with an opportunity to revoke their authorization cards if they were coerced or mislead into signing them.

Although the card check provisions of the EFCA have attracted the most attention and commentary, the binding arbitration provisions of the EFCA are the greater threat to business. These provisions place employers at a severe bargaining disadvantage, as unions will be able simply to wait out the 120-day negotiation/mediation period to force employers into mandatory, binding arbitration. Binding arbitration ends the free negotiation process and forces the employer to accept terms created by an arbitrator, who has no responsibility for the future of the company. Employers should emphasize their concern over this provision in their efforts to defeat or shape the bill. Ironically, the passage of EFCA legislation that contains mandatory interest arbitration would raise the stakes for employers enormously and may cause employers to resist organizing more vigorously than before the passage of the EFCA.

For over 70 years, the NLRA has fulfilled its mission of preserving industrial peace under a statutory scheme whose hallmarks are secret ballot elections, voluntarism, and a lack of governmental intervention into the bargaining process. Regrettably, EFCA would reject such fundamental precepts.

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ENDNOTES

I. Current NLRA Election and Bargaining Processes

1 NLRB, Casehandling Manual, Part Two, Representation Proceedings §§ 11009.1, 11702 (Aug. 2007), *available at* http://www.nlrb.gov/publications/manuals/r_-_casehandling_manual_(II).aspx [hereinafter "NLRB Casehandling Manual"]; NLRB, Rules & Regulations, § 101.18, *available at* http://www.nlrb.gov/Publications/rules_and_regulations.aspx [hereinafter "NLRB Rules & Regulations"].

2 NLRB Casehandling Manual at §§ 11023.1, 11024.1.

3 NLRB, Office of the General Counsel Memorandum GC 07-01 (Dec. 5, 2007) [(Summary of Operations, FY 2007)].

4 NLRB Casehandling Manual § 11312.1.

5 *Id.* at § 11302.1.

6 NLRB, Office of the General Counsel.

7 *Chamber of Commerce v. Brown*, 128 S. Ct. 2408-, (2008).

8 NLRB Casehandling Manual §§ 11302-11310.

9 *Id.* at § 11310.1.

10 NLRA, 29 U.S.C. §§ 151-169, at § 159(c)(1)(B)(3).

11 NLRB Casehandling Manual §§ 11470, 11476.

12 *Id.* at § 11470.

13 *Dana Corp.* (8-RD-1976) and *Metaldyne Corp.* (6-RD-1518 and 6-RD-1519), consolidated at *Dana Corp.*, 351 N.L.R.B. No. 28, slip op. at 7 (2007); NLRA § 9(c)(3).

14 *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

15 *Linden Lumber Div.*, 190 N.L.R.B. 718, 721 (1971), rev'd by *Truck Drivers Union Local 413 (Linden Lumber Div.) v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), rev'd by *Linden Truck Div. v. NLRB*, 419 U.S. 301 (1974).

16 *Dana Corp.*, slip op. at 5.

17 Under the Wagner Act, the Board issued certifications to unions who demonstrated their majority status through a secret ballot election or "any other suitable method." A card check was the most common "other suitable method." However, in the 1947 Taft Hartley amendments to the NLRA, Congress made the secret ballot election process the only basis for the issuance of a Board certification. *NLRB v. Gissel Packing, Co.*, 395 U.S. 575, 598-99 (1969).

18 *MRA Food, Inc.*, 344 N.L.R.B. No. 107 (2005).

19 *Keller Plastics, Easter, Inc.*, 157 N.L.R.B. 583 (1966).

20 *Harley Davidson Transp. Co.*, 273 N.L.R.B. 1531 (1985).

21 *Dana Corp.*, slip op. at 11.

22 A collective bargaining agreement bars the filing of a rival election petition or a petition for decertification for three years or the duration of the contract, whichever is less. *Levitz Furniture Co.*, 333 N.L.R.B. 717, 730 n. 70 (2001).

23 *Dana Corp.*, slip op. at 11-12.

24 *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 566 (4th Cir. 1966); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 586 (1969) (discussing inherent unreliability of card checks).

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

II. The EFCA's Provisions

26 EFCA, H.R. 800, 110th Cong. § 2 (1st Sess. 2007); 153 Cong. Rec. E260 (Feb. 5, 2007).

27 EFCA at § 3.

28 *Id.* at § 4(b).

29 29 U.S.C. § 151.

30 *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing on H.R. 800 Before the House Subcommittee on Health, Employment, Labor and Pensions*, 110th Cong. (Feb. 8, 2007) [hereinafter *Strengthening America's Middle Class hearing*] (written testimony of Nancy Schiffer), *available at* http://edlabor.house.gov/hearings/help020807.shtml.

31 *Id.* (written testimony of Teresa Joyce).

32 Comments of AFL-CIO President John Sweeney at June 19, 2007, EFCA Rally, *available at* http://www.aflcio.org/mediacenter/prsptm/sp06192007.cfm.

33 395 U.S. 575 (1969).

34 *Id.* at 601 n.18.

35 *Id.* at 602.

36 419 U.S. at 310.

37 *Dana Corp.*, slip op. at 6.

38 *Id.*

39 128 S. Ct. at 2413-14.

40 The card check certification provisions conceivably would also result in a union's, after obtaining cards from a majority of employees, not approaching other employees to sign a card, resulting in those employees effectively being disenfranchised and their preferences never being aired and considered by their coworkers.

41 NLRB, An Outline of Law And Procedure In Representation Cases 44-45 (July 2005), *available at* http://www.nlrb.gov/publications/manuals/r_-_case_outline.aspx.

42 *Id.* at 42.

43 NLRB Casehandling Manual §§ 11028.1-.2.

44 *The Smith Co.*, 192 N.L.R.B. 1098, 1101 (1971).

45 29 U.S.C. §§ 151 and 158(d).

46 *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).

47 *Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

48 *H.K. Porter Co., Inc.*, 397 U.S. at 103-04.

49 *Carpenters Union v. NLRB*, 357 U.S. 93, 99-100 (1958).

50 EFCA at § 3.

51 *See Connecticut State Conf. Bd., Amalgamated Trans. Union*, 339 N.L.R.B. 760 (2003).

52 *See* statements by ALPA and Paul Plaganis concerning the Airline Labor Dispute Resolution Act, Senate Bill 1327, *available at* http://www.alpa.org/alpa/desktopmoduals/viewdocument.aspx?documentld=229 and http://www.labornet.org/news/0000/rla.html (August 6, 2002). In its news release, the union stated: "under the pretense of improving the process for resolving airline labor disputes, the airlines want to impose "last offer" baseball-style binding arbitration on our negotiations. What the proposal really does is destroy the ability of airline employees to negotiate a fair contract. It would deprive us of our right to strike at the end of the 30-day cooling off period while offering management absolutely no incentive to resolve disputes through collective bargaining."

53 U.S. Departments of Labor & Commerce, The Dunlop Commission on the Future of Worker-Management Relations, Final Report, Sec. III(2)(3) (1994), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/2/.

54 Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First Contract Campaigns: Implications for Labor Law Reform* (1994), *available at* http://digitalcommons.ilr.cornell.edu/articles/18; Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing, Submitted to the U.S. Trade Deficit Review Commission* (September 6, 2000) *available at* http://digitalcommons.ilr.cornell.edu/reports/3.

55 Mich. Comp. Laws, §§ 423.234, 423.235 (2008).

56 Paul S. Kersey, *Proposal 3: Establishing a Constitutional Requirement Extending Mandatory Collective Bargaining and Binding Arbitration to State Government Employees*, Policy Brief, Mackinac Center for Public Policy (Sept. 26, 2002), *available at* http://www.mackinac.org/article.aspx?ID=4682.

57 James Sherk & Paul Kersey, *How the Employee Free Choice Act Takes Away Workers' Rights*, Heritage Foundation Backgrounder, No. 2027 (Apr. 23, 2007), *available at* http://www.heritage.org/ Research/Labor/bg2027.cfm.

58 S. 1041 § 4(b)(1); H.R. 800 § 4(b)(1) ("[I]f the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages.").

59 S. 1041 § 4(b)(2); H.R. 800 § 4(b)(2) ("Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation.").

III. Legislative History of the EFCA and Similar Legislation

60 EFCA, H.R. 800; 153 Cong. Rec. E260 (Feb. 5, 2007).

61 The Secret Ballot Protection Act of 2007, H.R. 866, 110th Cong. (1st Sess. 2007); 153 Cong. Rec. H1342 (Feb. 7, 2007).

62 H.R. 3619, 108th Cong. (1st Sess. 2003); 149 Cong. Rec. E2421 (Nov. 22, 2003).

63 S. 1925, 108th Cong. (1st Sess. 2003); 149 Cong. Rec. S15805 (Nov. 24, 2003).

64 *Developments in Labor Law: Examining Trends and Tactics In Labor Organization Campaigns: Hearing Before the House Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce*, 108th Cong. (Apr. 22, 2004), *available at* http://republicans.edlabor.house.gov/archive/hearings/ 108th/eer/eerhearings.htm [hereinafter *Developments in Labor Law hearing*]; *see also* Susan J. McGolrick, *Witnesses at House Hearing Discuss Merits of Elections Versus Card-Check Recognition*, Daily Lab. Rep. (BNA), Apr. 23, 2004 , at A-7.

65 *Developments in Labor Law hearing* (statement of Mr. Cohen).

66 *Id.* (statement of Ms. Schiffer).

67 Fawn H. Johnson, *NLRB Should Consider Card-Check Bill Before Adopting New Organizing Rule, Specter Says*, Daily Lab. Rep. (BNA), Sept. 24, 2004, at AA-1.

68 *Developments in Labor Law hearing* (statement of Mr. Messenger).

69 *Id.* (statement of Ms. Schiffer).

70 *Id.*

71 The Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. (2d Sess. 2004); 150 Cong. Rec. H2917 (May 12, 2004).

72 S. 2637, 108th Cong. (2d Sess. 2004); 150 Cong. Rec. S7896 (July 9, 2004).

73 *The Secret Ballot Protection Act of 2004: Hearing on H.R. 4343 Before the House Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce*, 108th Cong. (Sept. 30, 2004), *available at* http://republicans.edlabor.house.gov/archive/hearings/108th/eer/eerhearings.htm [hereinafter Secret Ballot hearing].

74 *Id.* (statement of Mr. Raudabaugh).

75 *Id.* (statement of Mr. Garren).

76 The Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. (1st Sess. 2005); 151 Cong. Rec. H791 (Feb. 17, 2005).

77 The Employee Free Choice Act of 2005, H.R. 1696, 109th Cong. (1st Sess. 2005); 151 Cong. Rec. H2148, E705 (Apr. 19, 2005).

78 S. 842, 109th Cong. (1st Sess. 2005). 151 Cong. Rec. S 3901 (Apr. 19, 2005).

79 S. 1173, 109th Cong. (1st Sess. 2005); 151 Cong. Rec. S6154, S6156 (June 7, 2005).

80 H.R. 800, 110th Cong. (1st Sess. 2007); 153 Cong. Rec. H1208-1209 (Feb. 5, 2007).

81 H.R. 866, 110th Cong. (1st Sess. 2007); 153 Cong. Rec. H1342 (Feb. 7, 2007).

82 Catherine Hollingsworth, *Card-Check Bill Introduced in House Would Allow Workers to Bypass Elections*, Daily Lab. Rep. (BNA), Feb. 7, 2007, at A-4.

83 *Strengthening America's Middle Class hearing, supra* note 30; *see also Hearing Witnesses Spar Over Fairness Of Election Process in Organizing Drives*, Daily Lab. Rep. (BNA), Feb. 9, 2007, at A-6.

84 *Strengthening America's Middle Class hearing, supra* note 30 (statement of Ms. Schiffer).

85 *Id.*

86 *Id.*

87 *Id.* (statement of Mr. Cohen).

88 *Id.*

89 *Id.*

90 *Id.*

91 Catherine Hollingsworth, *House Panel Approves Union Organizing Bill Covering Certification by Authorization Cards*, Daily Lab. Rep. (BNA), Feb. 16, 2007, at AA-1.

92 H.R. Rep. No. 110-123, at 6 (2008), *available at* http://thomas.loc.gov/cgi-bin/cpquery/dbname=cp110&Acronym=no&Syndict=no&MaxDocs=500&boolquery=no&HCOMM=education+and+labor.

93 *See Statement of Administration Policy on H.R. 800 — Employee Free Choice Act of 2007* (Feb. 28, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr800sap-r.pdf; *see also* Karen L. Werner, *Panel Allows Secret Ballot Amendment In House Floor Debate on Card Check Bill*, Daily Lab. Rep. (BNA), Mar. 1, 2007, at A-11.

94 153 Cong. Rec. H2043-H2091 (Mar. 1, 2007); *see also* Karen L. Werner, *House Passes Card-Check Organizing Bill, Setting Stage for Showdown in Senate*, Daily Lab. Rep. (BNA), Mar. 2, 2007, at AA-1.

95 The House Rules Committee refused to allow debate on amendments that would have allowed employees to use a card-check procedure to decertify unions as well as certify them, an amendment to apply the civil penalties portion of the EFCA to unions as well as to employers, and an amendment that would have required the NLRB to issue decisions on unfair labor practice cases within six months. H.R. Res. 203; 153 Cong. Rec. H2036 (Feb. 28, 2007).

96 153 Cong. Rec. H2078-H2079 (Mar. 1, 2007) (H. Amdt. 21).

97 153 Cong. Rec. H2078-2080, 2087 (Mar. 1, 2007) (Roll No. 114).

98 153 Cong. Rec. H2080 (Mar. 1, 2007) (H. Amdt. 22).

99 153 Cong. Rec. H2080-2082, H2087-2088 (Mar. 1, 2007) (Roll No. 115).

100 153 Cong. Rec. H2082 (Mar. 1, 2007) (H Amdt. 23).

101 153 Cong. Rec. H2082-2087, H2088-H2089 (Mar. 1, 2007) (Roll No. 116).

102 153 Cong. Rec. H2089 (Mar. 1, 2007).

103 153 Cong. Rec. H2089-H2091 (Mar. 1, 2007). (Roll No. 117).

104 153 Cong. Rec. H2091 (Mar. 1, 2007) (Roll No. 118).

105 *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families: Hearing Before the Senate Committee on Health, Education, Labor, and Pensions*, 110th Cong. (Mar. 27, 2007), *available at* http://help.senate.gov/Hearings/2007_03_27_a/2007_03_27_a.html [hereinafter *Restoring Economic Opportunity hearing*]; *see also* Karen L. Werner, *Hearing Highlights Diverging Views On Ballot Process, Need for Card-Check Bill*, Daily Lab. Rep. (BNA), Mar. 28, 2007, at A-10.

106 *Restoring Economic Opportunity hearing* (statements of Professor Cynthia Estlund and Mr. Peter Hurtgen).

107 S. 1041, 110th Cong. (1st Sess. 2007); 153 Cong. Rec. S4175 (Mar. 29, 2007).

108 S. 1312, 110th Cong. (1st Sess. 2007); 153 Cong. Rec. S5655 (May 7, 2007).

109 153 Cong. Rec. S7877 (June 19, 2007).

110 153 Cong. Rec. S8316-S8319 (June 25, 2007).

111 153 Cong. Rec. S8378-S8398 (June 26, 2007) (Roll Call No. 227). In the floor debate, Senator Obama supported the bill saying, "I support this bill because in order to restore a sense of shared prosperity and security, we need to help working Americans exercise their right to organize under a fair and free process and bargain for their fair share of the wealth our country creates … The Employee Free Choice Act would give workers the right to collect signed cards from a majority of their colleagues to form a union and would require the employer to respect and accept that decision. It increases penalties to discourage employers from punishing workers trying to organize their colleagues, and it encourages both sides to negotiate the first contract in good faith by sending stalemates to binding arbitration." 153 Cong. Rec. S8390-S8391 (June 26, 2007). Senator Obama, now the presumptive Democratic presidential nominee, recently again signaled his support for the EFCA saying, "As President, I will proudly fight for its enactment and sign it into law." James Parks, *Thousands Fill Atlantic City Streets to Demand Justice for Casino Workers* (June 23, 2008), *available at* http://blog.aflcio.org/2008/06/23/thousands-fill-atlantic-city-streets-to-demand-justice-for-casino-workers.

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In contrast, Senator McCain opposed the measure saying, "Since the inception of our democracy, we as citizens have placed a great amount of pride in our ability to freely cast votes and voice our opinions on how Federal, State, and local business should be conducted. Our ability to voice opinions through secret ballots stands as one of the hallmarks of our democratic process. Certainly, now, perhaps more than ever, we should be working to uphold this hallmark, not tear it down for the convenience of organized labor, which has been struggling with a declining membership. This bill is the product of partisan politics at its worst, and it must be soundly defeated." 153 CONG. REC. S8389 (June 26, 2007).

112 Derrick Cain, *Organized Labor Pushing for 'Radical Rewrite' Of Labor Laws, Chamber of Commerce Warns*, DAILY LAB. REP. (BNA), June 6, 2008, at A-12; *see also Turn Around America 2008: Employee Free Choice Act Million-Member Mobilization Toolkit, available at* http://www.aflcio.org/joinaunion/voiceatwork/efca/ mmmtoolkit.cfm.

113 Tim Miller, Editorial, *Giving Away the Store*, N.Y. POST (Dec. 17, 2007), *available at* http://www.nypost.com/seven/12172007/postopinion/opedcolumnists/giving_away_the_store_822456.htm?page=0.

114 *Id.*

115 *See, e.g.*, J. Justin Wilson, *Union Math, Union Myths*, CENTER FOR UNION FACTS (2008), *available at* http://www.unionfacts.com/downloads/Union_Math_Union_Myths.pdf; David L. Christlieb and Allan G. King, Littler Mendelson Special Report, *The Perils of Union Activism Have Been Greatly Exaggerated* (June 2007), *available at* www.littler.com/collateral/16586.pdf; James Sherk, *The Truth About Improper Firings and Union Intimidation*, Heritage Foundation Web Memo. (June 20, 2007), *available at* www.heritage.org/Research/Labor/ wm1393.cfm; Deroy Murdock, *Thuggery abounds in union organizing bids*, SCRIPPS NEWS (March 29, 2007), *available at* http://www.scrippsnews.com/node/20712.

IV. Positions Taken By the Presidential Candidates and Various Organizations and Prospects for Passage in the Next Congress

116 Brian Wingfield, *Fears of a Union Renaissance*, FORBES (June 5, 2008), *available at* http://www.forbes.com/businessinthebeltway/2008/06/05/labor-congress-teamsters-biz-beltway-cx_bw_0605labor.html.

117 Dave Newbart, *Obama Upstages Hospital Union Rally*, CHI. SUN-TIMES (Mar. 4, 2007), *available at* http://www.suntimes.com/news/politics/Obama/282672,cst-nws-obama04s1.stng.

118 *See, e.g.*, Steven Greenhouse, *Teamsters Endorse Obama, Offering a Blue-Collar Lift*, N.Y. TIMES (Feb. 21, 2008), *available at* http://query.nytimes.com/gst/fullpage.html?res=9405E6DA1F3BF932A15751C0A96 E9C8B63; *see also* Seth Michaels, *United Steelworkers Endorse Obama for President*, AFL-CIO NOW BLOG (May 15, 2008), *available at* http://blog.aflcio.org/2008/05/15/united-steelworkers-endorse-obama-for-president.

119 The bill was referred to a House subcommittee but has not been voted on. *See* status of Secret Ballot Protection Act, *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-1312.

120 *Employee Free Choice Act of 2007 — Motion to Proceed*, GovTrack.us (June 26, 2007), *available at* http://www.govtrack.us/congress/record.xpd?id=110-s20070626-7&person=300027.

121 CQ 2008 Election Guide, CQPOLITICS.COM, *available at* http://www.cqpolitics.com/wmspage.cfm? parm1=28 (last visited June 19, 2008).

122 Republican Senators thought to vote to stop a filibuster include Arlen Spector (PA), Olympia Snowe (moderate R-ME) and Susan Collins (moderate R-ME). Senator Collins is up for re-election in a state where voters strongly favor Senator Obama. Michael Fox, *Jottings By an Employer's Lawyer* (June 8, 2008), *available at* http://employerslawyer.blogspot.com/2008/06/ads-news-stories-employee-free-choice .html.

123 Bob Benenson, *Election 2008: With Enemies Like These...*, CQ WEEKLY (Apr. 28, 2008), *available at* http://public/cq.com/docs/cqw/weeklyreport110-000002712170.html.

124 Chris Cillizza, *Friday Line: How Many Seats Will Dems Gain in the Senate?*, WASHINGTONPOST.COM (May 16, 2008), *available at* http://blog.washingtonpost.com/thefix/2008/05/friday_senate_line_5.html.

125 *United States Senate Elections, 2008*, WIKIPEDIA (June 20, 2008), *available at* http://en.wikipedia.org/ wiki/United_State_Senate_elections%2C_2008.

126 David M. Herszenhorn, *Senate Democrats Hope for a Majority Not Seen in 30 Years: 60 Seats*, N.Y. TIMES (Mar. 7, 2008), *available at* http://www.nytimes.com/2008/03/07/us/politics/07senate.html?ref=politics.

V. The Claimed Rationale for the EFCA and the Real Causes for Low Union Representation in the United States

127 Tula Connell, *Here's What NLRB "Elections" Really Mean*, AFL-CIO NOW BLOG (Mar. 21, 2006), *available at* http://blog.aflcio.org/2006/03/21/here%E2%80%99s-what-nlrb-%E2%80%98elections%E2%80%99-really-mean.

128 While the data may contain a few extreme cases, which would unduly affect the mean or average of a distribution, statisticians recognize that the median is the preferred measure of central tendency. For example, in a Bureau of Labor Statistics (BLS) publication discussing pay of professional basketball players, the BLS notes, "the median is a better reflection of what the typical player makes than the average salary is." *See* Paul D. Staudohar, *Labor Relations in Basketball: The Lockout of 1998-99*, MONTHLY LAB. REV. (Apr. 1999), at 6, *available at* http://www.bls.gov/opub/mlr/1999/04/art1full.pdf.

129 NLRB, Office of the Executive Secretary.

130 *Id.*

131 *Id.*

132 Barry Hirsch & David Macpherson, *Union Membership and Coverage Database from the CPS*, *available at* http://unionstats.com.

133 Section 8(c) of the NLRA gives an employer the right to express its views on unionization, so long as there is no threat of reprisal or force, or promise of benefit. 29 U.S.C. § 158(c).

134 Tula Connell, *Here's What NLRB "Elections" Really Mean, supra* note 127.

135 *See, e.g., Heritage Broad. Co. v. NLRB*, 308 F.3d 656, 658 (6th Cir. 2002) (affirming that NLRB representation proceedings are not directly reviewable by federal courts); *see also* NLRB Casehandling Manual §§ 11360-11438 (addressing post-election challenges and objections).

136 *See Heritage Broad. Co. v. NLRB*, 308 F.3d at 658 (citing *NLRB v. Duriron Co., Inc.*, 978 F.2d 254, 256 n.1 (6th Cir. 1992) for the proposition that since NLRB representation proceedings are not directly reviewable by federal courts, "an employer who wants to challenge the fairness of an election must refuse to bargain with the certified union and then raise the validity of the election in the ensuing unfair labor practices proceeding.").

137 NLRB, Office of the Solicitor.

138 NLRB, Office of the Executive Secretary.

139 *Id.*

140 NLRB, Office of the Solicitor.

141 NLRB, Office of the Solicitor.

142 NLRB, Office of the Executive Secretary.

143 *See generally* sec. 8(a) of the NLRA, 29 U.S.C. § 158(a), and the numerous cases decided thereunder.

144 *See* NLRB, An Outline of Law and Procedure in Representation Cases, *supra* note 41, at Chapter 24.

145 NLRB Annual Report for FY 2006, Tables 11B & D, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf. The number of objections cases filed in FY 2006 does not necessarily correspond directly to the number of representation elections conducted in that year, because, in a small number of cases, objections could have been filed in early FY 2006 for elections conducted at the end of FY 2005. Nonetheless, the number of representation elections with respect to which objections were filed should not vary materially from 9.6%.

146 395 U.S. 575.

147 NLRB, Office of Executive Secretary.

148 *Id.*

149 *Id.*

150 For example, from 24.6% (1973) to 7.5% (2007). *See* Hirsch & Macpherson, *Union Membership and Coverage Database from the CPS, available at* http://unionstats.com.

151 Hirsch & Macpherson, *Union Membership and Coverage Database from the CPS, available at* http://unionstats.com; *see also* Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors*, Working Paper #503, PRINCETON UNIV., Industrial Relations Section, at 1 (2005).

152 http://www.seiu.org/media/pressreleases.cfm?pr_id=1585.

153 NLRB Elections Data & Statistics from BNA Plus.

154 Steven Greenhouse, *Janitors' Drive in Texas Gives Hope to Unions*, N.Y. TIMES (Nov. 28, 2005).

155 Lynne Jeter, *Union-Organizing Efforts Falling Short in Mississippi*, MISS. BUS. J. (June 14, 2004).

156 Kendra Marr, *The Economy's Steady Pulse: Health-Care Sector Is Poised to Keep Expanding, But So Are Its Costs*, WASH. POST (June 13, 2008).

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178 Source: NLRB Solicitor.

179 *Id.*

180 Robert J. Flanagan, *Has Management Strangled U.S. Unions?*, J. OF LAB. RESEARCH, Vol. XXVI, No. 1, at 41 (2005).

181 Leo Troy, *Twilight for Organized Labor*, J. OF LAB. RESEARCH, Vol. XXII, No. 2, at 246 (2001).

182 H.R. Mahood and Ramona M. Mahood, *527 Organizations: New Kids on the Block*, NAT'L SOC. SCI. ASS'N, *available at* http://www.nssa.us/journals/2007-27-2/2007-27-2-11.htm.

183 Henry S. Farber and Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, NBER WORKING PAPER SERIES, Working Paper No. 4216 (1992).

184 *See, e.g.*, Steven Greenhouse, *Corruption Tests Labor While It Recruits*, N.Y. TIMES (Jan. 3, 1999).

185 Steven Kreisberg, *The Future of Public Sector Unionism in the United States*, J. OF LAB. RESEARCH, Vol. XXV, No 2, at 228 (2004).

VI. Lessons to Be Learned from Similar Legislation in Canada

186 Typically, in a mandatory secret ballot vote jurisdiction, the appropriate labour board will hold the a vote in a very short time frame. For example, Alberta provides for a secret ballot vote as soon as possible, while Ontario, Nova Scotia, and Newfoundland provide for a vote within five days of the petition and British Columbia provides for a vote within ten days of the petition.

187 Danny J. Kaufer and Michael D. Grodinsky, *Card Majority Certification, The Canadian Experience* (2008), at 8.

188 Kaufer, at 17.

189 Kaufer, p. 5.

190 *See* Province of Quebec Labour Code, R.S.Q., ch. C-27; Prince Edward Island Labour Act, ch. L-1; The Trade Union Act, ch T-17 of the Revised Statutes of Saskatchewan (1978), as amended; *see also* Canada Labour Code, L-2.

191 Kaufer, at 5.

192 *Id.* at 5-6.

193 *Id.* at 6; *see also* Prince Edward Island Labour Act, sec. 13(4), c. L-1.

194 *Les Chemins De Fer Quebec-Gatinuau Inc. v. Travailleurs Unis D Transport*, Quebec Labour Court, 50028-00982-009 (Sept. 15, 2000) (Judge Lousi Morin).

195 *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503 v. La Compagnie Wal-Mart du Canada*, 2004 QCCRT 0482.

196 *Febricland Pacific Limited and International Ladies' Garment Workers' Union, Local No 287* [1999] B.C.L.R.B.D. No. 53 (Leave for Reconsideration denied: [1999] B.C.L.R.B.D. No. 218).

197 *Certain Employees of R.C. Purdy Chocolates Ltd. And R.C. Purdy Chocolates Lt. v. Communications, Energy and Paperworkers Union of Canada*, Local 2000, [2001] B.C.L.R.B.D. No. 412.

198 *TD Canada Trust v. United Steel, Paper and Forestry*, [2007] F.D.J. No. 1175.

199 The Canadian provinces that support card check recognition account for 66% of the days not worked because of strikes and lockouts, while those provinces account for only about 33% of the workforce. *Id.* at 8 citing Ernest B. Akyeampon, *Increased Work Stoppage*, PERSPECTIVES STATISTICS CANADA (August 2006) Catalogue no. 75-001-XIE.

VII. Potential Constitutional Challenge of the EFCA

200 EFCA at § 3.

201 *Id.*

202 *Whitman v. American Trucking Assocs., Inc.*, 531 U.S. 457, 472 (2001).

203 *Id.*

204 *Id.* (*quoting J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

205 *Id.* (*citing Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

206 293 U.S. 388 (1935).

207 *Id.* at 406.

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208 *Id.* at 428 (*quoting United States v. Grimaud*, 220 U.S. 506, 517 (1911)).

209 *Id.* at 428-29.

210 *Id.* at 430.

211 295 U.S. 495 (1935).

212 *Id.* at 537.

213 *Id.* at 541-42.

214 *Whitman*, 531 U.S. at 472.

215 S.1327, 107th Cong. (2001).

216 *Id.*

217 *Hess Collection Winery v. California Agricultural Labor Relations Bd.*, 45 Cal. Rptr. 3d 609 (2006).

218 *Id.* at 626.

219 *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316, 1320 (Wash. 1976).

220 *Id.* The Washington Supreme Court further noted that for the same reasons, "compulsory arbitration statutes in other states have been held to be constitutional delegations of legislative power." *Id.* (*citing City of Amsterdam v. Helsby*, 332 N.E.2d 290, 293 (N.Y. 1975); *Harney v. Russo*, 255 A.2d 560 (Penn. 1969); *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969)).

221 *Superintending School Comm. of City of Bangor v. Bangor Ed. Ass'n*, 433 A.2d 383 (Maine 1981).

222 *Id.* at 386.

223 *Id.* at 388.

224 *Municipality of Anchorage v. Anchorage Police Dep't Employees Assoc.*, 839 P.2d 1080 (Alaska, 1992) (final and binding interest arbitration statute upheld as a constitutional delegation of authority where it contained an "elaborate and detailed structure which guides the arbitrator's decisions and guards against arbitrary action"); *Fraternal Order of Police, Colorado Lodge #19 v. City of Commerce City*, 996 P.2d 133 (Colo., 2000) (mandatory interest arbitration statute upheld as constitutional because it allowed for judicial review of the arbitrator's decision and provided sufficient standards and safeguards to guide the arbitrator); *City of Detroit v. Detroit Police Officers Assoc.*, 294 N.W.2d 68 (Mich., 1980) (statute providing for mandatory interest arbitration was not an unconstitutional delegation of authority where the statute provided reasonably precise standards to guide the exercise of delegated authority); *Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer County Improvement Authority*, 386 A.2d 1290 (N.J., 1978) (mandatory interest arbitration statute upheld where it contained standards, expressed and implied, to guide the arbitrator in the exercise of authority; although the statute did not expressly provide for judicial review, the court concluded that "such review must be available if the statutory provision is to be sustained"); *Medford Firefighters Assoc., Local No. 1431 v. City of Medford*, 595 P.2d 1268 (Or. App., 1979) (court rejected argument that statute providing that arbitration award was binding on the parties was an unconstitutional delegation of authority where the statute contained "detailed standards to guide an independent arbitrator's decision" and "judicial review is available as a safeguard against arbitrariness").

VIII. Conclusion

225 *See Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

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