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Card Check: Changing the Rules for Collective Bargaining

By Thomas P. Gies

Whether the misleadingly named Employee Free Choice Act (EFCA)—known as "card check"—is introduced next week or next year, it remains the central political objective of organized labor. It was also championed as a domestic priority by President Barack Obama and congressional Democrats during the 2008 campaign. The EFCA would undercut the idea of a secret ballot in unionization drives and guarantee mandatory arbitration of many initial collective bargaining agreements. Canada's experience with card check illustrates how it could further hobble the U.S. economy.

Card check would replace the government-monitored secret ballot election procedure, the cornerstone of federal labor law since the 1930s, with a regime requiring an employer to recognize a union if it is able to persuade a majority of employees to sign union authorization cards. Under card check, the secret ballot election regulated by the National Labor Relations Board (NLRB) would go the way of the buggy whip. The EFCA also includes provisions that would impose dramatic changes in the rules governing private-sector collective bargaining by requiring mandatory arbitration of first contracts with newly certified unions if agreement cannot be reached on an unrealistic fast-track timeline. The legislation would also impose Draconian new penalties against employers found to have violated the law.

There are good reasons to be skeptical of the legislation. It lacks a serious intellectual rationale. Unions claim that the NLRB election procedure is responsible for the steady decline in private-sector union membership. They are mistaken. The union "win-rate" in NLRB-conducted elections has remained relatively constant for many years at more than 50 percent.[1] The most recent statistics show that unions won 67 percent of such elections held during the first six months of 2008.[2] In a recently published monograph, University of Chicago law professor Richard A. Epstein analyzed the numbers on NLRB elections since 2000 against the loss in union jobs due to attrition. He concluded that the loss of union membership is best understood as a "lack of demand for union representation and not a defect in the election process."[3]

Card check proponents are also wrong in claiming that change is needed because of widespread violations of the law by employers. One oft-repeated claim is that employers unlawfully fire 25 percent of employees who are active in union organizing campaigns. The leading study containing this allegation is widely understood to overstate the problem, as it relies exclusively on unverified reports from union organizers whose bias is evident. Epstein reviewed more recent and objective evidence, including NLRB statistics, suggesting that the statistical likelihood of an unlawful termination is actually less than 3 percent.[4] Card check proponents likewise exaggerate the length of time it takes to conduct an election under current law. NLRB statistics show that more than 90 percent of NLRB-conducted elections

Thomas P. Gies is an adjunct scholar at AEI and a labor and employment lawyer at Crowell & Moring LLP.

take place within sixty days of the filing of the petition.[5] If anything, current law gives unions significant advantages over employers in organizing campaigns. And it is unlikely that President Obama's appointees to the NLRB will be overly sympathetic to employers accused of being anti-union.

The reality, which the unions understandably do not like to acknowledge, is that organized labor has lost ground in the private sector for a variety of reasons having little to do with the current legal system. Among other trends, many employers have taken steps to make unionization unnecessary. Sophisticated managers know that the best way to avoid an organizing drive is to pay employees competitive wages and benefits and to treat them with respect and dignity. Most companies try to do the right thing by their employees while trying to remain (or become) competitive. In the end, the percentage of private-sector workers represented by labor unions has fallen below 10 percent in the last twenty years because employers have left union organizers with few grievances to exploit.

Card check proponents ignore obvious concerns about fraud and coercion associated with employees being pressured into signing union authorization cards. In a landmark decision upholding the appropriateness of the secret ballot in union elections, the Supreme Court described card check as "inherently unreliable" because of the "natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."[6] Even organized labor recognizes that union authorization cards are an unreliable measure of employee sentiment. Experienced union organizers know that a significant number of employees will often vote against unionization after hearing both sides of the story, even if they had previously signed an authorization card. This is one reason why the standard goal of union organizing campaigns since the 1960s has been to collect signatures from 75 percent of employees if possible.

The Attack on the Secret Ballot

U.S. labor law is founded on the principle that employees should have the right to decide, free of coercion from either companies or unions, whether they wish to organize in order to bargain collectively with their employers. Under current law, the NLRB conducts a secret ballot election if at least 30 percent of employees in an appropriate unit sign union authorization cards. Elections, which are administered by the NLRB, are typically conducted within forty days after a petition for an election has been filed. Employers and unions often engage in vigorous debate during this period.

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Employers typically insist on their right to have the question of unionization decided in a secret ballot election to make sure employees hear both sides of the story. This is necessary to counter the significant advantages that current law provides the unions. Unions often begin to organize in secret, trying to convince a substantial number of employees that unionization would be to their benefit. In this effort, unions often make all sorts of promises—realistic and otherwise. Employers are forbidden from responding in kind, as it is unlawful for an employer to make either threats or promises to influence employee sentiment. In cases in which the union gathers strength before the employer knows about the organizing activity, the company will often start out far behind. However, once the campaign becomes public—normally through a petition filed with the NLRB—the employer then can exercise its statutory and First Amendment rights to communicate factually to the workforce about the issues. Through their own communications, employers are often able to provide critical information that helps employees put union promises in context. An effective factual presentation by an employer often causes a substantial number of employees who had previously signed union cards to end up voting against unionization in a secret ballot election. Union organizers recognize this. AFL-CIO internal surveys show that unions win fewer than half of the NLRB elections in which unions collect authorization cards from only 60 percent of eligible employees.[7]

The current political debate over card check has been marked by significant exaggerations and misstatements about the current process. One of the most serious is the notion, commonly advanced by card check proponents, that the EFCA would not prohibit secret ballot elections but would merely provide employees with another option: certification by "majority sign-up" or card

check.[8] The argument is disingenuous. Under the EFCA, employees would have no meaningful choice between a secret ballot election and recognition by card check. That choice would be left to union organizers who will never opt for a secret ballot election if they can get authorization cards signed by a majority of the affected employees. The only scenario in which a secret ballot election would take place under EFCA would be the relatively rare situation in which a union organizer has gotten authorization cards signed by a minority of workers—that is, more than the 30 percent required for an election but less than the majority needed for automatic certification. Union organizers almost never file an election petition in these circumstances because they know that some of the employees who signed cards will not vote for the union after hearing the other side of the story. There is no reason to believe the union organizers would change their approach under a card check regime.

Dangers of Binding Arbitration under a Card Check Regime

Another EFCA provision—requiring mandatory arbitration of initial collective bargaining agreements—is even more problematic than the elimination of the secret ballot. Under the EFCA, a company and a union would have only ninety days to negotiate an initial collective bargaining agreement following certification. If they are unsuccessful, either party can demand mediation. If, after thirty days, mediation proves unsuccessful, a contract will be imposed on the company and the union by a panel of arbitrators through a process known as "interest arbitration." The arbitrators would have the authority to dictate the terms of the collective bargaining agreement, including wages, benefits, and work rules. The contract thus created would be binding upon the parties for two years.

Interest arbitration is rarely used in the private sector, as employers routinely oppose any such union demand. They have been right to do so based on experience in the public sector. Interest arbitration developed in the public sector some thirty years ago in states that permit public employees to form unions and engage in collective bargaining. Because strikes are typically prohibited by state law, some initially believed that interest arbitration would be a quick and effective way to resolve collective bargaining disputes. Results have been decidedly mixed.

Michigan has had a form of interest arbitration for police officers and firefighters for decades, administered through a law similar to statutes enacted in many states with strong public-sector unions. Michigan's law requires interest arbitration to be resolved quickly, with the arbitration panel being selected in less than three weeks and the first hearing being held within fifteen days of the selection of the panel. Arbitration hearings are supposed to be completed in thirty days. The reality has been different. In the early 1990s, only one out of every six arbitration cases was resolved within three hundred days. Although the pace has improved somewhat in recent years, on average, interest arbitration in Michigan takes almost fifteen months from the date that a request is filed to the date that a decision is reached.[9]

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The experience with interest arbitration in Michigan and other states has led scholars to conclude that the process has significant net disadvantages. Interest arbitration is widely seen as having a chilling effect on meaningful voluntary collective bargaining, as both parties resort to posturing in the hopes of getting the best deal from the arbitrators. This, in turn, leads to what has been called the "narcotic effect" of interest arbitration, in which parties abdicate responsibility for resolving disputes in favor of resolution by third parties.[10]

Collective bargaining at the U.S. Postal Service (USPS) has seen both the chilling effect and the narcotic effect at work. The postal strike of 1970 led to a reorganization of the old Post Office into today's USPS, including a provision calling for mandatory arbitration of collective bargaining disputes in the event traditional collective bargaining reached an impasse. But impasses became standard: USPS and three of its major unions became chronically unable to reach agreements without going to arbitration. The consistent use of interest arbitration both inhibited the parties' ability to reach agreement and exacerbated the historical pattern of adversarial labor-management relations at USPS.[11]

Perhaps more important, the public-sector experience undercuts any claim that interest arbitration would result in the imposition of "reasonable" (that is, less costly) economic terms in collective bargaining settlements. Starting with California's Proposition 13 in the mid-1970s, a principal cause of taxpayer revolt across the

country has been the skyrocketing cost of public services and the resulting increased tax assessments. Increased costs imposed through interest arbitration of public-sector labor contract disputes have long been seen as a significant feature of out-of-control local government budgets.[12] The President's Commission on the United States Postal Service recounted similar evidence that USPS unionized employees enjoy a substantial total compensation premium over similarly situated private-sector employees.[13]

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As currently proposed, the EFCA is largely silent about how interest arbitration would work in practice. The bill contains no standards for the selection of arbitrators or guidance for deciding which economic terms should be imposed in arbitration. Nor are there any deadlines for concluding the process or rules as to whether economic terms awarded by arbitrators will be made retroactive. The lack of specificity on these and other key issues is troubling. The process contemplated by the EFCA would distort traditional collective bargaining by making it more likely that the employer would be subject to the whims of the arbitration panel. In the current system, parties to first-contract negotiations often fail to reach an initial contract in four months' time. It often takes both parties (particularly unions) weeks to decide on their initial demands and the composition of their bargaining teams. A common reason why a first contract cannot be negotiated in a short time is that unions, consistent with the promises they make during the organizing drive, often make unreasonable economic demands that employers sensibly resist. The passage of time often helps to induce reality, leading to more reasonable union demands. Under current law, a union's only realistic option is to call a strike, an action that is often exceedingly unpopular among the newly organized workers.

Interest arbitration would change all of that. The traditional give-and-take of voluntary collective bargaining would be replaced by the union's bet that it can get a better deal from the arbitrators. The public-sector experience provides no reason to believe that the arbitration panel would have the courage to hold the line and say no to expensive union demands. It is a bad idea, especially in a recession, to put a company's financial future in the hands of government-appointed arbitrators acting under the vaguest of standards.

Constitutional Concerns

There are also doubts about the constitutionality of the EFCA's provisions. These begin with serious questions about the First Amendment right of association of those employees who may be opposed to unionization. Under card check, these employees are effectively denied any say in whether their workplace is unionized. Such an outcome is contrary to the Wagner Act, the original federal labor law enacted in the 1930s. The Wagner Act assumed that all employees would be able to participate fully in the unionization choice through voting in secret ballot elections after hearing both sides of the story. Epstein demonstrates that the Wagner Act made such participation a quid pro quo for the statute's confiscation of an employee's individual right to contract.[14]

The almost complete lack of standards for mandatory arbitration of first contracts under the EFCA raises substantial due process concerns, particularly in light of the fact that the statute is intended to take effect immediately upon enactment, rather than after promulgation of regulations. Epstein also posits that mandatory arbitration could amount to a "taking" of an employer's property in violation of the Fifth Amendment.[15]

A Compromise?

Trial balloons seen over Washington in recent weeks suggest that President Obama may be willing to compromise on one of the EFCA's most troublesome features. The new administration might trade the card check feature of the EFCA for a "quickie election" scheme modeled on the procedures used in some Canadian provinces. While this proposal might be good politics for card check supporters, the business community and others concerned about reviving the economy should be wary. A careful look at the Canadian experience suggests that it has very little to recommend itself.

Labor relations policy in Canada is conducted at the provincial level. All Canadian provinces operated under some version of a card check regime until the 1980s, which enabled unions to organize large percentages of Canadian private-sector workers. Even today, one-third of Canadian private-sector employees are unionized. It is

no coincidence that labor economists do not cite Canada as an engine of economic productivity. Economic growth in Canada, measured by GDP and traditional constructs of labor productivity, has lagged well behind the United States. For most of the last twenty years, GDP growth in Canada has been roughly 80 percent of that seen here.[16]

The economic consequences of card check were not lost on Canadians. At various times over the past two decades, voters in six Canadian provinces supported conservative political candidates who enacted legislation calling for mandatory elections for certifying unions instead of card check. Studies show that union certification rates in those provinces promptly declined by about 20 percent.[17] Indeed, some Canadian politicians have made the card check problem a key part of their agendas. After being elected premier of Ontario on an "open for business" platform in 1995, Mike Harris eliminated card check. Yet, even after these politically driven changes, the Canadian economy remains relatively burdened. The Canadian experience confirms the inverse relationship between union density and economic productivity. It is likely no coincidence that Canada's unemployment rate has traditionally been two or three percentage points higher than that of the United States.[18]

Adopting the Canadian process here would result in a substantial increase in organized labor's success rate—perhaps to levels comparable to Canada's. This is because, under the card check process, the union remains in control of the timing of the election by deciding when to file the petition. Those Canadian provinces that require elections limit the election campaign period to two weeks or less, compared to the forty-day period typically available in the United States. Business interests across Canada complain about having inadequate time to counter unions' promises. They have tried, thus far without success, to get longer campaign periods enacted into law.

Conclusion

While we wait to see when card check will be introduced, the new administration has not neglected its political supporters. In the last two weeks, President Obama has signed several executive orders covering various aspects of labor relations. Each encourages unionization in the important and growing government procurement sector of the economy. One of these orders expressly encourages the federal government to make wider use of so-called project labor agreements on large, federally funded construction projects. Such agreements effectively guarantee that all work on such projects will be performed by unionized contractors and subcontractors and thus inflate the cost of such contracts. Another order will require all government contractors to post notices that affirmatively spell out the right to organize. A third will change current government contract allowable cost rules and prohibit employers from charging government contracts for heretofore normal business costs incurred in connection with a unionization drive. The administration's use of the executive order is a clear signal that the new president will look for ways to make it easier for unions to be successful in organizing drives.

Imagine a political environment in which only one political party has access to the media in order to make its promises, criticize the other side, and press its case. Or consider a scenario in which one of the competing political parties cannot begin its campaign until a week before the election. Neither the twenty-first century U.S. economy nor American workers would benefit from changing the rules for union organizing in the manner currently proposed by card check supporters.

Card check should be seen for what it is: an attempt to rebuild the private-sector union movement by making it dramatically easier for unions to organize American workers. Adding card check to the already heavy burden of U.S. labor and employment law that companies face today will cost the U.S. economy additional jobs. This is hardly a recipe for getting the country through the current economic crisis without substantial additional damage.

Notes

1. "Number of Elections Fell in 2006; Union Win Rate Increased for 10th Year," Daily Labor Report, June 6, 2007.

2. "Union Win Rate in NLRB Elections Increased Substantially in First Half 2008," Daily Labor Report, November 11, 2008.

3. Richard A. Epstein, "The Case Against the Employee Free Choice Act" (John M. Olin Law and Economics Working Paper 452, University of Chicago Law School, Chicago, January 2009), 35, available at www.law.uchicago.edu/files/452.pdf (accessed February 17, 2009).

4. Ibid., 34.

5. Ronald Meisberg, "Summary of Operations (Fiscal Year 2007)" (memorandum 08-01, Office of the General Counsel, National Labor Relations Board [NLRB], Washington, DC, December 5, 2007), available at www.nlrb.gov/shared_files/GC%20Memo/2008/GC%2008-01%20Summary%20of%20Operations%20FY%2007.pdf (accessed February 17, 2009).

6. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

7. AFL-CIO, *AFL-CIO Organizing* (Washington, DC: AFL-CIO, 1989).

8. This is an argument made by, among others, a pro-union group called American Rights at Work. See American Rights at Work, "Secret Ballots Aren't Enough," available at www.americanrightsatwork.org/employee-free-choice-act/resource-library/secret-ballots-arent-enough.html (accessed February 17, 2009).

9. Paul Kersey, "Card Check, Binding Arbitration and Employee Free Choice: The Arbitration Gamble" (Mackinac Center for Public Policy, Midland, MI, February 27, 2007), available at www.mackinac.org/article.aspx?ID=8326 (accessed February 18, 2009).

10. J. Joseph Lowenberg, "Interest Arbitration: Past Present and Future," in *Labor Arbitration Under Fire*, ed. James L. Stern and Joyce M. Najita (Ithaca, NY: Cornell University Press, 1997).

11. General Accounting Office (GAO), "U.S. Postal Service: Labor-Management Relations Problems Persist on the Workroom Floor" (GAO/GGD-94-201A/B, September 29, 1994), available at http://archive.gao.gov/t2pbat2/152801.pdf (accessed February 17, 2009). Three years later, the GAO issued a second report concluding that the U.S. Postal Service and its unions had made little progress in addressing their labor management problems. That report listed "continued reliance" on interest arbitration as its first conclusion as to the reasons for continued adversarial labor relations at the agency. (GAO, "U.S. Postal Service: Little Progress Made in Addressing Persistent Labor-Management Problems" [GAO/T-GGC-98-7, November 4, 1997], available at www.gao.gov/archive/1998/gg98007t.pdf [accessed February 17, 2009].)

12. The adverse budgetary impact of public-sector interest arbitration has been a recognized problem for at least twenty-five years. See "Interest Arbitration: Can the Public Sector Afford It? Developing Limitations on the Process" in *Arbitration Issues for the 1980s: Proceedings of the Thirty-Fourth Annual Meeting of the National Academy of Arbitrators*, ed. James L. Stern and Barbara D. Dennis (Washington, DC: Bureau of National Affairs, 1982), available through www.naarb.org/proceedings (accessed February 17, 2009).

13. President's Commission on the United States Postal Service, *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service* (Washington, DC: Government Printing Office, 2003), 138, available at www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf (accessed February 17, 2009).

14. Richard A. Epstein, "The Case Against the Employee Free Choice Act."

15. Ibid.

16. Jean-Pierre Maynard, "A Comparison of GDP Per Capita in Canada and the United States from 1994 to 2005" (analytical paper, Statistics Canada, Ottawa, August 2007), available at http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/11-624-M/11-624-MIE2007016.pdf (accessed February 17, 2009).

17. Susan Johnson, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success" (Working Paper 1999-06, Department of Economics, McMaster University, Hamilton, ON, February 2001), available at http://socserv.socsci.mcmaster.ca/econ/rsrch/papers/archive/99-06.pdf (accessed February 18, 2009).

18. Statistics Canada, "Unemployment Rates, Canada and the United States, 1976–2007," November 25, 2008, available at www.statcan.gc.ca/pub/71-222-x/2008001/sectionp/p-unemployment-chomage-eng.htm (accessed February 17, 2009).