Labor Union Certification Procedures: Use of Secret Ballots and Card Checks

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Summary

The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other working conditions. An issue before Congress is whether to change the procedures under which a union is certified as the bargaining representative of a union chosen by a majority of workers.

Under current law, the National Labor Relations Board (NLRB) conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by a union, worker, or employer. Workers or a union may request an election if at least 30% of workers have signed a petition or authorization cards (i.e., cards authorizing a union to represent them). The NLRA does not require secret ballot elections. An employer may voluntarily recognize a union if a majority of workers have signed authorization cards.

Legislation has been introduced in the 111th Congress that, if enacted, would change current union certification procedures. The Employee Free Choice Act of 2009, H.R. 1409 and S. 560, would require the NLRB to certify a union if a majority of employees sign authorization cards. The Secret Ballot Protection Act, H.R. 1176 and S. 478, would require secret ballot elections for union certification.

Proponents of both measures sometimes use similar language to support their positions. Employers argue that, under card check certification, workers may be pressured or coerced into signing authorization cards and may only hear the union's point of view. Unions argue that, during an election campaign, employers may pressure or coerce workers into voting against a union. Supporters of secret ballot elections argue that casting a secret ballot is private and confidential. Unions argue that, during an election campaign, employers have greater access to workers. Unions argue that card check certification is less costly than a secret ballot election. Employers maintain that unionization may be more costly to workers, because union members must pay dues and higher union wages may result in fewer union jobs.

Requiring card check certification may increase the level of unionization, while requiring secret ballot elections may decrease it. Research suggests that, where card check recognition is required, unions undertake more union drives and the union success rate is higher. The union success rate is also greater where card check recognition is combined with a neutrality agreement (i.e., an agreement where the employer agrees to remain neutral during a union organizing campaign).

To the extent that requiring secret ballot elections or requiring certification when a majority of employees sign authorization cards would affect the level of unionization, the economic effects may depend on how well labor markets fit the model of perfect competition. Requiring card check certification may improve worker benefits and reduce earnings inequality—if more workers are unionized. Requiring secret ballot elections may increase inequality in compensation—if fewer workers are unionized. This report will be updated as issues warrant.

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The National Labor Relations Act of 1935 (NLRA), as amended, gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other conditions of employment.[1] The act also requires employers to bargain in good faith with a union chosen by a majority of employees. An issue before Congress is whether to change the procedures under which a union is certified as the bargaining representative of a union chosen by a majority of workers.

Legislation was introduced in the 110th Congress that, if enacted, would have changed existing union certification procedures. Similar legislation is expected to be introduced in the 111th Congress. This report summarizes legislation introduced in the 110th Congress. The report then reviews the rights and responsibilities of workers and employers under the NLRA and the different ways that workers may form or join a union. Next, the report analyzes the potential effects of changes in union certification procedures. Finally, the report considers whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

Legislation in the 111th Congress

H.R. 1409, the Employee Free Choice Act of 2009, would require the National Labor Relations Board (NLRB) to certify a union if a majority of employees in a bargaining unit sign authorization cards designating the union as their bargaining representative.[2] If less than a majority, but at least 30%, of employees sign authorization cards, a secret ballot election may be held. (See the section on "Secret Ballot Elections" later in this report.)

H.R. 1409 would also establish procedures for reaching a first contract agreement. Within 10 days (or a longer period if agreed to by both the union and employer) after receiving a request to begin bargaining, the employer and union must meet to begin negotiations over an initial contract agreement. If the employer and union cannot reach an agreement within 90 days after bargaining has begun (or a longer period if agreed to by both parties), either party may request mediation by the Federal Mediation and Conciliation Service (FMCS). If an agreement cannot be reached within 30 days through mediation (or a longer period if agreed to by both parties), the FMCS would refer the dispute to binding arbitration. The arbitration decision would be binding on both the employer and union for two years, unless the parties agree to amend it. The legislation would increase the penalties for employer violations of certain unfair labor practices committed during a union organizing campaign or during negotiation of a first contract. H.R. 1409 was introduced by Representative George Miller on March 10, 2009, and was referred to the House Committee on Education and Labor.

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[1] The NLRA is also known as the Wagner Act, after Senator Robert Wagner of New York who sponsored the bill in the U.S. Senate. Representative William Connery of Massachusetts sponsored the bill in the U.S. House of Representatives.

[2] This section uses terms and refers to agencies—e.g., certification, recognition, bargaining unit, unfair labor practices, National Labor Relations Board (NLRB), and Federal Mediation and Conciliation Service (FMCS)—that are described later in this report.
An authorization card may serve more than one purpose. A single-purpose card authorizes the union to represent the employee signing the card. A dual-purpose card designates the union as the employees' bargaining representative and requests an election. The NLRB may not issue a bargaining order (see "Bargaining Orders" later in this report) if a union uses dual-purpose cards. Dual-purpose cards could indicate that a majority of employees want an election, but not that a majority of employees want to be represented by a union. Commerce Clearing House, *Labor Law Reporter: Labor Relations* (Chicago: CCH Inc., 2007), ¶ 3042. Bruce S. Feldacker, *Labor Guide to Labor Law*, 3rd ed. (Englewood Cliffs, N.J.: Prentice Hall, 1990), p. 72. (Hereafter cited as Feldacker, *Labor Guide to Labor Law*.)

In the Senate, the Employee Free Choice Act of 2009, S. 560, was introduced on March 10, 2009, by Senator Edward Kennedy. The bill was referred to the Committee on Health, Education, Labor, and Pensions (HELP). [3]

H.R. 1176, the Secret Ballot Protection Act, would require a secret ballot election for union certification. The bill would make it an unfair labor practice for an employer to recognize or bargain with a union that has not been selected by a majority of employees in a secret ballot election conducted by the NLRB. It would also be an unfair labor practice for a union to cause or attempt to cause an employer to recognize or bargain with a union that has not been chosen by a majority of employees in a secret ballot election. H.R. 1176 was introduced by Representative John Kline on February 25, 2009, and was referred to the House Committee on Education and Labor.

In the Senate, the Secret Ballot Protection Act of 2009, S. 478, was introduced by Senator Jim DeMint on February 25, 2009. The bill was placed on the Senate Legislative Calendar. [4]

The National Labor Relations Act

The NLRA, as amended, provides the basic framework governing labor-management relations in the private sector.[5] The act begins by stating that the purpose of the law is to improve the bargaining power of workers:

> The inequality of bargaining power between employees ... and employers ... substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners ... and by preventing the stabilization of competitive wage rates and working conditions within and between industries....
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these

[3] The Employee Free Choice Act was also introduced in the 108th, 109th, and 110th Congresses. For more information on the act, see CRS Report RS21887, *The Employee Free Choice Act*, by Jon O. Shimabukuro. Legislation that would require card check recognition was introduced in Congress as early as the 95th Congress (1977-1978). Early in the 95th Congress, Representative Frank Thompson Jr. introduced H.R. 77, the Labor Reform Act of 1977. H.R. 77 would have required the NLRB to certify a union as the exclusive bargaining representative of employees in a bargaining unit if 55% of the employees signed authorization cards. No hearings were held and no action was taken on the bill. Later in the 95th Congress, President Jimmy Carter sent to Congress proposals to amend the NLRA. H.R. 8410/S. 1883, which was also called the Labor Reform Act of 1977, was introduced in the House by Representative Frank Thompson Jr. and in the Senate by Senators Harrison Williams Jr. and Jacob Javits. H.R. 8410/S. 1883 would have created timetables for holding representation elections. The bill passed the House. In the Senate, the Senate Human Resources Committee reported a bill (renumbered as S. 2467). The measure was filibustered on the Senate floor. After six cloture votes, the bill was returned to committee for changes. The committee did not report another bill.

[4] The Secret Ballot Protection Act was also introduced in the 108th, 109th, and 110th Congresses. S. 478 includes a provision not in H.R. 1176. Section 4(b) of S. 478 states that "Nothing in this Act (or the amendments made by this Act) shall be construed to limit or otherwise diminish the remedial authority of the National Labor Relations Board." With this provision, the NLRB should, for example, be able to issue a bargaining order as a remedy to employer unfair labor practices. See the section on "Bargaining Orders" later in this report.

[5] More specifically, the NLRA applies to employers engaged in interstate commerce. 29 U.S.C. § 152(6).

> obstructions when they have occurred by encouraging the practice and procedure of collective bargaining.... [6]

The NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours, and other conditions of employment. Under the act, workers also have the right not to join a union. The act requires an employer to bargain in good faith with a union chosen by a majority of employees. To protect the rights of employers and workers, the act defines certain activities as unfair labor practices.[7]

The NLRA does not apply to railroads or airlines, federal, state, or local governments, agricultural workers, family domestic workers, supervisors, independent contractors, and others. The definition of "employee" in the NLRA does not exclude unauthorized workers. Thus, unauthorized workers can engage in union activities.[8]

National Labor Relations Board (NLRB)

The NLRA is administered and enforced by the NLRB, which is an independent federal agency that consists of a five-member Board and a General Counsel. The Board resolves objections and challenges to secret ballot elections, decides questions about the composition of bargaining units, and hears appeals of unfair labor practices.[9] The General Counsel's office conducts secret ballot

[6] 29 U.S.C. § 151. Many economists argue that there is not an inequality of bargaining power between employers and employees. For example, see Morgan O. Reynolds, *Power and Privilege: Labor Unions in America*, New York: Universe Books, 1984, pp. 59-62; and Morgan O. Reynolds, "The Myth of Labor's Inequality of Bargaining Power," *Journal of Labor Research*, vol. 12, spring 1991, pp. 168-183. The argument that workers and employers have equal bargaining power is generally based on the premise that labor markets fit the economic model of perfect competition. See the section later in this report on whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

[7] National Labor Relations Board, *Basic Guide to the National Labor Relations Act* (Washington: U.S. Govt. Print. Off., 1997), pp. 1, 17, available at http://www.nlrb.gov. (Hereafter cited as NLRB, *Basic Guide to the NLRA*.)
The Labor Management Relations Act of 1947 (P.L. 80-101, commonly called the Taft-Hartley Act) amended the NLRA to add language that employees have the right to refrain from joining a union, unless a collective bargaining agreement with a union security agreement is in effect. A union security agreement may require bargaining unit employees to join the union after being hired (i.e., a union shop) or, if the employee is not required to join the union, to pay a representation fee to the union (i.e., an agency shop). Under Section 14(b) of the Taft-Hartley Act, states may enact right-to-work laws, which do not allow contracts to include a union security agreement. Michael Ballot, Laurie Lichter-Heath, Thomas Kail, and Ruth Wang, *Labor-Management Relations in a Changing Environment*, New York: John Wiley and Sons, Inc., 1992, pp. 265-268.

[8] NLRB, Basic Guide to the NLRA, p. 37.
In a 1984 decision (Sure-Tan, Inc. v. NLRB, 467 U.S. 883), the U.S. Supreme Court ruled that the definition of employee in the NLRA does not exclude unauthorized workers. Thus, unauthorized workers can engage in union organizing and collective bargaining, can vote in NLRB elections, and are protected from unfair labor practices. But, the Supreme Court has also ruled that unauthorized workers cannot be awarded back pay as the result of violations of unfair labor practices. See CRS Report RS21186, *Hoffman Plastic Compounds v. NLRB and Backpay Awards to Undocumented Aliens*, by Jon O. Shimabukuro.

[9] A bargaining unit is a group of employees represented, or seeking representation, by a union. A bargaining unit is generally determined on the basis of a "community of interest" of the employees involved. Employees who have the same or similar interests with respect to wages, hours, and other working conditions may be grouped together into a bargaining unit. A bargaining unit may include the employees of one employer, one establishment, or one occupation or craft. A bargaining unit may include both professional and nonprofessional employees, provided a majority of professional employees vote to be members of the unit. Guards cannot be included in the same bargaining unit as other employees. A union and employer may agree on the appropriate bargaining unit. If not, the issue is settled by the NLRB. NLRB, *Basic Guide to the National Labor Relations Act*, p. 7. Feldacker, *Labor Guide to Labor Law*, pp. 39-44.

elections, investigates complaints of unfair labor practices, and supervises the NLRB's regional and other field offices.[10]

Organizing Campaign Rules

Campaign rules differ for employers, employees, and union organizers. Rules also differ for soliciting union support (e.g., expressing support for a union or handing out authorization cards) and for distributing union literature. Because of exceptions to the basic rules, the rules that apply to a specific union organizing campaign may differ from the general rules described here.[11]

Employers

Employers may campaign against unionization.[12] Employers may require employees to attend meetings during work hours where management can give its position on unionization. These meetings are called "captive audience" meetings. Employers cannot hold a captive audience meeting during the 24-hour period before an election. Supervisors can give employees written information (including memos and letters) and hold individual meetings with employees.

Employees

During work hours, employees can campaign for union support from their coworkers in both work and nonwork areas (e.g., a coffee room or the company parking lot). But employees can only campaign on their own time (e.g., at lunchtime or during breaks). If an employer does not allow the distribution of literature in work areas, employees may only distribute union literature in nonwork areas. If an employer allows the distribution of other kinds of literature in work areas, employees may also distribute union literature in those areas.

An employer may prevent employees from using the employer's e-mail for union activities (e.g., organizing and bargaining), provided the employer does not allow employees to use their work e-mail to solicit support for other causes or organizations.[13] Conversely, if an employer allows

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[10] NLRB, *Basic Guide to the NLRA*, p. 33. William N. Cooke, *Union Organizing and Public Policy: Failure to Secure First Contracts* (Kalamazoo, MI: W.E. Upjohn Institute, 1985), p. 85.

[11] Unless noted otherwise, this section is based on Stephen I. Schlossberg and Judith A. Scott, *Organizing and the Law,* 4th ed., Washington: Bureau of National Affairs, 1991, pp. 45-55. (Hereafter cited as Schlossberg and Scott, *Organizing and the Law*.) James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, Public Law and Legal Theory Working Paper Series No. 28, November 2004, p. 8, available at http://www.law.bepress.com/osulwps. (Hereafter cited as Brudney, *Neutrality Agreements and Card Check Recognition*.) Feldacker, *Labor Guide to Labor Law*, pp. 74-79.

[12] The Taft-Hartley Act of 1947 amended the NLRA to add Section 8(c), which gives employers and unions the right to express their views on unionization, provided such "expression contains no threat of reprisal or force or promise of benefit." For a legal history of this provision, see Kate E. Andrias, "A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections, *Yale Law Journal*, vol. 112, June 2003, pp. 2419-2432.

[13] In a December 2007 decision, the Board ruled that an employer's e-mail system is the employer's property and that employees do not have a statutory right to use their work e-mail for union activities. National Labor Relations Board, *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, vol. 351, no. 70, December 16, 2007, available at http://www.nlrb.gov/shared_files/Board%20Decisions/351/F35170.pdf, pp. 1, 5, 7.

employees to use their work e-mail to solicit support for other causes or organizations, employees may also use their work e-mail for union activities.[14]

Union Organizers

In general, union organizers cannot conduct an organizing campaign on company property. A union cannot reply to an employer's captive audience speech if the union has other means of reaching employees.[15] Nonemployee union organizers may be allowed in the workplace if the site is inaccessible (e.g., a logging camp or remote hotel) or if the employer allows nonemployees to solicit on company property. Union organizers may meet with employees on union property. They may hand out literature or solicit support on public property (e.g., on public sidewalks outside of a business. Organizers may also contact employees at home by phone or mail or may visit employees at home.[16] Under a neutrality agreement (described later in this report), an employer may allow organizers onto company property.

Unfair Labor Practices

To protect the rights of both employees and employers, the NLRA defines certain activities as unfair labor practices.

Employers

Although employers have the right to campaign against unionization, they cannot interfere with, restrain, or coerce employees in their right to form or join a union. An employer cannot threaten employees with the loss of their jobs or benefits if they vote for a union or join a union. An employer cannot threaten to close a plant should employees choose to be represented by a union. An employer cannot raise wages to discourage workers from joining or forming a union. An employer cannot discriminate against employees with respect to the conditions of employment (e.g., fire, demote, or give unfavorable work assignments) because of union activities. An employer must bargain in good faith with respect to wages, hours, and other working conditions.[17]

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[14] National Labor Relations Board, Office of the General Counsel, *Report on Case Developments*, May 15, 2008, available at http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf.

[15] Comment, "Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections," *University of Pennsylvania Law Review*, vol. 127, January 1979, p. 768.

[16] Under what is known as the "Excelsior" rule, within seven days after the NLRB has directed that a representation election be held or after a union and employer have agreed to hold an election, an employer must provide the regional director of the NLRB a list of the names and addresses of employees eligible to vote in the election. This list is made available to all parties. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedures in Representation Cases*, Washington: U.S. Govt. Print. Off., April 2002, p. 251. U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, May 1994, available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace, p. 68. The latter report is popularly called the "Dunlop report," after former Secretary of Labor John T. Dunlop, who chaired the commission. (Hereafter cited as John T. Dunlop, *Fact Finding Report: Commission on the Future of Worker-Management Relations.*)

[17] NLRB, *Basic Guide to the NLRA,* pp. 14-22.

Unions

Employees have the right to organize and bargain collectively. But a union cannot restrain or coerce employees to join or not join a union. A union cannot threaten employees with the loss of their jobs if they do not support unionization. A union cannot cause an employer to discriminate against employees with respect to the conditions of employment. A union must bargain in good faith with respect to wages, hours, and other working conditions. A union cannot boycott or strike an employer that is a customer of or supplier to an employer that the union is trying to organize.[18]

An unfair labor practice may be filed by an employee, employer, labor union, or any other person. After an unfair labor practice charge is filed, regional staff of the NLRB investigate to determine whether there is reason to believe that the act has been violated. If no violation is found, the charge is dismissed or withdrawn. If a charge has merit, the regional director first seeks a voluntary settlement. If this effort fails, the case is heard by an NLRB administrative law judge. Decisions by administrative law judges can be appealed to the five-member Board.[19]

Remedies

The NLRA attempts to prevent and remedy unfair labor practices. The purpose of the act is not to punish employers, unions, or individuals who commit unfair labor practices. The act allows the NLRB to issue cease-and-desist orders to stop unfair labor practices and to order remedies for violations of unfair labor practices. If an employer improperly fires an employee for engaging in union activities, the employer may be required to reinstate the employee (to their prior or equivalent job) with back pay. If a union causes a worker to be fired, the union may be responsible for the worker's back pay.[20]

In FY2007, 29,821 employees were awarded $117.3 million in back pay. Employers paid $116.8 million to 29,559 employees, while unions paid $0.5 million to 262 employees.[21] Back pay can be awarded to workers who were fired, demoted, denied work, or were otherwise discriminated against for union activities. Estimates of the number of workers who are illegally fired for union activities range from 1,000 to 3,000 a year, with more firings in the 1980s than in later years.[22] In

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[18] Ibid., pp. 23-32.

[19] National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2007* (Washington: U.S. Govt. Print. Off., October 16, 2008), p. 4, available at http://www.nlrb.gov. (Hereafter cited as NLRB, *Annual Report, Fiscal Year 2007*.) NLRB, *Basic Guide to the NLRA*, p. 36.

[20] 29 U.S.C. § 160(c). NLRB, *Basic Guide to the NLRA*, p. 38.
The amount of back pay awarded is "net back pay" plus interest. Net back pay is the amount of compensation (i.e., wages plus benefits) that a worker would have received if he or she had not been unlawfully fired less the amount of compensation received (less the expenses from looking for work) from other work during the back pay period. If a discharged employee is able to work but does not look for work, compensation that he or she could have received from work may be deducted from gross back pay. Interest on net back pay is simple interest (i.e., not compounded). National Labor Relations Board, *NLRB Casehandling Manual, Part 3, Compliance Proceedings*, available at http://www.nlrb.gov/Publications/Manuals, §§ 10536 and 10566.
In a September 2007 decision, the Board ruled that if a worker who is fired for union activities does not start to look for work within two weeks of being fired, back pay does not begin to accrue until the worker starts to look for work. National Labor Relations Board, *Grosvenor Resort*, vol. 350, no. 86, September 11, 2007, available at http://www.nlrb.gov/shared_files/Board%20Decisions/350/v35086.pdf, p. 3.

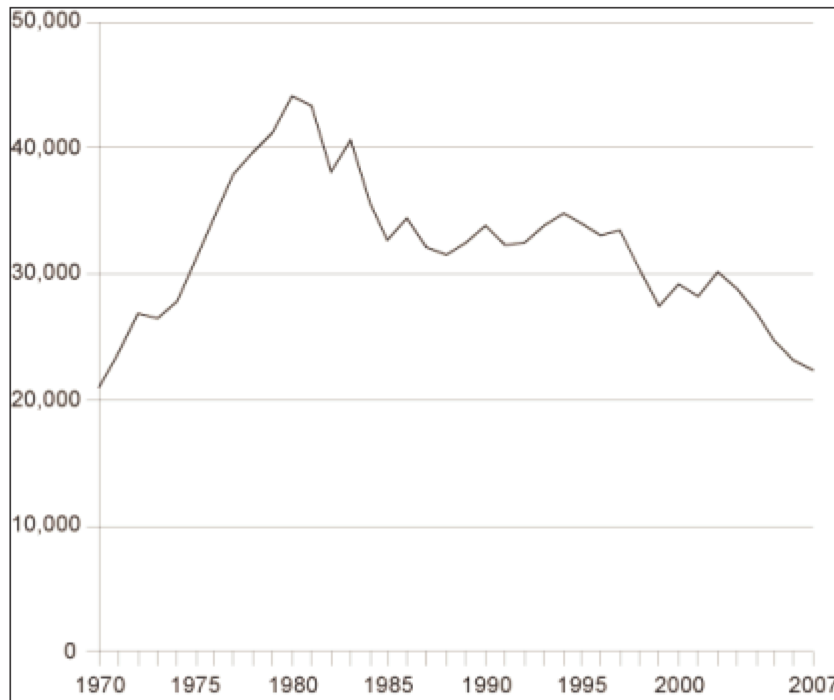
[21] NLRB, *Annual Report, Fiscal Year 2007*, Table 4.

[22] John Schmitt and Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007*, Center for Economic and Policy Research, March 2009, available at http://www.cepr.net/documents/publications/ (continued...)

a study of 400 NLRB election campaigns conducted in 1998 and 1999, Kate Bronfenbrenner concluded that workers are fired for union activities in 25% of union campaigns.[23]

Figure 1 shows the trend in the number of unfair labor practice charges filed from FY1970 to FY2007. During this period, the number of charges filed peaked at 44,063 in FY1980. The number stood at 22,331 in FY2007.[24] In FY2007, 38.7% of the charges filed were found to have merit.[25] In FY2007, 73.2% of the charges were filed against employers (by unions or individuals) and 26.8% were filed against unions (by employers or individuals).[26]

Figure 1. Unfair Labor Practice Charges, FY1970-FY2007



Source: NLRB, *Annual Reports*, various years.

(...continued)

dropping-the-ax-2009-03.pdf, p. 10. John T. Dunlop, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, pp. 69-70, 84.

[23] Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing*, U.S. Trade Deficit Review Commission, 2000, available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports, p.743.

[24] NLRB, *Annual Report, Fiscal Year 2007*, Chart 2.

[25] NLRB, *Annual Report, Fiscal Year 2007*, Chart 5. From FY1970 to FY2007, the percent of unfair labor practice charges found to have merit ranged from about 30% to 40%. NLRB, *Annual Report*, various years.

[26] The percentage calculations do not include charges alleging a "hot cargo" agreement or charges that a union did not give at least a 10-day notice before picketing or striking a health care institution. (A "hot cargo" agreement is where an employer and union agree that the employer will not do business with another employer.) NLRB, *Annual Report, Fiscal Year 2007*, Table 2. NLRB, *Basic Guide to the NLRA*, pp. 21, 32.

Union Certification and Recognition

Section 9(a) of NLRA states that a union may be "designated or selected for the purposes of collective bargaining by the *majority* of the employees" (emphasis added). Currently, there are three ways for employees to join or form a union. First, a union that is selected by a majority of employees in an election conducted by the NLRB is *certified* as the bargaining representative of employees in the bargaining unit. Second, an employer may voluntarily *recognize* a union if a majority of employees in a bargaining unit have signed authorization cards. Finally, the NLRB may order an employer to *recognize* and bargain with a union if a majority of employees have signed authorization cards and the employer has engaged in unfair labor practices that make a fair election unlikely.

A union must be certified through a secret ballot election or recognized by an employer before collective bargaining can begin. As discussed below under "Certification," a union that is certified as the result of a secret ballot election has certain advantages over a union that is recognized by an employer without an election.

Secret Ballot Elections

The NLRB conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by a union, worker, or employer. Employees or a union may petition the NLRB for an election if at least 30% of employees have signed a petition or authorization cards. An employer may request an election if a union has claimed to represent a majority of its employees and has asked to bargain with the employer (and the union itself has not requested an election). An employer is not required to give a reason for requesting an election.[27] If a majority of employees voting (i.e., not a majority of employees in the bargaining unit) in an NLRB-conducted election choose to be represented by a union, the union is certified by the NLRB as the employees' bargaining representative.[28] The NLRA does not provide a timetable for holding an election. Certification of a union by the NLRB does not require that a union and employer reach an initial contract agreement.[29]

After a petition is filed requesting an election, the employer and union may agree on the time and place for the election and on the composition of the bargaining unit. If an agreement is not reached between the employer and union, a hearing may be held in the regional office of the

[27] U.S. Supreme Court, "National Labor Relations Board v. Gissel Packing Co., Inc.," *United States Reports*, vol. 395 (Washington: U.S. Govt. Print. Off., 1969), pp. 593-594, 609. (Hereafter cited as U.S. Supreme Court, *NLRB v. Gissel Packing*.) In *NLRB v. Gissel Packing*, the U.S. Supreme Court consolidated four NLRB cases. In each case, a majority of employees signed authorization cards. The employer refused to bargain, arguing that authorization cards are inherently unreliable. The NLRB concluded that the employers committed unfair labor practices that made a fair election unlikely and ordered the employers to bargain with the respective unions. U.S. Supreme Court, *NLRB v. Gissel Packing*, pp. 575-595.

[28] 29 U.S.C. § 159(c). NLRB, *Annual Report, Fiscal Year 2007*, p. 27. National Labor Relations Board, The NLRB: What it is, What it Does, National Labor Relations Board, p. 3, available at http://www.nlrb.gov. U.S. Supreme Court, NLRB v. Gissel Packing, pp. 593-594, 609. NLRB, Basic Guide to the NLRA, p. 8.

[29] Some evidence indicates that within three years of winning an election, approximately one-fourth of unions have not reached a first contract with the employer. Thomas F. Reed, "Union Attainment of First Contracts: Do Service Unions Possess a Competitive Advantage?" *Journal of Labor Research*, vol. 11, fall 1990, pp., 426, 430. William N. Cooke, "The Failure to Negotiate First Contacts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, January 1985, p. 170.

NLRB. The regional director may then direct that an election be held. The regional director's decision may be appealed to the Board.[30]

In a secret ballot election, employees choose whether to be represented by a labor union. If an election has more than one union on the ballot and no choice receives a majority of the vote, the two unions with the most votes face each other in a runoff election.[31]

The right of an individual to vote in an NLRB election may be challenged by either the employer or union. If the number of challenged ballots could affect the outcome of an election, the regional director determines whether the ballots should be counted. Either the employer or union may file objections to an election, claiming that the election or the conduct of one of the parties did not meet NLRB standards. A regional director's decision on challenges or objections may be appealed to the Board.[32]

A union and employer may also agree to a secret ballot election conducted by a third party, such as an arbitrator, clergyman, or mediation board.[33]

The NLRB also conducts secret ballot elections to decertify a union that has previously been certified or recognized. A decertification petition may be filed by employees or a union acting on behalf of employees. A decertification petition must be signed by at least 30% of the employees in the bargaining unit represented by the union. Under what is called a "certification bar," a union that is certified after winning a secret ballot election is protected for a year from a decertification petition and from an election petition filed by another union. A secret ballot election is required for decertification.[34]

Number of NLRB Elections

Table 1 shows the number of secret ballot elections conducted by the NLRB from FY1994 to FY2007. In FY2007, the NLRB conducted 1,905 elections. Unions won 54.9% of these elections, which was up from 44.4% in FY1994.[35]

In most elections conducted by the NLRB, the employer and union agree on the composition of the bargaining unit and on the time and place for an election. In FY2007, 85.6% of elections were based on agreements between the two parties.[36]

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[30] NLRB, *Basic Guide to the NLRA*, pp. 8-9. National Labor Relations Board, *NLRB Rules and Regulations*, available at http://www.nlrb.gov/nlrb/, Sec. 102.67.

[31] NLRB, *Basic Guide to the NLRA*, p. 36.

[32] NLRB, *Annual Report, Fiscal Year 2007*, pp. 5, 110, 113.

[33] Schlossberg and Scott, *Organizing and the Law,* p. 176.

[34] NLRB, *Annual Report, Fiscal Year 2007*, p. 27. National Labor Relations Board, *The National Labor Relations Board and YOU: Representation Cases*, p. 2, available at http://www.nlrb.gov. Feldacker, *Labor Guide to Labor Law*, p. 57. House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, H.R. 4343*, Secret Ballot Protection Act of 2004*, hearings, 108th Congress, second session, Serial No. 108-70, September 2004, Washington: U.S. Govt. Print. Off., p. 11. (Hereafter cited as House Education and the Workforce, *H.R. 4343, Secret Ballot Protection Act of 2004*.)

[35] NLRB, *Annual Report, Fiscal Year 2007*, Chart 12.

[36] NLRB, *Annual Report, Fiscal Year 2007*, Table 11A.

Table 1. Number of Representation Elections Conducted by the NLRB, FY1994-FY2007

Fiscal Year	Number of Elections Conducted	Number of Elections Won by Unions	Percentage of Elections Won by Unions
2007	1,905	1,045	54.9%
2006	2,181	1,195	54.8%
2005	2,745	1,504	54.8%
2004	2,826	1,447	51.2%
2003	3,077	1,579	51.3%
2002	3,151	1,606	51.0%
2001	3,975	1,591	40.0%
2000	3,467	1,685	48.6%
1999	3,743	1,811	48.4%
1998	4,001	1,856	46.4%
1997	3,687	1,677	45.5%
1996	3,470	1,469	42.3%
1995	3,632	1,611	44.4%
1994	3,752	1,665	44.4%

Sources: National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2007* (Washington: U.S. Govt. Print. Off., October 16, 2008), Chart 12, available at http://www.nlrb.gov. National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2003* (Washington: U.S. Govt. Print. Off., April 20, 2004), Chart 12, available at http://www.nlrb.gov.

Note: The number of elections conducted includes elections that resulted in a runoff or rerun.

First Contract Agreements Following Certification

The NLRB does not collect data on how long it takes for a union and employer to reach a first contract agreement after a union wins an NLRB election. Nor does the NLRB collect data on whether the parties reach a first contract agreement. However, a recent study estimated that, within two years of winning an NLRB election, a contract had not been reached in over two-fifths of cases. This is a higher percentage than found in estimates published in previous studies. Estimates from several studies are shown in **Table 2**.

Table 2. First Contract Agreements Following Certification

Period Studied	Sample	A First Contract Agreement Was Reached	A First Contract Agreement Was Not Reached
October 1, 1999 to June 1, 2004[a]	First contract agreement after a union won an NLRB election.	In 56% of certifications, a contract was agreed to within two years of the election.	In 44% of certifications, a contract was not agreed to within two years of the election.
FY1986 to FY1993[b]	First contract agreement after a union won an NLRB election.	At least 56% of certifications resulted in a first contract. The actual percentage may be closer to two-thirds.	At most, 44% of certifications did not result in a first contract. The actual percentage may be closer to one-third.

Period Studied	Sample	A First Contract Agreement Was Reached	A First Contract Agreement Was Not Reached
1982 to 1986[c]	First contract agreement after a union won an NLRB election.	85% of service unions achieved a first contract agreement; 64% of manufacturing unions achieved a first contract.	15% of service unions did not reach a first contract agreement; 36% of manufacturing unions did not reach a first contract agreement.
April 1979 to March 1981[d]	First contract agreement after a union won an NLRB election. Sample included bargaining units of 100 or more employees.	63%	37%
1979 to 1980[e]	First contract agreement after a union won an NLRB election.	77%	33%
1970[f]	First contract agreement after a union won an NLRB election.	78%	22%
July 1, 1957 to June 30, 1962[g]	First contract agreement after a union won an NLRB election.	86%	14%

a. The estimate is based on 8,155 NLRB elections won by unions in cases closed between October 1, 1999 and June 1, 2004. Employers must bargain in good faith for one year after an NLRB election is won by a union. Therefore, the study used information from the FMCS for the period from October 1, 1999 to June 1, 2005. In recent years, the FMCS has attempted to contact the parties involved in first contract negotiations. John-Paul Ferguson, "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004," *Industrial and Labor Relations Review*, vol. 62, October 2008, pp. 3-6.

b. The 56% estimate is based on 10,783 union elections certified by the NLRB and contract agreements in which the FMCS was involved. Other certifications may have resulted in a first contract agreement (e.g., where the FMCS was not contacted for help). Therefore, the actual percentage of certifications that resulted in a first contract may be closer to two-thirds. The estimates were calculated by the FMCS for the Commission on the Future of Worker-Management Relations (the "Dunlop Commission"). U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, May 1994, available at [digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace], pp. 73, 87.

c. The estimates are based on a survey of union organizers involved in 128 elections won by unions. Thomas F. Reed, "Union Attainment of First Contracts: Do Service Unions Possess a Competitive Advantage?," *Journal of Labor Research*, vol. 11, Fall 1990, pp. 428-430.

d. The estimates are based on a survey by the AFL-CIO of 271 elections won by unions. William N. Cooke, "The Failure to Negotiate First Contracts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, January 1985, p. 164.

e. The estimates are based on a survey of unions that won 118 elections in Indiana during 1979 and 1980. The survey was conducted between June 1, 1982 and October 1, 1982. William N. Cooke, "The Failure to Negotiate First Contracts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, January 1985, pp. 169-170.

f. The estimates are based on a 1975 survey by the AFL-CIO of 2,656 elections won by unions in 1970. The estimates are based on the number of responses, which was not reported. William N. Cooke, "The Failure to Negotiate First Contracts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, January 1985, p. 164.

g. Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," *Harvard Law Review*, vol. 98, December 1984, pp. 353-355.

Although the NLRA does not provide a specific timetable for holding an election, most elections are held within two months of the filing of a petition. In FY2007, 93.9% of initial representation elections were conducted within 56 days of filing a petition. The median time to proceed to an election from the filing of a petition was 39 days.[37]

In FY2007, objections were filed in 163 of the elections conducted. Most (66.9%) of the objections were filed by unions. The remainder were filed by employers (33.1%) or by both parties.[38] For decisions reached in FY2007, it took a median of 102 days between a regional hearing on a contested election and a decision from the Board.[39] As of September 30, 2007, representation cases awaiting a Board decision had been pending for a median of 318 days from the date that an election petition was filed.[40]

Voluntary Card Check Recognition

The NLRA does not require secret ballot elections. An employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees in a bargaining unit. An employer may also enter into a card check agreement with a union before union organizers begin to collect signatures. A card check agreement between a union and employer may require the union to collect signatures from more than a majority (sometimes called a supermajority) of bargaining unit employees.[41] A neutral third party often checks, or validates, signatures on authorization cards. A collective bargaining contract may include a card check arrangement for unorganized (including new) branches, stores, or divisions of a company.

Under voluntary recognition, employees have 45 days to file a decertification petition or an election petition requesting representation by another union. After 45 days, an election petition cannot be filed for "a reasonable period of time." (See the section on "NLRB Review of Voluntary Recognition" later in this report.)

Neutrality Agreements

A card check arrangement may be combined with a neutrality agreement. Not all neutrality agreements are the same. However, in general, under a neutrality agreement an employer agrees to remain neutral during a union organizing campaign. The employer may agree not to attack or criticize the union, while the union may agree not to attack or criticize the employer. The

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[37] National Labor Relations Board, General Counsel, *Summary of Operations: Fiscal Year 2007*, Memorandum GC 08-01, p. 6, available at http://www.nlrb.gov.

[38] Ibid., Table 11C.

[39] Ibid., Table 23.
An analysis by the General Accounting Office (GAO) of cases appealed to the Board found that among cases closed between 1984 and 1989 the median time from the date of regional action on an appeal to a decision by the Board was between 190 and 256 days. U.S. General Accounting Office, *National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters*, Report HRD-91-29, January 1991, pp. 21-22. The General Accounting Office is now called the Government Accountability Office.

[40] NLRB, *Annual Report, Fiscal Year 2007*, Table 23.

[41] One study of card check agreements found that, under some agreements, a union needed signatures from at least 65% of bargaining unit employees. Adrienne E. Eaton and Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, vol. 55, October 2001, p. 48. (Hereafter cited as Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*.)

agreement may allow managers to answer questions or provide factual information to employees. A neutrality agreement may give a union access to company property to meet with employees and distribute literature. An employer may also agree to give the union a list of employee names and addresses. A neutrality agreement may cover organizing drives at new branches of a company.[42]

Corporate Campaigns

To gain an agreement from an employer for a card check campaign—possibly combined with a neutrality agreement—unions sometimes engage in "corporate campaigns." A corporate campaign may include a call for consumers to boycott the employer; rallies and picketing; a public relations campaign (e.g., press releases, Internet postings, news conferences, or newspaper and television ads); charges that the employer has violated labor or other laws; public support from political, civic, and religious leaders; and other strategies.[43]

Number of Voluntary Recognitions

Historically, the NLRB has not collected data on voluntary recognitions.[44] The FMCS, however, is involved in voluntary recognitions. The FMCS was created by the Labor Management Relations Act of 1947 (the Taft-Hartley Act). The main purpose of the FMCS is to mediate collective bargaining agreements. FMCS mediators act as a neutral third-party to help settle issues during the bargaining process.[45] Some of the requests received by the FMCS are for mediation where an employer has voluntarily agreed to negotiate with a union. **Table 3** shows the number of voluntary recognitions, for FY1996 to FY2004 (the most recent year for which published data are available), where the FMCS helped mediate a first contract. Cases where an employer voluntarily recognized a union and reached a first contract without FMCS assistance

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[42] Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 47-48. Charles I. Cohen, "Neutrality Agreements: Will the NRLB Sanction Its Own Obsolescence?" *The Labor Lawyer*, vol. 16, fall 2000, pp. 203-204. Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 5-6.
It has been argued that, under the NLRA, neutrality and card check agreements, may be unlawful. See Arch Stokes, Robert L. Murphy, Paul E. Wagner, and David S. Sherwyn, "Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot," *Cornell Hotel and Restaurant Administration Quarterly*, vol. 42, October-November 2001, pp. 91-94. A counter argument can be found in Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 28-53.

[43] A union may engage in a corporate campaign to achieve other objectives, e.g., a contract agreement. Charles R. Perry, *Union Corporate Campaigns* (Philadelphia: Industrial Research Unit, Wharton School, University of Pennsylvania, 1987), pp. 1-8, 37-53.
For different views on corporate campaigns, see U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Compulsory Union Dues and Corporate Campaigns*, hearings, 107th Cong., 2nd sess., July 23, 2002, Serial No. 107-74 (Washington: GPO, 2002). For a discussion of corporate campaigns published by the U.S. Chamber of Commerce, see Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (Washington: U.S. Chamber of Commerce, 2005), available at http://www.uschamber.com/publications/reports/06union_campaigns.htm.

[44] In a September 2007 decision, the Board said that the Regional Office of the NLRB must be notified in writing (by the employer, union, or both) of a voluntary recognition. National Labor Relations Board, *Dana Corporation*, vol. 351, no. 28, September 29, 2007, available at http://www.nlrb.gov/shared_files/OM%20Memo/2008/OM%2008-07%20Dana%20Corp%20351%20NLRB%20No%2028.pdf, p. 10. (Hereafter cited as NLRB, *Dana Corporation*, September 29, 2007.) Also see the section later in this report on "The United Auto Workers (UAW) and the Dana and Metaldyne Corporations."

[45] Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004,* p. 29, available at http://www.fmcs.gov.

are not included in these numbers. Therefore, the actual number of voluntary recognitions is probably greater than the numbers shown in **Table 3**.

Table 3. Number of Voluntary Recognitions in Which the Federal Mediation and Conciliation Service (FMCS) Provided Assistance for Initial Contracts, FY1996-FY2004

Fiscal Year	Number of Voluntary Recognitions
2004	258
2003	240
2002	273
2001	420
2000	381
1999	260
1998	227
1997	249
1996	173

Source: Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004*, p. 18, available at http://www.fmcs.gov. Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2000,* p. 39, available at http://www.fmcs.gov.

Bargaining Orders

The final way that a union may be recognized by an employer is through a bargaining order. The NLRB may order an employer to recognize and bargain with a union if a majority of employees have signed authorization cards and the employer has committed unfair labor practices that make it unlikely that a fair election can be held.

According to Feldacker, "[h]ard and fast rules are not possible in determining the situations in which the Board will issue a bargaining order. Each case is based on the specific facts of the employer's violations.[46] Bargaining orders may be appealed to the U.S. Court of Appeals and to the U.S. Supreme Court.[47]

Certification Versus Recognition

A union that wins a secret ballot election is certified by the NLRB as the bargaining representative of employees in that bargaining unit. Voluntary recognition or a bargaining order do not result in certification by the NLRB. The Taft-Hartley Act of 1947 (P.L. 80-101) eliminated certification through any method other than an election conducted by the NLRB.[48]

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[46] Feldacker, *Labor Guide to Labor Law*, pp. 90-91.

[47] Daniel Quinn Mills, *Labor-Management Relations*, 5th ed., New York: McGraw-Hill, Inc., 1994, pp. 213-217.

[48] When enacted in 1935, Section 9(c) of the NLRA (P.L. 74-198) stated that whenever a question of employee representation arises the NLRB "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." Alternative methods of selection could include authorization cards, petitions, employee (continued...)

Certification gives a union certain advantages. For instance, a union that is certified after winning a secret ballot election is protected for a year from a decertification petition and from an election petition requesting representation by another union (the "certification bar"). Under voluntary card check recognition, employees have 45 days to file a decertification petition or an election petition requesting to be represented by a different union (the "recognition bar").

The duration of an employer's duty to bargain also depends on whether a union has been certified by the Board or has been recognized voluntarily by the employer. If a union wins an NLRB election (or under a bargaining order), the employer is required to bargain in good faith for a year. Under voluntary card check recognition, the employer is required to bargain with the union for "a reasonable period of time."[49]

Withdrawal of Recognition

Under certain circumstances, an employer may withdraw recognition of a union before a contract agreement has been reached. After one year, if an employer and a certified union have not reached a contract agreement, the employer may withdraw recognition of the union if both parties have engaged in good faith bargaining and the employer doubts, on the basis of objective information (e.g., a petition signed by a majority of employees and given to the employer), that a majority of employees no longer support the union. Under a voluntary recognition, if no contract agreement has been reached after a reasonable period of time, an employer may withdraw recognition if the employer has reasonable doubt on the basis of objective information that a majority of employees support the union.[50]

(...continued)

testimony, affidavits of union membership, participation in a strike, or acceptance of strike benefits. Whichever method was used, if a majority of employees chose to be represented by a union, the union would be certified by the NLRB. During the five years after the NLRA was enacted, the NLRB issued 897 certifications after an election and 272 certifications (or 23.3% of the total) without an election. According to Becker, from 1935 to 1939:

> Certification depended upon proof presented at a trial-like hearing rather than the outcome of an election. An employee or union filed a petition requesting certification, the Board investigated, and, if it discovered "a question" concerning representation, held a hearing. At the hearing, if the union offered sufficient evidence that employees had "already chosen" to be represented, the Board would certify the union without an election.

By 1939, the NLRB only certified unions that had been chosen by a secret ballot election. This approach was written into law by the Taft-Hartley Act. The act amended Section 9(c) to say that the Board "shall direct an election by secret ballot and shall certify the results thereof." The words "or utilize any other suitable method to ascertain such representatives" were removed. National Labor Relations Board, *Legislative History of the National Labor Relations Act of 1935* (Washington: U.S. Govt. Print. Off., 1949), p. 3274. National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* (Washington: U.S. Govt. Print. Off., 1985), p. 1670. Craig Becker, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," *Minnesota Law Review*, vol. 77, 1992, pp. 507-510. Alan Roberts McFarland and Wayne S. Bishop, *Union Authorization Cards and the NLRB: A Study of Congressional Intent, Administrative Policy, and Judicial Review* (Philadelphia: University of Pennsylvania, 1969), pp. 12-14, 50. William B. Gould IV, *A Primer on American Labor Law*, 4th ed. (Cambridge, MA: MIT Press, 2004), p. 89.

[49] Feldacker, *Labor Guide to Labor Law*, pp. 57, 139-140.

[50] Feldacker, *Labor Guide to Labor Law*, p. 140.

Joy Silk Doctrine

Before the Taft-Hartley Act of 1947, only a union or employee could request a secret ballot election.[51] Section 9(c) of the Taft-Hartley Act gave employers the right to request an election. Soon after Taft-Hartley was enacted, a U.S. Appeals court ruled that an employer's right to request an election was limited to instances where the employer had "good faith" doubt that the union was supported by a majority of employees. An employer had good faith doubt if he believed that signatures on authorization cards were obtained through misrepresentation or coercion. [52] An employer who did not have good faith doubt that the union was supported by a majority of employees was required to recognize the union or face a bargaining order for refusing to bargain with a union chosen by a majority of employees. [53] This approach was known as the "Joy Silk doctrine."[54]

By 1969, the Board said that it had abandoned the Joy Silk doctrine. Thereafter, if a majority of employees signed authorization cards, an employer could voluntarily recognize the union or could insist on an election, either by requesting the union to file an election petition or by filing a petition himself. [55] In a 1974 ruling, the U.S. Supreme Court said that, if an employer insists on an election, the union must take the next step and file an election petition. [56]

Under EFCA, if a majority of employees sign authorization cards, it would be up to the union to request an election. Opponents of EFCA maintain that unions may not request secret ballot elections.

NLRB Review of Voluntary Recognition

In recent years, the NLRB has considered cases involving voluntary recognition.

The United Auto Workers (UAW) and the Dana and Metaldyne Corporations

In June 2004, the Board voted 3-2 to review two cases where bargaining unit employees filed a decertification petition within weeks after the employer recognized a union under a card check agreement. In the first case, the United Auto Workers (UAW) and Metaldyne Corporation entered into a card check and neutrality agreement in September 2002. Metaldyne recognized the UAW as the bargaining representative of production and maintenance workers at its St. Marys, Pennsylvania plant in December 2003. In the second case, the UAW and Dana Corporation entered into a card check and neutrality agreement in August 2003. The company recognized the union at its Upper Sandusky, Ohio plant in December 2003.

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[51] Marie C. Grossman, "Labor Law—Employer's Duty to Bargain—Authorization Cards," *Case Western Reserve Law Review*, vol. 21, 1970, p. 308.

[52] McFarland and Bishop, *Union Authorization Cards and the NLRB,* p. 55.

[53] Michael Eugene Earwood and Herbert C. Ehrhardt, "Labor Law—Employer's Duty to Bargain on the Basis of Authorization Cards—Union Has the Burden of Seeking an NLRB Election," *Mississippi Law Journal*, vol. 46, 1975, p. 522. McFarland and Bishop, *Union Authorization Cards and the NLRB,* p. 55.

[54] Joy Silk Mills, Inc., 85 NLRB 1263 (1949).

[55] U.S. Supreme Court, *NLRB v. Gissel Packing*, pp. 591-592, 594.

[56] U.S. Supreme Court, "Linden Lumber Division, Summer & Co. v. National Labor Relations Board," *United States Reports*, vol. 419 (Washington: U.S. Govt. Print. Off., 1974), p. 310.

In both the Dana and Metaldyne cases, the UAW and the employers entered into card check and neutrality agreements before signatures on authorization cards were collected. The signatures were validated by a neutral third party. In both cases, employees filed decertification petitions after the UAW was recognized by the employer, but before an agreement was reached on a contract. Regional NLRB directors dismissed both decertification petitions, saying that they were inconsistent with the Board's "recognition bar" doctrine. Under this doctrine, following an employer's voluntary recognition of a union, employees or another union cannot file a petition for an election for a "reasonable period of time."

Employees at both Dana and Metaldyne Corporations petitioned the NLRB to review the dismissals. The employees were represented by the National Right to Work Legal Defense Foundation. The NLRB granted the request, saying that the issue was whether voluntary recognition should prevent employees from filing a decertification petition within a reasonable time in cases where an employer and union enter into a card check agreement.[57]

In September 2007, the Board issued a decision in both cases. The Board said that, following a voluntary recognition, employees have 45 days to file a petition to decertify the union. Similarly, a rival union has 45 days to file an election petition. The petitions must be signed by at least 30% of bargaining unit employees. Employees must also receive notice of the voluntary recognition and their right to petition for a decertification or representation election. If a petition is not filed within 45 days of notice of the voluntary recognition, an election petition cannot be filed during the recognition bar period (i.e., for "a reasonable period of time").[58]

Shaw's Supermarkets and the United Food and Commercial Workers (UFCW) Union

In another case involving voluntary card check recognition, the NLRB agreed to review a case where a union claimed that an employer had agreed to voluntary card check recognition at newly acquired stores. In December 2004, the Board by a vote of 2-1 agreed to review a case involving Shaw's Supermarkets and the United Food and Commercial Workers Union (UFCW).[59] In August 2003, Shaw's opened a new store in Mansfield, Massachusetts. A majority of workers at the new store signed authorization cards. The UFCW claimed that, under a clause in an existing bargaining contract, Shaw's had agreed to voluntary card check recognition at newly acquired stores.[60] Shaw's filed a petition requesting a secret ballot election. In May 2004, an acting regional director of the NLRB dismissed Shaw's petition without a hearing. The Board agreed to review the case and returned it to the regional office for a hearing. In its decision, the Board said

> The issues in this case include (1) Whether the Employer clearly and unmistakably waived the right to a Board election; (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

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[57] National Labor Relations Board, *Order Granting Review*, Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519, vol. 341, no. 150, June 7, 2004, available at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/UnitedTransportation.pdf.

[58] NLRB, *Dana Corporation*, September 29, 2007, pp. 1, 9-10.

[59] The NLRA (Section 3(b)) allows the Board to delegate decisions to a group of three or more members.

[60] These clauses have been called "after-acquired stores" clauses, "additional stores" clauses, and "Kroger" clauses. The latter term is the result of NLRB and court decisions involving the Kroger Company.

The Board went on to say: "We do not resolve these issues at this stage. We merely hold that they are worthy of review."[61] After the hearing ordered by the Board, a regional director, in March 2005, again dismissed Shaw's petition for an election.[62] In March 2006, the Board again agreed to review the case.[63] As of November 24, 2008, the Board has not issued a final decision.

NLRB Review of Withdrawal of Recognition

Once a union and employer enter into a collective bargaining agreement, election petitions are subject to a "contract bar." A contract of up to three years bars an election petition for the duration of the contract.[64] The election petition may be for a decertification election or for representation by another union.

In August 2007, the Board issued a decision allowing an employer to withdraw recognition of a union after the third year of a longer-term contract. In January 1999, Shaw's Supermarkets entered into a five-year contract with the UFCW. After three years, a majority of employees signed a petition requesting a decertification election. Instead of going forward with a decertification election, Shaw's withdrew recognition of the union. The action was appealed to the NLRB.

Under current rules, neither the employer nor the incumbent union can initiate an election petition (requesting decertification or representation by another union) for the duration of a contract. Under a three-year "contract bar," employees or another union (but not the employer or existing union) can file an election petition after three years of a contract of more than three years. Thus, the General Counsel of the NLRB argued that Shaw's should not be allowed to withdraw recognition of the union during the term of the five-year contract. By a vote of 2-1 the Board disagreed with the General Counsel. The majority members of the Board concluded that Shaw's had acted properly when it withdrew recognition of the union. The majority said that the employer relied on evidence of a loss of majority support for the union (i.e., signatures of a majority of employees). The dissenting member said that the NLRB should have gone forward with a decertification election.[65]

[61] National Labor Relations Board, *Shaw's Supermarkets and United Food and Commercial Workers Union Local 791, AFL-CIO*, Case 1-RM-1267, December 8, 2004, pp. 1-3, available at http://www.nlrb.gov/nlrb/shared_files/decisions/343/343-105.pdf.

[62] National Labor Relations Board, *Shaw's Supermarkets and Local 791, United Food and Commercial Workers Union, AFL-CIO*, Case 1-RM-1267, http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2005/1-RM-1267(3-22-05).pdf.

[63] Bureau of National Affairs, "NLRB 2-1 Grants Shaw's Request for Review in Case Involving After-Acquired Store Clause," *Daily Labor Report*, no. 55, March 22, 2006, p. A-1.

[64] NLRB, *Basic Guide to the NLRA*, p. 10.

[65] National Labor Relations Board, *Shaw's Supermarkets*, vol. 350, no. 55, August 10, 2007, available at http://www.nlrb.gov/shared_files/Board%20Decisions/350/F35055.pdf, pp. 1-3, 7.

Potential Effects of Changes in Union Certification Procedures

Changes in union certification procedures may affect the level of unionization in the United States.[66] This section summarizes the most common arguments made in favor of requiring secret ballot elections and the most common arguments made in support of card check certification. The section also reviews research on the effects of different union certification procedures on union success rates.

The most common arguments made by the proponents of requiring card check certification and the proponents of requiring secret ballot elections are summarized in **Table 4**.[67]

Proponents of each view sometimes use similar language in support of their positions. Employers argue that, under card check certification, employees may be pressured or coerced into signing authorization cards and that employees may only hear the union's point of view. On the other hand, unions argue that, during an election campaign, employers may pressure or coerce employees into voting against a union. Proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during an election campaign, employers have greater access to employees (e.g., captive audience meetings and access to employees on company property). Unions argue that card check certification is less costly than a secret ballot election. But employers maintain that unionization may be more costly to employees, because union members must pay dues and higher union wages may result in fewer union jobs.

Research Findings

Little research has been done comparing the effects of requiring card check certification versus the effects of requiring secret ballot elections. The research that exists, however, suggests that changes in union recognition procedures could affect the level of unionization in the United States. Research suggests that the union success rate is greater with card check certification than with secret ballots. Unions also undertake more unionization drives under card check certification. The union success rate under card check certification is greater when a card check campaign is combined with a neutrality agreement.

[66] For a discussion of union membership trends in the United States, see CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.

[67] The arguments for and against requiring card check certification and secret ballot elections are considered in House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, H.R. 4343, *Secret Ballot Protection Act of 2004*.

Table 4. Common Arguments Made by Proponents of Requiring Card Check Certification and Requiring Secret Ballots

Proponents of Requiring Card Check Certification	Proponents of Requiring Secret Ballot Elections
Card check certification requires signatures from more than 50% of bargaining unit employees. A secret ballot election is decided by a majority of workers voting.	Casting a secret ballot is private and confidential. A secret ballot election is conducted by the NLRB. Under card check certification, authorization cards are controlled by the union.
During a secret ballot campaign, the employer has greater access to employees.	Under card check certification, employees may only hear the union's point of view.
Because of potential employer pressure or intimidation during a secret ballot election, some workers may feel coerced into voting against a union.	Because of potential union pressure or intimidation, some workers may feel coerced into signing authorization cards.
Employer objections can delay a secret ballot election.	Most secret ballot elections are held soon after a petition is filed.
Allegations against a union for unfair labor practices can be addressed under existing law. Existing remedies do not deter employer violations of unfair labor practices.	Allegations against an employer for unfair labor practices can be addressed under existing law. Existing remedies do not deter union violations of unfair labor practices.
Card check certification is less costly for both the union and employer. If secret ballot elections were required, the NLRB would have to devote more resources to conducting elections.	Union members must pay union dues. Unionization may result in fewer union jobs.
Neutrality agreements and card check certification may lead to more cooperative labor-management relations.	An employer may be pressured by a corporate campaign into accepting a neutrality agreements and card check certification. If an employer accepts a neutrality agreement, employees who do not want a union may hesitate to speak out.

Source: Table compiled by CRS.

Evidence from Canada suggests that the union success rate is higher under automatic card check recognition than under secret ballots. In Canada, each of the 10 provinces has laws governing union recognition.[68] In 1976, all 10 provinces allowed card check recognition. Beginning with Nova Scotia in 1977, five provinces currently require secret ballot elections.[69] British Columbia changed from card check recognition to requiring secret ballot elections in 1984, repealed mandatory voting in 1993, and restored mandatory voting in 2001.[70] Under mandatory voting a

[68] Gary N. Chaison and Joseph B. Rose, "The Canadian Perspective on Workers' Rights to Form a Union and Bargain Collectively," Edited by Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald L. Seeber, in *Restoring the Promise of American Labor Law* (Ithaca, NY: ILR Press, 1994), p. 244.

[69] The five Canadian provinces that currently require secret ballot elections are Alberta, British Columbia, Newfoundland, Nova Scotia, and Ontario. Keith Godin, Milagros Palacios, Jason Clemens, Niels Veldhuis, and Amela Karabegovic, "An Empirical Comparison of Labour Relations Laws in Canada and the United States," *Centre for Labour Market States*, No. 2, May 2006, available at http://www.fraserinstitute.ca/admin/books/files/EmpCompLRL.pdf, p. 10. (Hereafter cited as Godin et al., *An Empirical Comparison of Labour Relations Laws in Canada and the United States*.) Susan Johnson, "The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note," *Industrial Relations*, vol. 43, April 2004, p. 357.

[70] Beginning in 1993, British Columbia eliminated the requirement for secret ballot elections. Union certification occurred when at least 55% of employees signed authorization cards. Elections were held if 45% to 55% of employees signed authorization cards. Elections were held within ten days, or a longer period if the election was conducted by mail. Canada, Human Resources and Social Development, *Highlights of Major Developments in Labour Legislation*
(continued...)

union must receive a majority of votes in a secret ballot election to be recognized as the bargaining agent. Under card check recognition, a union is automatically recognized if the number of employees who sign authorization cards meets a minimum threshold. In general, a union is automatically recognized if more than 50% to 65% of employees, depending on the province, sign authorization cards.[71]

A study of the union success rate under mandatory voting and automatic card check recognition concluded that the union success rate in Canada is nine percentage points higher under card check recognition than under secret ballots. The study examined 171 union organizing campaigns between 1978 and 1996 in nine provinces.[72]

In the province of British Columbia, union recognition based on card checks was allowed until 1984. From 1984 through 1992, union certification required a secret ballot election. Card checks were again allowed beginning in 1993. (As noted above, mandatory voting resumed in 2001.) The union success rate fell almost 19 percentage points (from 93.1% to 74.5%) after mandatory voting was adopted in 1984 and increased by about the same amount when card check recognition was reinstated in 1993. In addition, during the period when mandatory voting was in effect, there were about 50% fewer attempts to organize workers. After 1993, the number of union organizing drives did not return to their pre-1984 levels.[73]

In the province of Ontario, card check recognition was allowed before 1995. Since November 1995, secret balloting is required. A study of 3,564 certification applications before and after the switch to secret ballots found that the certification rate was higher with the use of card checks. After the change to secret ballots, the union success rate fell from 72.7% to 64.3%. On the other hand, under secret balloting, larger bargaining units were organized. The average size of units certified under secret balloting was 63.1 workers, compared to an average of 36.3 employees under card check recognition. The average size of the bargaining units where organizing drives were held was also larger after secret balloting was initiated; 63.1 workers versus 39.7 workers under card check recognition. Under card check recognition, a union was certified if 55% of employees signed cards. Under secret balloting, elections are normally held within five working days after the date of an application. The study included both private and public sector employers, but excluded the construction industry.[74]

(...continued)

(1992-1993), available at http://www.hrsdc.gc.ca/en/lp/spila/clli/dllc/11_1992_1993.shtml. Beginning in 2001, secret ballot elections were required—when at least 45% of employees in a bargaining unit signed authorization cards. An election must be held within 10 days, or longer if the vote is conducted by mail. Canada, Human Resources and Social Development, *Highlights of Major Developments in Labour Legislation (2000-2001)*, available at http://www.hrsdc.gc.ca/en/lp/spila/clli/dllc/03_2000_2001.shtml.

[71] Godin et al., *An Empirical Comparison of Labour Relations Laws in Canada and the United States*, p. 11.

[72] Susan Johnson, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success," *Economic Journal*, vol. 112, pp. 355-359.

[73] The data are based on 6,550 private sector union drives from 1978 to 1998. The calculations of the union success rate are for the six years before 1984—when card check recognition was in effect, the nine years from 1984 to 1992 when mandatory voting was in effect, and the six years from 1993 to 1998 after card check recognition was restored. Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998," *Industrial and Labor Relations Review*, vol. 57, July 2004, pp. 493-494, 506-507, 510.

[74] Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card Check to Mandatory Vote Certification," *Social Science Research Network (SSRN)*, available at papers.ssrn.com, pp. 4-6, 16, 23.

A study based on unionization in Canada concluded that each one percentage point increase in unionization raised the short-term unemployment rate by 0.30 to 0.35 percentage points. The study was based in union membership data in the 10 Canadian provinces over the period from 1976 to 1997.[75]

Evidence also suggests that card check recognition may be more successful under a neutrality agreement. A study of union organizing drives in the United States concluded that union success rates are higher when a card check agreement is combined with a neutrality agreement. The study examined 57 card check agreements involving 294 organizing drives. Unions had a success rate of 78.2% in drives where card check recognition was combined with a neutrality agreement and a 62.5% success rate in cases where there was only a card check agreement.[76]

The union success rate may be higher under card check recognition because, in part, employers have less of an opportunity to campaign against unionization. Unions may initiate more organizing drives under card check recognition because a card check campaign costs less than a secret ballot election. A secret ballot election may take longer than a card check campaign and employer opposition may be greater (requiring a union to expend more resources).[77] Unions may have a higher success rate when card check recognition is combined with a neutrality agreement because there may be less employer opposition to unionization under a neutrality agreement. (Some research has concluded that management opposition is a key factor affecting union success rates in NLRB conducted elections.)[78]

Requiring card check certification if a majority of employees sign authorization cards may increase the union success rate. Whether or not requiring card check certification would reverse the decline in private sector unionization in the United States is not certain. Shrinking employment in unionized firms and decertifications may offset any increase in union membership due to requiring card check recognition. In addition, requiring card check recognition may increase employer opposition during the collection of authorization cards.

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[75] The study estimated the effect on the unemployment rate one year after an increase in union membership. Anne Layne-Farrar, "An Empirical Assessment of the Employee Free Choice Act: The Economic Implications," *Social Science Research Network (SSRN)*, available at papers.ssrn.com, pp. 20-22, 35.

[76] The success rate was measured as the percentage of organizing campaigns that resulted in union recognition. The results include some agreements in the public sector. Some of the agreements were with employers where a union represented other workers. Some of the agreements were with employers with whom the union had no existing bargaining relationship. Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 45-48, 51-52.
Because the Employee Free Choice Act may increase the number of unionized workers, a report by the Institute for America's future argues that, if the legislation were enacted, 3.5 million more persons would have health insurance and 2.8 million more people would have pensions. Alex Carter and Eric Lotke, *The Employee Free Choice Act: Impact on Health Care and Pension Benefits*, Institute for America's Future, April 2007, available at [cdncon.vo.llnwd.net/o2/fotf/EFCA/UnitedStatesofAmerica.pdf].

[77] Robert J. Flanagan, "Has Management Strangled U.S. Unions?," *Journal of Labor Research*, vol. 26, winter 2005, p. 51.

[78] Richard B. Freeman and Morris M. Kleiner, "Employer Behavior in the Face of Union Organizing Drives," *Industrial and Labor Relations Review*, vol. 43, April 1990, p. 351.

Public Opinion

According to an annual Gallup poll, Americans are generally supportive of unions. The latest poll, from August 2008, concluded that 59% of Americans approve, while 31% disapprove, of unions.[79]

According to a March 2009 Gallup poll, 53% of Americans favor a law that would make it easier for labor unions to organize; 39% of those polled said they opposed such a law; and 8% said they had no opinion. Of those polled , 34% said they were following news about EFCA either "very closely" or "somewhat closely"; 65% said they were following news about the bill "not too closely' or "not at all." Of those who have been following the bill very closely, 58% opposed the legislation. On the other hand, of those not following the bill at all, 58% favored the legislation.[80]

According to a poll from Rasmussen Reports, also from March 2009, 33% of respondents agreed that Congress should change the law to make it easier for workers to form or join a union; 40% disagreed and 27% were not sure. Sixty-one percent of respondents agreed when asked the following question: "Under current law, if enough workers express interest in forming a union, a secret ballot is held. Is it fair to require a secret ballot to determine if workers want to form a union?" Thirty-two percent of respondents agreed to the following question: "Some people believe that a secret ballot vote is not necessary and that a union should be formed whenever a majority of workers sign a card saying they want one. If a majority of a company's workers sign a card saying they want to form a union, is it fair to form a union without having a vote?" At the same time, 57% of respondents thought that it is "very difficult" or "somewhat difficult" to form a union.[81]

Two other surveys provide information about secret ballot elections and card check recognition.[82] According to a March 2006 survey conducted for the Center for Union Facts (a business group), 75% of 1,000 persons surveyed said that they believe that a secret ballot election is the most fair and democratic way for employees to decide whether or not to join a union. By contrast, 12% of respondents said that card check recognition is the most fair and democratic way to form a union.[83] According to a 2005 survey conducted by American Rights at Work (a labor group), 22% of 430 workers who had gone through a union organizing campaign said that they experienced a "great deal" of pressure from management. By contrast, 6% of workers said that they experienced a great deal of union pressure. Among workers who signed authorization cards in the presence of a union organizer, 5% said that the presence of the organizer made them feel pressure to sign the cards.[84]

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[79] The results of the poll are based on telephone interviews with 1,009 adults ages 18 and older. Jeffrey M. Jones, "Americans Remain Broadly Supportive of Labor Unions," December 1, 2008, available at http://www.gallup.com.

[80] The results of the poll are based on telephone interviews with 1,024 adults ages 18 or older. Lydia Saad, "Majority Receptive to Law Making Union Organizing Easier," Gallup, Inc., March 17, 2009, available at http://www.gallup.com.

[81] The results of the Rasmussen poll are based on an automated survey of 1,000 adults. Rasmussen Reports, *61% Say Secret Ballot Is Fair Way To Vote For A Union*, March 17, 2009, available at http://www.rasmussenreports.com.

[82] For information on the two surveys, see Bureau of National Affairs, *Two Surveys Reach Different Conclusions on Benefits of Card Checks, NLRB Elections*, no. 55, March 22, 2006, p. A-5.

[83] The survey was conducted by the Opinion Research Corporation (a social and marketing research firm). Center for Union Facts, *Nationwide Poll: Americans Overwhelmingly Prefer Secret Ballot Elections to Card Checks*, March 21, 2006, available at http://www.unionfacts.com/news.cfm?id=13.

[84] The survey was prepared by two university professors and conducted by the Eagleton Research Center at Rutgers (continued...)

Small Business

The NLRA does not include a statutory exemption for small businesses. However, the NLRB does not certify bargaining units of only one employee. Nor does it assert jurisdiction over employers with annual revenues or sales below certain standards.

Size of Bargaining Unit

The Board does not certify a bargaining unit that consists of only one employee. The principle of collective bargaining presupposes that there is more than one employee who wants to bargain collectively.[85]

Jurisdictional Standards

The NLRB has statutory jurisdiction over employers whose operations affect interstate commerce. Thus, the Board can certify the results of an election where the employer's operations affect commerce.[86] However, in addition to this statutory requirement, the NLRB has established administrative standards that an employer must meet before the Board will assert jurisdiction over a question of union representation. These jurisdictional standards are generally based on an employer's annual sales or gross revenue. For example, a retail business must have annual sales of at least $500,000 before the Board will assert jurisdiction. Hotels and motels must have at least $500,000 in gross revenues. A nonretail business must have either $50,000 in annual direct or indirect sales to buyers in other states or make $50,000 in direct or indirect purchases from sellers in other states. Private colleges and symphony orchestras must have at least $1 million in annual revenue. [87] These standards have been in effect since August 1, 1959.

The Board's ability to establish jurisdictional standards was codified by the Labor-Management Reporting and Disclosure Act of 1959, which added Section 14(c)(1) to the NLRA (29 U.S.C. 164(c)(1)). In part, Section 14(c)(1) states:

> The Board, in its discretion, may ... decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

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University. American Rights at Work, *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*, March 2006, available at http://www.americanrightsatwork.org.

[85] National Labor Relations Board, "Appropriate Unit: General Principles," *Outline of Law and Procedure in Representation Cases*, Chapter 12, available at http://www.nlrb.gov/nlrb/legal/manuals/outline_chap12.pdf, p. 130.

[86] Although a business may not sell directly to consumers in another state or buy from businesses in another state, its operations my nevertheless affect commerce. For example, the operations of a manufacturer that sells all of its goods to a retailer in the same state may affect commerce if that retailer sells to consumers in another state. NLRB, *Basic Guide to the NLRA*, p. 33.

[87] NLRB, *Basic Guide to the NLRA*, pp. 33-34. National Labor Relations Board, "Jurisdiction," *Outline of Law and Procedure in Representation Cases*, Chapter 1, available at http://www.nlrb.gov/nlrb/legal/manuals/RCase_Outline/outline_chap1.pdf, pp. 1-15.

In other words, the Board *must* assert jurisdiction over a labor dispute where the employer meets the jurisdictional standards that were in effect on August 1, 1959 (provided the employer's operations affect commerce). But the Board *may* decline to assert jurisdiction over a labor dispute that does not have a substantial effect on interstate commerce. Thus, for the purposes of EFCA, it is not certain that the Board would not certify the results of a majority card check if the employer did not meet the current jurisdictional standards (because the statute says that the Board may, as opposed to must, decline to assert jurisdiction).

If EFCA were enacted and the Board did not assert jurisdiction over smaller employers, employees at these companies may be able to unionize through other means. An employer could voluntarily recognize a union if a majority of employees sign authorization cards or a secret ballot election could be supervised by a third party other than the NLRB. In addition, Section 14(c)(2) of the NLRA (29 U.S.C. 164(c)(2)) states, in part:

> Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory ... from assuming and asserting jurisdiction over labor disputes over which the Board declines ... to assert jurisdiction.

Thus, if the NLRB does not assert jurisdiction over a successful card check campaign at a small business, a state labor agency may assert jurisdiction.

A report by the Government Accountability Office (GAO) estimated that, in February 2001, because of the jurisdictional standards, 5 million employees of small employers do not have collective bargaining rights under the NLRA (excluding supervisors and managers who are excluded by statute from coverage under the NLRA).[88] If more recent data were used, the 5 million estimate could be higher or lower today. Because the dollar amounts for the jurisdictional standards are not adjusted for inflation, employers who met the standards in 1959 would probably not meet them today. On the other hand, there are more businesses today, many of which would meet the standards.

Is There an Economic Rationale for Protecting the Rights of Workers to Organize and Bargain Collectively?

The NLRA gives private sector workers the right to organize and bargain collectively over wages, hours, and other working conditions. It also requires employers to bargain in good faith with a union chosen by a majority of employees. The act says that the purpose of the law is to improve the bargaining power of workers. This section considers whether there is an economic rationale for protecting the rights of workers to organize and bargain collectively.

[88] U.S. Government Accountability Office, *Collective Bargaining Rights: Information on the Number of Workers with and Without Bargaining Rights*, GAO-02-835, September 2002, available at http://www.gao.gov/new.items/d02835.pdf, pp. 11-12, 26-27.

Government Intervention in Labor Markets

Governments may intervene in labor markets for a number of reasons. One of these reasons is to improve competition.[89] According to standard economic theory, competitive markets generally result in the most efficient allocation of resources, where resources consist of individuals with different skills, capital goods (i.e., buildings and equipment and associated technology), and natural resources. In turn, an efficient allocation of resources generally results in greater total output and consumer satisfaction.

In competitive labor markets workers are paid according to the value of their contribution to output. Under perfect competition, wages include compensation for unfavorable working conditions. The latter theory, called the "theory of compensating wage differentials," recognizes that individuals differ in their preferences or tolerance for different working conditions—such as health and safety conditions, hours worked, holidays and annual leave, and job security.[90]

If labor markets do *not* fit the model of perfect competition, increasing the bargaining power of workers may raise wages, improve benefits (e.g., for health care and retirement), and improve working conditions to levels that would exist under competitive conditions. In labor markets where a firm is the only employer (called a monopsony) unionization could, within limits, increase both wages and employment.[91]

On the other hand, increasing the bargaining power of employees in competitive labor markets may result in a misallocation of resources—and reduce total economic output and consumer satisfaction. In competitive labor markets, higher union wages may reduce employment for union workers below the levels that would exist in the absence of unionization.[92] If unions lower employment in the unionized sector, they may increase the supply of workers to employers in the nonunion sector, lowering the relative wages of nonunion workers.[93]

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[89] The following conditions are the general characteristics of a competitive labor market: (1) There are many employers and many workers. Each employer is small relative to the size of the market. (2) Employers and workers are free to enter or leave a labor market and can move freely from one market to another. (3) Employers do not organize to lower wages and workers do not organize to raise wages. Governments do not intervene in labor markets to regulate wages. (4) Employers and workers have equal access to labor market information. (5) Employers do not prefer one worker over another equally qualified worker. Workers do not prefer one employer over another employer who pays the same wage for the same kind of work. (6) Employers seek to maximize profits; workers seek to maximize satisfaction. Lloyd G. Reynolds, Stanley H. Masters, and Colletta H. Moser, *Labor Economics and Labor Relations*, 11th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1998), pp. 16-21.

[90] Randall K. Filer, Daniel S. Hamermesh, and Albert E. Rees, *The Economics of Work and Pay*, 6th ed., New York: Harper Collins, 1996, pp. 376-390. Ronald G. Ehrenberg and Robert S. Smith, *Modern Labor Economics: Theory and Public Policy*, 7th ed. (Reading, MA: Addison-Wesley, 2000), pp. 251-259. (Hereafter cited as Ehrenberg and Smith, *Modern Labor Economics*.)

[91] Bruce E. Kaufman, *The Economics of Labor Markets*, 4th ed. (Fort Worth: Dryden Press, 1994), pp. 277-280. (Hereafter cited as Kaufman, *The Economics of Labor Markets*.)

[92] In competitive labor markets, unions can offset the employment effect of higher wages by trying to persuade consumers to buy union-made goods (e.g., campaigns to "look for the union label"), limiting competition from foreign made goods (e.g., though tariffs or import quotas), or negotiating contracts that require more workers than would otherwise be needed. Kaufman, *The Economics of Labor Markets*, pp. 276-277. Ehrenberg and Smith, *Modern Labor Economics*, p. 493. Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington: The World Bank, 2002), p. 27.

[93] If unions raise the wages of union workers and lower employment in the union sector, the supply of workers available to nonunion employers may increase, resulting in greater competition for jobs and lower wages for nonunion workers (the "spillover" effect). On the other hand, nonunion employers, in order to discourage workers from (continued...)

It is difficult, however, to determine the competitiveness of labor markets. First, identifying the appropriate labor market may be difficult. Labor markets can be local (e.g., for unskilled labor), regional, national, or international (e.g., for managerial and professional workers). Second, measuring the competitiveness of labor markets is difficult. Finally, labor markets may change over time because of demographic, economic, technological, or other changes.[94]

Distribution of Earnings

A second reason governments may intervene in labor markets is to reduce earnings inequality.[95] Competitive labor markets may allocate resources efficiently, but they may result in a distribution of earnings that some policymakers find unacceptable. Unionization may be a means of reducing earnings inequality. Some economists argue that, during a recession, greater earnings equality may increase aggregate demand and, therefore, reduce unemployment.

Collective Voice

Finally, some economists maintain that unions give workers a "voice" in the workplace. According to this argument, unions provide workers an additional way to communicate with management. For instance, instead of expressing their dissatisfaction with an employer by quitting, workers can use dispute resolution or formal grievance procedures to resolve issues relating to pay, working conditions, or other matters.[96]

Conclusion

The economic impact of requiring card check certification or secret ballot elections may rest on the desired objectives of policymakers.

By bargaining collectively, unionized workers may obtain higher wages, improved benefits, and better working conditions than if each worker bargained individually.[97] But, depending on how well labor markets fit the model of perfect competition, collective bargaining may improve or harm the allocation of resources (i.e., economic efficiency). If labor markets are competitive, increasing the bargaining power of workers may reduce economic output and consumer satisfaction, but may increase equality. On the other hand, if labor markets are not competitive,

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(...continued)

unionizing, may pay higher wages (the "threat" effect). Ehrenberg and Smith, *Modern Labor Economics*, pp. 504-508.

[94] Kaufman argues that labor markets in the United States have become more competitive since World War II. Bruce E. Kaufman, "Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy," *Journal of Labor Research*, vol. 10, summer 1989, pp. 292-293.

[95] Governments may also intervene in private markets to produce "public" goods (e.g., national defense) or correct instances where the market price of a good does not fully reflect its social costs or benefits—called, respectively, negative and positive "externalities." Air and water pollution are frequently cited as examples of negative externalities; home maintenance and improvements are often cited as examples of positive externalities.

[96] Richard B. Freeman and James L. Medoff, "The Two Faces of Unionism," *Public Interest*, no. 57, fall 1979, pp. 70-73. Richard B. Freeman, "The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations," *Quarterly Journal of Economics*, vol. 94, June 1980, pp. 644-645.

[97] Bargaining between employers and workers includes the right of workers to strike (in the private sector) and the right of employers to lock out employees.

increasing the bargaining power of workers may improve the allocation of resources as well as increase equality.[98]

By requiring card check certification, the number of organizing campaigns and the union success rate may increase. Conversely, by requiring secret ballot elections, the number of organizing drives and the union success rate may decline. Thus, compared with existing recognition procedures, requiring secret ballot elections may lower the level of unionization, whereas requiring card check certification may raise it. Accordingly, depending on the competitiveness of labor markets, requiring card check certification may either improve or harm economic efficiency. Similarly, requiring secret ballot elections may either improve or harm efficiency. If either change were enacted, it may be difficult, however, to predict or measure the size of the effects.

Regardless of the competitiveness of labor markets, requiring secret ballot elections may increase earnings inequality—if fewer workers are unionized. Requiring card check certification may reduce inequality—if more workers are unionized. Again, the size of the effects may be difficult to predict or measure.

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[98] The results of research on the wage differential between union and nonunion workers vary. But, in general, most studies find that, after controlling for individual, job, and labor market characteristics, the wages of union workers are in the range of 10% to 30% higher than the wages of nonunion workers. Although the evidence is not conclusive, some studies have concluded that unions reduce earnings inequality in the overall economy. CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.