MHA
Massachusetts Hospital Association

testimony

HB 2465

AN ACT RELATIVE TO WRITTEN MAJORITY AUTHORIZATION CARDS, PETITIONS AND OTHER WRITTEN EVIDENCE OF COLLECTIVE BARGAINING RESULTS

Joint Committee on Public Service

March 15, 2007

The Massachusetts Hospital Association (MHA), on behalf of our member hospitals and health systems, appreciates this opportunity to enter testimony in strong opposition to **HB 2465**, "An Act Relative to Written Majority Authorization Cards, Petitions and Other Written Evidence of Collective Bargaining Results".

HB 2465 would impose a requirement that employers must accept a particular union based on a majority of signed authorization cards *without a formal secret ballot election process*. It also extends the timeline for gathering signatures from the current sixty-day process to twelve months – an extraordinary six-fold increase. Under the so-called "card check" approach, union authorization cards are signed in the presence of an interested party – a union organizer or a pro-union co-worker. Then without the protection provided by a secret ballot and without safeguards against undue pressure, the cards are then presented as representing the true intent of the employees.

MHA supports the current legally recognized system of allowing employees to choose whether or not to be represented by a union, and by which union. Under the current system, if a simple majority of the employees sign union authorization cards, the employer may choose to recognize the union or may decide to follow the statutory process, which culminates in a secret ballot election, conducted by the Massachusetts Labor Relations Commission. This system is the same model that has been employed pursuant to the National Labor Relations Act, as amended, since 1935, with the National Labor Relations Board supervising the process. These measures represent the most reasonable and fairest process to make best use of an employee's freedom of choice, freedom from intimidation and illicit interference. There may be ways to improve the effectiveness of the current system, but eliminating the legal requirements that protect the Commonwealth's tradition and respect for an individual's right to vote in a confidential and protected manner, is not one of the ways.

The importance of the secret ballot is highlighted by what this legislation would not change: the current process for de-certification. Presumably, if eliminating the secret ballot process for union elections was in the best interest of employees, then eliminating the secret ballot process for the de-certification of a union would also be in the best interest of employees. The absence of such a provision could be an indication that this legislation is an effort to improperly tip a careful balance of power at the expense of employee rights.

AFSCME Council 93

American Federation of State, County and Municipal Employees
8 Beacon Street, Boston, MA 02108 617 367-6000
www.afscmecouncil93.org

DATE: 03/15/07
TO: Members of the Joint Committee on Public Service
FROM: Peter P. Wright, Legislative & Political Action Director
James Durkin, Legislative Agent
RE: HB2465 An Act Relative to Majority Authorization Cards, Petitions, and other Written Evidence of Collective Bargaining Results

On behalf of AFSCME Council 93, a labor union representing more than 35,000 public employees in the Commonwealth of Massachusetts, we wish express our support of HB2465, AN ACT RELATIVE TO MAJORITY AUTHORIZATION CARDS, PETITIONS, AND OTHER WRITTEN EVIDENCE OF COLLECTIVE BARGAINING RESULTS.

This proposed legislation would allow for recognition of a collective bargaining unit once a majority of employees complete and submit authorization cards or other written evidence indicating their willingness to form a union.

Currently, completion of authorization cards is just the beginning of a long road leading to the formation of a union. Under existing Massachusetts law, union organizers must get at least 30 percent of workers to sign cards. Then, once the 30 percent level is reached, the State Labor Relations Commission schedules an election.

But unfortunately, it can take up to six months or longer before the election date is set, which we believe gives management a strong and unfair disadvantage over union proponents. Most - if not all - union organizers will attest that those opposed to labor unions will use the long period before the election to do everything possible to dissuade workers from taking advantage of their legal right to vote in favor of forming a union. Typical examples include mandatory group or one-on-one meetings with employees in an attempt to convince them that voting to form a union is a bad choice. In other instances, workers are frightened with the threat of layoffs, loss of benefits and the potential of being forced into participating in illegal strikes or other job actions. Sadly, in some instances, management will go so far as to wrongfully discipline or even fire union activists.

Since management has almost exclusive access to these workers during the period before the election, it is very difficult for organizers to effectively counter management's arguments and calm the fears of workers who may have been intimidated. HB2465 allows workers to freely choose - or not choose - to form a union without fear of external influences.

In addition, this legislation helps promote healthier relationships between employers and employees by avoiding long and sometimes costly battles between the two groups.

As such, we respectfully request that members of the committee issue a favorable recommendation for HB 2465. Thank you for your consideration.

AIM the employer's voice & resource
ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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BRIDGEWATER BURLINGTON HOLYOKE MARLBOROUGH WASHINGTON, D.C.

March 15, 2007

Senator Benjamin B. Downing, Chair
Representative Jay R. Kaufman, Chair
Members of the Joint Committee on Public Service
State House, Boston, MA 02133

Re: Opposition to H.2465, An Act Relative to Written Majority Authorization Cards, Petitions and other Written Evidence of Collective Bargaining Results.

Dear Senator Downing and Representative Kaufman;

Associated Industries of Massachusetts (A.I.M) is a statewide employer association of 7,600 Massachusetts employers who collectively employ more than 680,000 people. A.I.M. members own and operate businesses throughout Massachusetts in virtually every sector and industry of the Massachusetts economy. A.I.M. and its members are strongly opposed to H.2465, An Act Relative to Written Majority Authorization Card, Petitions and other Written Evidence of Collective Bargaining Results and we ask this committee to give the bill an unfavorable report.

A.I.M. supports the current statutory system of allowing workers to choose whether or not to be represented by a union, and by which union. Under the current system, if a simple majority of the workers signs a union authorization card, the employer may choose to recognize the union or may decide to follow statutory process, which culminates in a secret ballot election, conducted by the Massachusetts Labor Relations Commission. This method is the same model that has been utilized pursuant to the National Labor Relations Act (NLRA), as amended, since 1935, with the National Labor Relations Board supervising the statutory procedures. Such procedures are clearly the fairest process designed to maximize employee free choice, freedom from coercion, unlawful interference and inappropriate peer pressure.

The legislation before you would abolish this process and would impose a requirement that employers must accept a particular union based on a majority of signed authorization cards without a formal secret ballot election process. Allowing written majority authorization, and effectively leaving the process "open" for twelve months, may subject workers to undue and inappropriate pressure to select representation. In Congressional testimony in 2004, Attorney Clyde Jacob, a labor relation law expert stated, "The risk of harassment, intimidation, and forgery in the card solicitation process is too substantial to permit union cards to be a method ... by which a union can establish legal representation. The quiet, sober, and private atmosphere of the voting booth should be the preferred method in all cases". Moreover, when Congress enacted the NLRA in 1935, it was intended to provide a comprehensive national system of collective bargaining and labor relations in the private sector, superseding state laws. A.I.M. believes that the NLRA creates significant preemption issues for this legislation if it becomes law.

We urge the Committee to reject this bill and to retain the current system in Massachusetts.

Sincerely,

John R. Regan
Vice President, Government Affairs

#2465

Written Majority Authorization

Jurisdiction	Legal Authority	Effect
Federal (National Labor Relations Act)	Employee Free Choice Act HR 800 (enacted by House, 3-1-07; pending in the Senate)	Mandatory – would oblige employer to recognize union on basis of WMA (recognition based on WMA is currently permissive under the NLRA)
Federal (Railway Labor Act)	National Mediation Board Representation Manual § 7.0 (revised text eff. 6-21-05)	Permissive – recognition based on WMA is lawful if agreed to by the union and carrier
Alaska	Alaska Statutes § 23.40.100, § 42.40.750; 8 AK Admin. Code § 97.110	Permissive – with respect to public employees and employees of Alaska Railroad Corporation
California	Cal. Gov't Code §§ 3507.1, 3577, 71636.3; Cal. Educ. Code § 92625	Mandatory – WMA-recognition required for employees of local public agencies, public-sector higher education employees, Trial Court employees, and employees of firms performing service contracts for the University of California
Illinois	IL Public Labor Relations Act 5 ILCS 315/9 IL Educational Labor Relations Act, 115 ILCS 5/7	Recognition based on WMA mandatory for public employees, and in public schools and public higher education
City of Duluth, Minnesota	Ordinance 06-042-0 (10-23-06)	Mandatory – recognition based on WMA required for hotels and restaurants that receive certain city subsidies
New Jersey	NJ Employer-Employee Relations Act, NJ Stat. §§ 34:13A-5.1 & 5.3	Mandatory – recognition based on WMA required for public employers and most private-sector employers not covered by the National Labor Relations Act
New Mexico	N.M. Stat. Anno. Chapter 10, § 10-7E-14	Permissive – public employers may agree to recognition based on WMA
New York	Consol. L. of N.Y. c. 7, art. 14, § 207, c. 18, art. 2, § 12 (Tribal-state Compact), c. 31, art. 20, § 705	Mandatory – Recognition based on WMA is required for non-NLRA private-sector employers and Indian gaming casinos, and presumptively required for public employers
Ohio	Ohio Rev. Code § 4117.05	Permissive for public employers
Oklahoma (municipalities)	Okla. Stat. Ann. Title 11, § 51-211	Mandatory – recognition based on WMA is required for public employees of larger cities

The Commonwealth of Massachusetts
HOUSE OF REPRESENTATIVES
STATE HOUSE, ROOM 134 BOSTON 02133-1054

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REPRESENTING THE PEOPLE
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Vice Chair
Committee on Municipalities & Regional Government
Member, Committee on Ways & Means
Member, Committee on Education

March 15, 2007

Joint Committee on Public Service
State House
Boston, MA 02133

Dear Chairman Kaufman, Chairman Downing, and Honorable Members of the Committee:

I write in support of H. 2465, *An Act Relative to Written Majority Authorization Cards, Petitions, and other Written Evidence of Collective Bargaining Results.*

House Bill 2465 allows for the recognition of a labor organization upon the written authorization from a majority of employees in the form of signed cards, petitions or other written evidence.

While employees in Massachusetts have a legal right to form unions, employers often utilize intimidation to prevent employees from doing so. This legislation protects the confidentiality of the workers and allows them to exercise their right to form a union without fear of repercussion from their employers. Majority authorization procedures also ensure a democratic process as a majority of workers must sign written forms in order for a union to be recognized.

Labor unions play a vital role in protecting the rights of our workers. I ask that the Committee report H. 2465 favorably to allow more of our workers the security unions provide. Thank you for your time and consideration.

Sincerely,

Alice K. Wolf

Alice K. Wolf
State Representative

NFIB
The Voice of Small Business®

MASSACHUSETTS

March 20, 2007

Honorable Jay R. Kaufman
House Chairman, Committee on Public Service
State House – Room 473B
Boston, MA 02133

Re: House Bill No. 2465 – Legislation Relative to Written Majority Authorization Cards, Petitions and other Written Evidence of Collective Bargaining Results

Dear Representative Kaufman:

I have enclosed copies of testimony from the National Federation of Independent Business (NFIB) regarding the above-entitled legislation for you, committee staff, and the Senate members of the Public Service Committee.

Thank you for your attention.

Very truly yours,

William B. Vernon

WBV:as

Enclosure

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Testimony of

Bill Vernon, State Director, National Federation of Independent Business
In Opposition to H. 2465, Relative to Written Majority Authorization Cards, Petitions and Other Written Evidence of Collective Bargaining Results
Before the Joint Committee on Public Service
March 19, 2007

Chairman Downing and Chairman Kaufman and Members of the Public Service Committee:

My name is Bill Vernon. I am the Massachusetts Director of the National Federation of Independent Business (NFIB). A non-profit, non-partisan organization, NFIB is the nation's and our state's largest small business advocacy group. In Massachusetts, NFIB represents thousands of small and independent business owners involved in all types of industry, including manufacturing, retail, wholesale, service, and agriculture. The average NFIB member has five employees and annual gross revenues of about $450,000. In short, NFIB represents the small Main Street business owners from across our state. On behalf of those small and independent business employers in the Commonwealth, I urge you to oppose House Bill No. 2465, legislation designed to eliminate workers' right to vote in private on whether to join a union and which union to join.

The current statutory procedure for workers to choose a union for representation in collective bargaining negotiations culminates in a fair and orderly secret ballot election monitored and governed by neutral observers. This legislation would replace that procedure with a process that culminates in a conversation or argument in a parking lot or in a private home. Secret ballot elections – where the campaigning ends and voters make their decisions in private and with dignity – are the cornerstone of American democracy and afford the best protection against voter intimidation.

Public employees with important public responsibilities are often most deserving of protection from pressure tactics and intimidation. Provisions in House Bill No. 2465 to allow the election process to remain open for one year can only increase the possibility that inappropriate electioneering tactics will be employed to garner sufficient support from reluctant or undecided workers.

Unions once fought hard on behalf of workers to ensure their right to secret ballot elections to choose to form or join an existing union. House Bill No. 2465 is a reversal of current labor law and of labor's position on this issue. Labor was right the first time.

Thank you.

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My name is Bill Vernon. I am the Massachusetts Director of the National Federation of Independent Business (NFIB). A non-profit, non-partisan organization, NFIB is the nation's and our state's largest small business advocacy group. In Massachusetts, NFIB represents thousands of small and independent business owners involved in all types of industry, including manufacturing, retail, wholesale, service, and agriculture. The average NFIB member has five employees and annual gross revenues of about $450,000. In short, NFIB represents the small Main Street business owners from across our state. On behalf of those small and independent business employers in the Commonwealth, I urge you to oppose House Bill No. 2465, legislation designed to eliminate workers' right to vote in private on whether to join a union and which union to join.

The current statutory procedure for workers to choose a union for representation in collective bargaining negotiations culminates in a fair and orderly secret ballot election monitored and governed by neutral observers. This legislation would replace that procedure with a process that culminates in a conversation or argument in a parking lot or in a private home. Secret ballot elections – where the campaigning ends and voters make their decisions in private and with dignity – are the cornerstone of American democracy and afford the best protection against voter intimidation.

Public employees with important public responsibilities are often most deserving of protection from pressure tactics and intimidation. Provisions in House Bill No. 2465 to allow the election process to remain open for one year can only increase the possibility that inappropriate electioneering tactics will be employed to garner sufficient support from reluctant or undecided workers.

Unions once fought hard on behalf of workers to ensure their right to secret ballot elections to choose to form or join an existing union. House Bill No. 2465 is a reversal of current labor law and of labor's position on this issue. Labor was right the first time.

Thank you.

National Federation of Independent Business - MASSACHUSETTS
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The Voice of Small Business®

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Testimony of

Bill Vernon, State Director, National Federation of Independent Business
In Opposition to H. 2465, Relative to Written Majority Authorization Cards, Petitions and Other Written Evidence of Collective Bargaining Results
Before the Joint Committee on Public Service
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GREATER BOSTON LABOR COUNCIL, AFL-CIO

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RICHARD M. ROGERS
Executive Secretary-Treasurer

LOUIS A. MANDARINI, JR.
President

PATRICIA ARMSTRONG
Vice-President

March 12, 2007

Dear Representative,

The freedom to join a union is a fundamental union right protected by our constitutional freedom of association, our nation's labor laws, and international human rights laws, including the 1948 Universal Declaration of Human Rights. In the United States the right to form a union has been seriously eroded resulting in a system where employer harassment, intimidation and termination of workers are standard practice in union organizing drives.

Last year the Massachusetts Legislature took a positive step by passing the 'Majority Authorization' bill, which would have allowed for union recognition when a majority of employees sign authorization cards. Unfortunately former Governor Romney vetoed the bill at the end of the 2005-2006 legislative session. The committee on Public Service will soon be conducting a hearing on the ' Majority Authorization' bill and we urge you to work for swift passage of this legislation.

In Congress the 'Employee Free Choice Act' has passed the House of Representatives. This initiative to reform our national labor laws is of the utmost importance to organized labor. We are asking you to lend your support to this effort by signing the enclosed pledge. The AFL-CIO has set a goal of collecting thousands of pledges from elected officials to demonstrate the wide spread support that 'Employee Free Choice Act' enjoys as we fight to restore the freedom to join unions.

Sincerely,

Richard M Rogers
Executive Secretary-Treasurer

H2465

Employee Free Choice Act of 2007 (Engrossed as Agreed to or Passed by House)

HR 800 EH

110th CONGRESS
1st Session
H. R. 800

AN ACT

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Employee Free Choice Act of 2007'.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) In General- Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

`(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

`(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include--

`(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

Order Code RL32930

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

May 23, 2005

Gerald Mayer
Economic Analyst
Domestic Social Policy Division

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

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 working conditions. An issue before Congress is whether to change the procedures under which workers choose to join, or not join, a union.

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, employees, or an employer. Employees or a union may request an election if at least 30% of employees have signed a petition or authorization cards (i.e., cards authorizing a union to represent them). The NLRA does not require secret ballot elections, however. An employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees. An employer may also enter into a card check agreement with a union before organizers begin to collect signatures.

Legislation introduced in the 109th Congress, H.R. 874, would require secret ballot elections for union certification. Other legislation, S. 842 and H.R. 1696, would require the NLRB to certify a union if a majority of employees sign authorization cards (i.e., card check recognition).

In general, proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during a secret ballot campaign, employers have greater access to employees. Employers argue that, under card check recognition, employees may only hear the union's point of view. Employers argue that employees may be misled or pressured into signing authorization cards. Unions argue that, during a secret ballot campaign, employer threats and intimidation may cause some employees to vote against a union. Unions argue that card check recognition is less costly than a secret ballot election. Employers argue that, in the long run, unionization may be more costly to employees, because of union dues and fewer union jobs.

Universal card check recognition may increase the level of unionization, while mandatory secret ballot elections may decrease it. Research suggests that the union success rate is greater with card check recognition than with secret ballots, that unions undertake more union drives under card check recognition, and that the union success rate under card check recognition is greater when a card check campaign 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 mandatory secret ballots or universal card check recognition would affect the level of unionization, the economic effects may depend on how well labor markets fit the model of perfect competition. Universal card check recognition may reduce earnings inequality — if more workers are unionized. Mandatory secret ballot elections may increase inequality — if fewer workers are unionized. This report will be updated as issues warrant.

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

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 working conditions.[1] An issue before Congress is whether to change the procedures under which workers choose to join, or not join, a union.

This report begins with a summary of legislation that would, if enacted, change existing union recognition procedures. The report then reviews the rights and responsibilities of employers and employees under the NLRA. The report then examines the potential impact of changes in union recognition procedures. Finally, the report considers whether there is an economic rationale for granting workers the right to organize and bargain collectively.

Legislation and NLRB Action

Legislation has been introduced in the 109th Congress that would, if enacted, change union recognition procedures. In addition, the National Labor Relations Board (NLRB) is currently reviewing two cases that may affect recognition procedures under a card check agreement.[2]

H.R. 874, the "Secret Ballot Protection Act of 2005," 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. 874 was introduced by Representative Charlie Norwood and has been referred to the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce.

S. 842 and H.R. 1696, the "Employee Free Choice Act," would require the NLRB to certify a union if a majority of employees sign authorization cards (i.e., cards authorizing a union to represent them). The bill would also establish procedures for reaching an initial contract agreement. If a union and employer cannot reach an agreement within 90 days (or a longer period if agreed to by both the union

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

[2] This section uses terms — unfair labor practices and neutrality agreements — that are described below in the section on "The National Labor Relations Act."

and employer), either party could request mediation by the Federal Mediation and Conciliation Service (FMCS). Disputes that cannot be settled through mediation would be subject to binding arbitration. The legislation would increase penalties for employer violations of certain unfair labor practices committed during a union organizing campaign or during negotiation of a first contract. S. 842 was introduced by Senator Edward Kennedy; H.R. 1696 was introduced by Representative George Miller. The Senate measure was referred to the Committee on Health, Education, Labor, and Pensions. The House bill was referred to the Committee on Education and the Workforce.[3]

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 five-member board resolves objections and challenges to secret ballot elections. It also hears appeals of unfair labor practices and resolves questions about the composition of bargaining units. The General Counsel's office conducts secret ballot elections, investigates complaints of unfair labor practices, and supervises the NLRB's regional and other field offices.[4]

Under current law, if a union has been certified by the NLRB in a secret ballot election, the certification is binding for at least one year. During this period, petitions for a decertification election are dismissed. Once a union and employer enter into a first contract, petitions are subject to a "contract bar." A contract of three years or less bars an election for the period covered by the contract.[5]

The NRLB is currently reviewing 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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[3] While not related to union recognition procedures, H.R. 1748, the "Union Member Freedom from Strikes Act of 2005," would make it an unfair labor practice for a union to strike over a contract dispute unless employees have voted by secret ballot to reject the employer's last contract proposal. H.R. 1748 was introduced by Rep. Charlie Norwood and was referred to the House Committee on Education and the Workforce.

[4] National Labor Relations Board, *Basic Guide to the National Labor Relations Act*, U.S. Govt. Print. Off., 1997, p. 33, available at [http://www.nlrb.gov], (Hereafter cited as NLRB, *Basic Guide to the NLRA*.) William N. Cooke, *Union Organizing and Public Policy: Failure to Secure First Contracts* (Kalamazoo, MI., W.E. Upjohn Institute), 1985, p. 85.

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

In both the Dana and Metaldyne cases, the UAW and the employers entered into card check and neutrality agreements before 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 but before an agreement was reached on a contract. Regional NLRB directors dismissed both petitions, saying that "a reasonable time" had not passed since the UAW was recognized as the workers' bargaining representative. Employees at both companies petitioned the NLRB to review the dismissals. The employees are represented by the National Right to Work Legal Defense Foundation. The NLRB granted the request, saying that the issue is 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.[6] The NLRB has indicated that decisions in the two cases are not expected before spring 2005.[7,8]

The National Labor Relations Act

The NLRA, as amended, provides the basic framework governing labor-management relations in the private sector.[9] The act begins by stating that the purpose of the act 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 obstructions when they have occurred by encouraging the practice and procedure of collective bargaining....[10]

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[6] National Labor Relations Board, *Order Granting Review*, June 7, 2004, Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519, available at [http://www.nlrb.gov/nlrb/shared_files/decisions/341/341-150.pdf]. Bureau of National Affairs, "NLRB 3-2 Agrees to Review Dismissal of Petitions Filed Shortly After Recognition," *Daily Labor Report*, no. 110, June 9, 2004, p. AA-1.

[7] Bureau of National Affairs, "Battista Tells Labor Law Conference Neutrality Ruling Not Likely Before Spring," *Daily Labor Report*, no. 216, Nov. 9, 2004, p. C-1.

[8] The General Counsel of the NLRB has proposed that employees be allowed to file a decertification petition within 21 days following an employer recognition of a union under a card check agreement. The decertification petition would have to be signed by at least 50% of bargaining unit employees. Bureau of National Affairs, "Rosenfeld Discusses Voluntary Recognition, Decertification Bar During Labor Law Forum," *Daily Labor Report*, no. 224, Nov. 22, 2004, p. A-7.

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

[10] 29 U.S.C. § 151. Many economists argue that there is not an inequality of bargaining

(continued...)

The NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions through a representative of their choosing. Under the act, workers also have the right not to join a union.[11] To protect the rights of employers and employees, the act defines certain activities as unfair labor practices.[11,12]

The NLRA does not apply to railroads; airlines; federal, state, and local governments; agricultural laborers; family domestic workers; supervisors; independent contractors; and others.[13]

Forming or Joining a Union

Employees may form or join a union either through a successful secret ballot election or through voluntary recognition. Under some circumstances, the five-member board may order an employer to bargain with a union, even though the union lost a secret ballot 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, employees, or an 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 file a petition if a union has claimed to represent a majority of its employees and has

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[10] (...continued)
power between employers and employees. For example, see Morgan O. Reynolds, *Power and Privilege: Labor Unions in America*, (N.Y., 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 below on whether there is an economic rationale for granting workers the right to organize and bargain collectively.

[11] NLRB, *Basic Guide to the NLRA*, p. 1.

[12] The Labor Management Relations Act of 1947 (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 union security agreements. 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.

[13] NLRB, *Basic Guide to the NLRA*, p. 37.

sought to bargain with the employer on behalf of the workers.[14] The NLRA does not provide a specific timetable for holding an election.

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 NLRB. The regional director may then direct that an election be held. The regional director's decision may be appealed to the five-member board.[15]

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.[16]

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 either 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 five-member board.[17]

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.[18]

The NLRB also conducts elections to decertify unions that have previously been 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. A secret ballot election is required for decertification.[19]

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[14] 29 U.S.C. § 159(c). National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2004*, U.S. Govt. Print. Off., Apr. 29, 2005, available at [http://www.nlrb.gov], pp. 45, 193-195. (Hereafter cited as NLRB, *Annual Report, Fiscal Year 2004*.) National Labor Relations Board, *The NLRB: What it is, What it Does*, National Labor Relations Board, p. 3, available at [http://www.nlrb.gov], NLRB, *Basic Guide to the NLRA*, p. 8.

[15] NLRB, *Basic Guide to the NLRA*, pp. 8-9. Stephen I. Schlossberg and Judith A. Scott, *Organizing and the Law*, 4th ed., Bureau of National Affairs, Washington, 1991, pp. 192-195. (Hereafter cited as Schlossberg and Scott, *Organizing and the Law*.)

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

[17] NLRB, *Annual Report, Fiscal Year 2004*, pp. 5, 190, 193.

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

[19] NLRB, *Annual Report, Fiscal Year 2004*, p. 45. National Labor Relations Board, *The National Labor Relations Board and YOU: Representation Cases*, p. 2., available at [http://www.nlrb.gov], House, Committee on Education and the Workforce, Subcommittee

(continued...)

Number of NLRB Elections. **Table 1** shows the number of secret ballot elections conducted by the NLRB in FY1994 through FY2004. In FY2004, the NLRB conducted 2,826 elections. Unions won 51.2% of these elections, which was up from 44.4% in FY1994. Certification of a union by the NLRB does not require that a union and employer reach a contract agreement.[20]

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 FY2004, of the 2,826 elections conducted, 2,312 (or 81.8%) were based on agreements between the parties.[21]

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 FY2004, 93.6% of initial representation elections were conducted within 56 days of filing a petition.[22]

In FY2004, objections were filed in 242, or 8.6%, of the 2,826 elections conducted. Most (61.2%) of the objections were filed by unions. The remainder were filed by employers (37.6%) or by both parties.[23]

For decisions reached in FY2004, it took a median of 133 days between a regional hearing on a contested election and a decision from the five-member board.[24,25]

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[19] (...continued)
on Employer-Employee Relations, *H.R. 4343, Secret Ballot Protection Act of 2004*, hearings, 108th Congress, second session, Serial No. 108-70, Sept. 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*.)

[20] 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, Jan. 1985, p. 170.

[21] NLRB, *Annual Report, Fiscal Year 2004*, Table 11A.

[22] National Labor Relations Board, General Counsel, *Summary of Operations: Fiscal Year 2004*, Dec. 10, 2004, p. 7, available at [http://www.nlrb.gov].

[23] NLRB, *Annual Report, Fiscal Year 2004*, Table 11C.

[24] Ibid., Table 23.

[25] An analysis by the General Accounting Office (GAO) of cases appealed to the five-member 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, Jan. 1991, pp. 21-22. The General Accounting Office is now called the Government Accountability Office.

Table 1. Number of Representation Elections Conducted by the NLRB, FY1994-FY2004

Fiscal Year	Number of Elections Conducted	Number of Elections Won by Unions	Percent of Elections Won by Unions
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%

Source: National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2004*, U.S. Govt Print. Off., Apr. 29, 2005, available at [http://www.nlrb.gov], p. 20. National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2003*, U.S. Govt Print. Off., Apr. 20, 2004, available at [http://www.nlrb.gov], p. 18.

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

Voluntary Recognitions. 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. An employer may also enter into a card check agreement with a union before 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 (i.e., a supermajority) of bargaining unit employees.[26] A neutral third party often checks, or validates, signatures on authorization cards. A collective bargaining contract may include a card check arrangement for unorganized branches or divisions of a company.[27]

Bargaining Orders. Under some circumstances, an employer may be ordered to bargain with a union even though the union lost the election. If the five-member board determines that "pervasive" employer violations of unfair labor practices undermined the election and if a majority of employees signed authorization cards, the board may order the employer to bargain with the union. The union must file

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[26] 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, Oct. 2001, p. 48. (Hereafter cited as Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements.*)

[27] Ibid., p. 48.

objections to the election and file unfair labor practice charges against the employer.[28] (See the discussion of "Unfair Labor Practices" below.)

Neutrality Agreements. A card check arrangement may be combined with a neutrality agreement. Not all neutrality agreements are the same. But, in general, 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 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 the company.[29,30]

The NLRB does not collect data on voluntary recognitions. 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.[31] Some of the requests received by the FMCS are for mediation where an employer has voluntarily agreed to negotiate with a union. **Table 2** shows the number of voluntary recognitions, for FY1996 to FY2004, where the FMCS helped mediate a first contract. Cases where an employer voluntarily recognized a union and reached a first contract without FMCS assistance are not included in these numbers. Therefore, the actual number of voluntary recognitions is probably greater than the numbers shown in **Table 2**.

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[28] If employer unfair labor practices make it unlikely that a fair election can be held, the board may issue a bargaining order without holding an election. Bruce S. Feldacker, *Labor Guide to Labor Law*, (3rd ed., Prentice Hall, Englewood Cliffs, N.J., 1990), pp. 90-93. (Hereafter cited as Feldacker, *Labor Guide to Labor Law*.) Schlossberg and Scott, *Organizing and the Law*, pp. 180-181.

[29] 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. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, Public Law and Legal Theory Working Paper Series No. 28, Nov. 2004, pp. 5-6, available at [http://.www.law.bepress.com/osulwps]. (Hereafter cited as Brudney, *Neutrality Agreements and Card Check Recognition*.)

[30] 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, Oct.-Nov. 2001, pp. 91-94. A counter argument can be found in Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 28-53.

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

Table 2. 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].

Organizing Campaign Rules. Campaign rules differ for employees, union organizers, and employers. Rules also differ for soliciting union support (e.g., expressing support for a union or distributing authorization cards) and for distributing 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.[32]

Employees. During work hours, employees can campaign for union support from their coworkers in both work and nonwork areas (e.g., coffee rooms or the company parking lot). But employees can only solicit support on their own time (e.g., lunchtime or 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.

Union Organizers. In general, union organizers cannot conduct an organizing campaign on company property. 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. Organizers may meet with employees on union property. They may also meet with employees and distribute literature in public areas on employer property (e.g., a cafeteria or parking lot) or in public areas (e.g., sidewalks or parking areas). Organizers may also contact

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[32] Unless noted otherwise, this section is based on: Schlossberg and Scott, *Organizing and the Law*, pp. 45-55; Feldacker, *Labor Guide to Labor Law*, pp. 74-79; and Brudney, *Neutrality Agreements and Card Check Recognition*, p. 8.

employees at home by phone or mail or may visit employees at home.[33] Under a neutrality agreement, an employer may allow organizers onto company property.

Employers. Employers may campaign on company property. Employers may require employees to attend meetings during work hours where management can give its position on unionization. These meetings are generally 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.

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); legislative initiatives; charges that the employer has violated labor or other laws; public support from political, civic, and religious leaders; and other strategies.[34,35]

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

Employers. Employers have the right to campaign against a union. But an employer cannot restrain or coerce employees in their right to form or join a union. An employer cannot threaten employees with the loss of jobs or benefits if they vote for a union or join a union. An employer cannot threaten to close a plant if 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

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[33] 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*, U.S. Govt. Print. Off., Apr. 2002, p. 251. U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, May 1994, p. 68. The latter report is popularly called the "Dunlop report," after former Secretary of Labor John T. Dunlop, who chaired the commission.

[34] 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.

[35] For differing 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 Congress, second session, Serial No. 107-74, Washington; U.S. Govt. Print. Off., July 23, 2002.

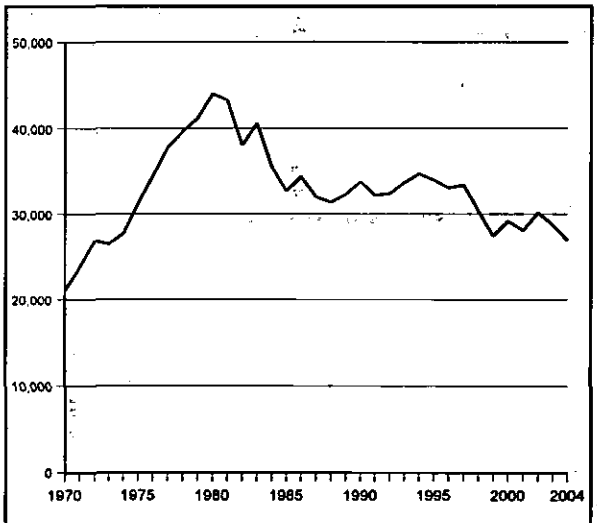
employer must bargain in good faith with respect to wages, hours, and working conditions.[36]

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 jobs if they do not support union activities. 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 working conditions. A union cannot boycott or strike an employer that is a customer of or supplier to an employer that the union is attempting to organize.[37]

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.[38]

Figure 1 shows the trend in the number of unfair labor practice charges filed for FY1970 to FY2004. During this period, the number of charges filed peaked at 44,063 in FY1980. The number stood at 26,890 in FY2004. In FY2004, 39.1% of the charges filed were found to have merit.[39] In FY2004, 74.3% of charges were filed against employers (by unions or individuals) and 25.7% were filed against unions (by employers or individuals).[40]

Figure 1. Unfair Labor Practice Charges, Fiscal Years 1970-2004



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

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

[37] Ibid, pp. 23-32.

[38] NLRB, *Annual Report, Fiscal Year 2004*, p. 6. NLRB, *Basic Guide to the NLRA*, p. 36.

[39] From FY1970 to FY2004, the percent of unfair labor practice charges found to have merit ranged from about 30% to 40%. NLRB, *Annual Report*, various years.

[40] The percentage calculations do not include 29 alleged "hot cargo" agreements. Under the

(continued...)

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.[41,42]

Impact of Changes in Recognition Procedures

Changes in union recognition procedures may affect the level of unionization in the United States.[43] This section summarizes the most common arguments made in favor of requiring secret ballot elections and the arguments made in support of universal card check recognition. The section also reviews research on the effect of different union recognition procedures on union success rates.

The most common arguments made by the proponents of universal card check recognition and the proponents of mandatory secret ballot elections are summarized in **Table 3**.[44] In general, proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during a secret ballot campaign, employers have greater access to employees (e.g., captive audience meetings and access to employees on company property). Employers argue that, under card check recognition, employees may only hear the union's point of view. Employers argue that employees may be misled or pressured into signing authorization cards. Unions argue that, during a secret ballot campaign, employer threats or intimidation may cause some employees to vote against a union. Unions argue that card check recognition is less costly than a secret ballot election. Employers argue that, in the long run, unionization may be more

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[40] (...continued)
NLRA, it is an unfair labor practice for an employer and union to agree that the employer will not do business with another employer. NLRB, *Annual Report, Fiscal Year 2004*, p. 3, Table 2. NLRB, *Basic Guide to the NLRA*, p. 21.

[41] 29 U.S.C. § 160(c). NLRB, *Basic Guide to the NLRA*, p. 38.

[42] The amount of back pay awarded is "net back pay," which is the amount of compensation 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. National Labor Relations Board, *NLRB Casehandling Manual*, available at [http://.www.nlrb.gov/nlrb/legal/manuals], §§ 10530.1 and 10530.2.

[43] 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.

[44] The arguments for and against card check and mandatory secret ballots are covered in House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations *H.R. 4343, Secret Ballot Protection Act of 2004*.

costly to employees: Union members pay dues and higher union wages may result in fewer union jobs.

Table 3. Common Arguments Made by Proponents of Card Check Recognition and Mandatory Secret Ballots

Proponents of Card Check Recognition	Proponents of Mandatory Secret Ballots
Card check recognition requires signatures from over 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 recognition, authorization cards are controlled by the union.
During a secret ballot campaign, the employer has greater access to employees.	Under card check recognition, 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 within two months 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 recognition 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.	Unionization may cost workers union dues; higher union wages may result in fewer union jobs.
Card check and neutrality agreements may lead to more cooperative labor-management relations.	An employer may be pressured by a corporate campaign into accepting a card check or neutrality agreement. If an employer accepts a neutrality agreement, employees who do not want a union may hesitate to speak out.

Research Findings

Little research has been done comparing the impact of universal card check recognition versus mandatory 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 recognition than with secret ballots. Unions also undertake more unionization drives under card check recognition. The union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement.

Evidence from Canada suggests that the union success rate is higher under card check recognition than under secret ballots. In Canada, each of the 10 provinces has

laws governing union recognition.[45] In 1976, all ten provinces used card check recognition. Beginning with Nova Scotia in 1977, five provinces have adopted mandatory voting.[46] Under mandatory voting a union must receive a majority of votes in a secret ballot to be recognized as the bargaining agent. Under card check recognition, a union is recognized if the number of employees signing authorization cards meets a minimum threshold. In general, the union is recognized if more than 50% to 55% of employees, depending on the province, sign authorization cards.[47]

A study of the union success rate under mandatory voting and card check recognition concluded that the union success rate in Canada is 9 percentage points higher under card check recognition than under mandatory voting. The study examined 171 union organizing campaigns between 1978 and 1996 in nine provinces.[48]

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 after 1992. During an 11-year period when card checks were allowed, the union success rate was 91%. During the period when voting was mandatory, the union success rate was 73%. In addition, while card checks were allowed, there were more attempts to organize workers: an average of 531 organizing drives a year when card checks were in effect versus an average of 242 a year when mandatory voting was in effect.[49]

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

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

[46] The five Canadian provinces that currently require secret ballots are: Nova Scotia, Alberta, Newfoundland, Ontario, and Manitoba. British Columbia adopted mandatary voting in 1983 and reversed itself in 1993. Susan Johnson, "The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note," *Industrial Relations*, vol. 43, Apr. 2004, p. 357. (Hereafter cited as Johnson, *The Impact of Mandatory Votes*.) Chris Riddell, "Union Suppression and Certification Success," *Canadian Journal of Economics*, vol. 34, May 2001, p. 397. (Hereafter cited as Riddell, *Union Suppression and Certification Process*.)

[47] Johnson, *The Impact of Mandatory Votes*, pp. 356-357.

[48] 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.

[49] The data are for union drives in the private sector. The calculation of the union success rate under card checks is for the five years before and the six years after voting was mandatory. The calculations of the union success rate and the average annual number of unionizing drives exclude 1984, when card checks were allowed for part of the year. Because of incomplete data, the calculation of the average annual number of unionizing drives also excludes 1998. Riddell, *Union Suppression and Certification Success*, p. 400.

agreements involving 294 organizing drives. Unions had a success rate of 78.2% in drives where there was both a card check and neutrality agreement and a 62.5% success rate in cases where there was only a card check agreement.[50]

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).[51] 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.)[52]

Requiring card check recognition may increase the union success rate, but it may not reverse the decline in private sector unionization in the United States. Shrinking employment in unionized firms and decertifications may offset any increase in union membership due to universal card check recognition. In addition, universal card check recognition may increase employer opposition during the collection of authorization cards.

Is There an Economic Rationale for Giving Workers the Right to Organize and Bargain Collectively?

The NLRA gives private sector employees the right to organize and bargain collectively over wages, hours, and working conditions. This section considers whether there is an economic rationale for granting workers the right to organize and bargain collectively.

Government Intervention in Labor Markets

Governments may intervene in labor markets for a number of reasons. One of these reasons is to improve competition.[53] According to economic theory,

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[50] 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.

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

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

[53] The following conditions are the general characteristics of a competitive labor market:

(continued...)

competitive markets generally result in a more efficient allocation of resources, where resources consist of individuals with different skills, capital goods (e.g., computers, machinery, and buildings), and natural resources. A more 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.[54]

If labor markets do not fit the model of perfect competition, increasing the bargaining power of workers may raise wages 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) unions could, within limits, increase both wages and employment.[55]

In competitive labor markets, however, increasing the bargaining power of employees 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.[56] If unions lower employment in the unionized sector, they

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[53] (...continued)
(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.

[54] 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, Mass.: Addison-Wesley, 2000), pp. 251-259. (Hereafter cited as Ehrenberg and Smith, *Modern Labor Economics*.)

[55] 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*.)

[56] 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* (continued...)

may increase the supply of workers to employers in the nonunion sector, lowering the wages of nonunion workers.[57]

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, labor market competitiveness is difficult to measure. Finally, labor markets may change over time because of economic, technological, or policy changes.[58]

Distribution of Earnings

Competitive labor markets may allocate resources efficiently, but they may result in a distribution of earnings that some policymakers find unacceptable. Thus, governments may intervene in labor markets to reduce earnings inequality.[59] Some economists argue that during a recession, greater equality may increase aggregate demand and, therefore, reduce unemployment. Unionization may be a means of reducing earnings inequality.

Collective Voice

Finally, an argument made by some economists is 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

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[56] (...continued)
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.

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

[58] Kaufman argues that labor markets in the U.S. 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.

[59] 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.

resolution or formal grievance procedures to resolve issues relating to pay, working conditions, or other matters.[60]

Discussion

The economic impact of universal card recognition or mandatory secret ballot elections may rest on the desired objectives of policymakers and the competitiveness of labor markets.

By bargaining collectively, instead of individually, unionized workers may obtain higher wages and better working conditions than if each worker bargained individually.[61] But, depending on how well labor markets fit the model of perfect competition, collective bargaining may equalize bargaining power between employers and employees or it may give unequal power to unionized workers. If labor markets are competitive, increasing the bargaining power of workers may reduce economic output and consumer satisfaction (economic efficiency), but may increase equality. On the other hand, if labor markets do not fit the model of perfect competition, increasing the bargaining power of workers may improve economic efficiency as well as increase equality.[62]

Universal card check recognition may increase the number of organizing campaigns and increase union success rates. Conversely, mandatory secret ballot elections may reduce the number of organizing drives and reduce union success rates. Thus, compared to existing recognition procedures, mandatory secret ballots may lower the level of unionization, while universal card check recognition may raise it. Accordingly, depending on the competitiveness of labor markets, universal card check recognition may either improve or harm economic efficiency. Similarly, mandatory secret ballots 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, mandatory secret ballot elections may increase earnings inequality — if fewer workers are unionized. Universal card check recognition may decrease inequality — if more workers are unionized. Again, the size of the effects may be difficult to predict or measure.

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[60] 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.

[61] 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.

[62] 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.

In sum, if the policy objective is to increase total economic output and consumer satisfaction, mandatory secret ballots or universal card check recognition may either improve or harm economic efficiency, depending on the competitiveness of labor markets. Universal card check recognition may reduce earnings inequality; mandatory secret ballot elections may increase it.

April 17, 2007

Jay Kaufman
State House, Room 156
Boston, MA 02133

Dear Representative Jay Kaufman,

AN ACT RELATIVE TO WRITTEN MAJORITY AUTHORIZATION CARDS, PETITIONS AND OTHER WRITTEN EVIDENCE OF COLLECTIVE BARGAINING RESULTS

The Home Care Alliance of Massachusetts wishes on behalf of our 120 member home health and homecare agencies to express our strong opposition to **HB 2465,** "An Act Relative to Written Majority Authorization Cards, Petitions and Other Written Evidence of Collective Bargaining Results".

HB 2465 would impose a requirement that employers must accept a particular union based on a majority of signed authorization cards *without a formal secret ballot election process.* It also extends the timeline for gathering signatures from the current sixty-day process to twelve months – an extraordinary six-fold increase. Under the so-called "card check" approach, union authorization cards are signed in the presence of an interested party – a union organizer or a pro-union co-worker. Then without the protection provided by a secret ballot and without safeguards against undue pressure, the cards are then presented as representing the true intent of the employees.

The Home Care Alliance supports the current legally recognized system of allowing employees to choose whether or not to be represented by a union, and by which union. Under the current system, if a simple majority of the employees sign union authorization cards, the employer may choose to recognize the union or may decide to follow the statutory process, which culminates in a secret ballot election, conducted by the Massachusetts Labor Relations Commission. This system is the same model that has been employed pursuant to the National Labor Relations Act, as amended, since 1935, with the National Labor Relations Board supervising the process. These measures represent the most reasonable and fairest process to make best use of an employee's freedom of choice, freedom from intimidation and illicit interference. ***There may be ways to improve the effectiveness of the current system, but eliminating the legal requirements that protect the Commonwealth's tradition and respect for an individual's right to vote in a confidential and protected manner, is not one of the ways.***

It is the position of the Home Care Alliance that HB 2465 rescinds important rights and protections for Massachusetts employees, and eliminates existing safeguards that have been assured under state and federal law. This legislation would change the current union election system that is based on the bedrock principle of democracy: free and fair elections where ballots are cast in private, free from interference or influence by union organizers or management.

If you have any questions regarding this testimony, or require further information, please contact me at 617-482-8830 or pkelleher@hcalliancema.org.

Sincerely,

Patricia Kelleher

Associated Builders and Contractors, Inc.

Massachusetts Chapter

Associated Builders and Contractors Testimony on HB 2465: An Act Relative to Written Majority Authorization Cards, Petitions and Other Written Evidence of Collective Bargaining Results

Sponsor: Representative Robert A. DeLeo

The right to a private ballot is a cornerstone of our democracy. For well over a century it has been the American standard at the ballot box, allowing voters to make tough and even controversial election choices without fear of reprisal or intimidation.

At issue is whether or not public employees should continue to have the right to a federally supervised secret ballot election when deciding if they want to join a union. HB 2465 would strip away this right and replace private ballot elections with a union-run process where workers sign cards to indicate whether or not they want to join the union. Because there is no secret ballot, the way each worker votes could be made known not only to their co-workers, but also to union organizers and their employer.

This is wrong. Workers deserve the continued right to make these important personal decisions in private, without fear of coercion or reprisal from union organizers, their employer, or both. HB 2465 would take away that right.

Today, the most common method for determining whether or not employees want a union to represent them is a secret ballot election overseen by the National Labor Relations Board (NLRB). The NLRB provides detailed procedures that ensure a fair election, free of fraud, where employees may cast their vote confidentially, without peer pressure or coercion from unions or employers. The average time for an election to be held is just 39 days and 94 percent of elections are held within 56 days. The rare exceptions that take longer hardly justify abandoning the entire secret ballot election process.

Federal courts have repeatedly ruled that federally supervised secret ballot elections are the fairest and most foolproof method to determine whether a union has the support of a majority of employees. The Second Circuit Court of Appeals ruled: "It is beyond dispute that the secret ballot election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer." The Sixth Circuit stated: "An election is the preferred method of determining the choice by employees of a collective bargaining representative."

The only to way to guarantee worker protection from coercion and intimidation is through the continued use of a federally supervised secret ballot election so that personal decisions about whether to join a union remain private. We urge the Committee to reevaluate the merits of this bill in order to preserve the rights of all workers to utilize the secret ballot election process.

Associated Builders and Contractors, Massachusetts Chapter represents over 440 local general contractor, subcontractor, supplier and associate companies, which employ more than 20,000 workers throughout Massachusetts. It has spent the past 38 years fulfilling its founders' mission of promoting and advancing the merit construction industry and its philosophy that all construction contracts, both public and private, should be awarded to the lowest responsible bidder, regardless of labor affiliation. ABC is a national federation consisting of more than 80 chapters and 24,000 firms from coast to coast.

Free and Fair?

How Labor Law Fails U.S. Democratic Election Standards

Based on a Report by Gordon Lafer, Ph.D., University of Oregon
Produced for American Rights at Work, June 2005

Recent debates on labor law reform have focused on how we best bring elections for union representation in line with the norms of U.S. democracy. One side argues that the current National Labor Relations Board system must restrict all forms of union recognition to the process of a secret ballot election to safeguard democracy. Others assert that the secret ballot is not enough to guarantee a free and fair election.

American Rights at Work commissioned University of Oregon political scientist Gordon Lafer to investigate how current union election procedures measure up to U.S. democratic standards. Lafer engaged in a thorough examination of the political philosophy and published works of the founders, the historical development of electoral law and jurisprudence, and current statutes and regulations that define "free and fair" elections.

Lafer concludes that union representation elections fall alarmingly short of living up to the most fundamental tenets of democracy. The inclusion of a secret ballot does not change the fact that the process as a whole is fundamentally broken and unfair.

Democratic Elections Standards:	How Do Union Representation Elections Measure Up?
Equal Access to the Media: *Distribution of Competing Viewpoints to Create an Informed Electorate*	**Employees are restricted from openly disseminating information:** In elections for union representation, employers have monopoly control of media within the workplace. They can distribute anti-union information anywhere and at anytime, while pro-union workers are restricted to posting literature in the break area during break time. Unions are restricted to distributing material off-site.
Freedom of Speech: *Broad Debate of Public Issues*	**Employees are restricted from openly expressing their opinions:** Employers are allowed to enforce a total ban on employees discussing the proposed union outside of the break room. Yet employers enjoy unfettered communication— subjecting employees to mandatory staff meetings and one-on-one meetings with supervisors, often with the intent of intimidating those suspected of supporting union formation. Labor law provides no equal opportunities for pro-union workers to respond or present alternative viewpoints.
Equal Access to Voters: *Promoting Balanced Competition & a Level Playing Field*	**Employers have greater access to voters:** Although pro-union workers and union organizers are permitted to contact workers outside of the workplace, such communication is exceedingly difficult to arrange. Employers have unilateral access to employees within the workplace, and can easily contact them at home. While employers may freely distribute a steady stream of anti-union correspondence through the mail, pro-union workers lack access to employee address information until they can document that 30% of the workforce wants a union. Even then, employers can legally provide lists with incomplete information, such as missing zip codes and telephone and apartment numbers.

Democratic Elections Standards:	How Do Union Representation Elections Measure Up?
Voter Coercion: *Restricting Undue Influence*	**Employees are not protected against economic coercion:** Employers and their supervisory personnel exercise considerable economic leverage over workers, including the discretion to assign and change work duties, grant raises and promotions, and control work schedules. Existing statutes prohibit explicit threats to and bribery of employees. But this leaves ample room for employers to stop short of that threshold and still conduct activities designed to thwart union recognition. Workers are subjected to thinly-veiled threats in the form of 'predictions' that choosing to form a union may lead the company to close the worksite, lose business and make cutbacks. Employers are also free to make statements like "a union is a declaration of disloyalty to me personally and an affront to everything the company stands for."
Timely Implementation of the Voters' Will: *A Binding System of Regular Elections & Fixed Terms of Office*	**Open-Ended Delays:** In union representation elections workers can face infinite delays in the implementation of election results. Often times these lengthy delays are a result of employers taking full advantage of permissive election guidelines. These guidelines not only allow the appeals process to drag on for years, but mandate that the workplace be governed as if employees voted against organizing for the duration of the appeals process.
Campaign Finance Regulation: *Promoting a Competitive Environment & a Level Playing Field*	**Virtually no regulation of election spending:** In union representation elections, anti-union employers have access to resources that few unions can ever hope to match, such as on-the-clock meetings, the use of company property and equipment, and converting supervisors to anti-union campaign staff. In addition, U.S. labor law provides no financial limitation and alarmingly little in the way of reporting requirements for expenditures during the course of a union recognition election.

Free and Fair? How Labor Law Fails U.S. Democratic Election Standards is the first in a series of original research projects by American Rights at Work that analyzes the union recognition process.

The full report is available online at www.americanrightsatwork.org/resources/studies.cfm.

AMERICAN RIGHTS AT WORK

American Rights at Work is a nonprofit, nonpartisan organization committed to ensuring that workers can exercise their democratic rights to join or form a union and engage in collective bargaining with their employer.

Free and Fair?

How Labor Law Fails U.S. Democratic Election Standards

Gordon Lafer, Ph.D.

An American Rights at Work Report

June 2005

About the Author

Gordon Lafer is an Associate Professor at the University of Oregon, where he has lectured on economic policy, globalization, labor, and American politics since 1997. He received his Ph.D. in political science with distinction from Yale University in 1995. Additionally, he has served as an economic policy advisor to the New York City Mayor's Office and as a strategic consultant for a wide range of labor organizations.

Lafer is the author of The Job Training Charade (Cornell University Press, 2002) and of numerous articles in popular and scholarly journals on topics of economic development, employment policy, and political theory. He is also the founder and co-chair of the American Political Science Association's Labor Project.

American Rights at Work *is a nonprofit, nonpartisan organization committed to ensuring that workers can* exercise their democratic rights to join or form a union and engage in collective bargaining with their employer.

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Introduction

Since its inception, federal labor law has been understood as a means of introducing the principles of U.S. democracy into the workplace. Senator Robert F. Wagner, author of the 1935 National Labor Relations Act (NLRA), explained the law's core purpose. "Only 150 years ago did this country cast off the shackles of political despotism," Wagner declared. "Today... we strive to liberate the common man."[1] The U.S. Senate Report on the NLRA similarly explained that the legislation was motivated by the notion that "a worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."[2]

In the decades since the Act was passed, thinking about unionization has continued to be framed by this vision of democracy at work, with both pro- and anti-union commentators drawing parallels between the rights of Americans as citizens to elect their own government and the rights of Americans as employees to represent themselves in the workplace. In recent debates over labor law reform, management as well as labor organizations have grounded their arguments in the parallels between political and union elections. Supporters of the Employee Free Choice Act, for instance, assert that it is needed in order to guarantee the rights to self-representation promised by the Wagner Act. On the other hand, those seeking to outlaw the ability of employers to recognize unions on the basis of signed statements from a majority of workers also ground their argument in an appeal to U.S. tradition; the secret ballot is the cornerstone of democracy, they argue, and therefore must be a requirement of union recognition as well.[3] Whatever their particular proposals, everyone seemingly agrees that unionization procedures should follow the norms of U.S. political democracy.

If there is a consensus that the rules for union formation should be based on the practices of U.S. democracy, any discussion of labor law must start with an assessment of the extent to which the current system embodies these practices. This is the subject of this study. In what follows, I will examine how current union election procedures, as overseen by the National Labor Relations Board (NLRB), measure up to the standards of democracy articulated by the founders and enshrined in U.S. law and jurisprudence. While there are upwards of 10,000 annual cases of labor law violation — thus rendering union elections considerably dirtier and less democratic in practice than on paper — that is not a consideration for this paper.[4] The study below provides a best-case analysis, examining how current union election procedures — as they are laid out in law, and assuming they were faithfully upheld by all parties — compare to the standards of U.S. democracy.

Principles of U.S. Democracy: Defining Fair Elections

As the world's first democracy, the United States has long served as the standard-bearer for defining what constitutes "free and fair" elections. But what exactly are these standards? While there are myriad practices that make up a democratic election — and many practices that vary from one state to another — a handful of core principles define the U.S. tradition of democratic elections. In addition to the secret ballot, these include:

- Genuine competition between parties and equal access to voters
- Free speech for both candidates and voters
- Equal access to the media
- Separation of state and party
- Leveling the playing field by controlling campaign finance
- Protecting voters from economic coercion
- Timely implementation of the voters' will

Genuine Competition between Parties and Equal Access to Voters

One of the key principles of the U.S. system of democracy is that elections must be not only "free and fair" but also competitive. In a system where the people are self-governing, it is critical that voters receive thorough and detailed information from each of the major candidates. It is not enough to have two candidates running against each other if one of them is prevented from publicizing his message to the voters. This, indeed, is why the U.S. government consistently denounces elections in countries where state-controlled media refuse to allow equal airtime for opposition candidates.[5] This same principle is the driving motivation behind federal matching funds in presidential elections. While the Federal Elections Commission (FEC) does not require that opposing candidates have the exact same amount of money, the establishment of matching funds aims to create a roughly level playing field. Similarly, the Federal Communications Commission's (FCC) Equal Time Rule, requiring broadcasters to provide equal access to competing candidates, is designed to promote balanced competition between the parties.

Free Speech for Both Candidates and Voters

At the heart of our system is the free speech right of all citizens to engage in unfettered debate of political issues. While the First Amendment is often thought of as a means of safeguarding individuals' right to aesthetic self-expression, constitutional scholars from liberal Alexander Meikeljohn to conservative Robert Bork agree that its primary purpose is to protect free speech specifically on political matters.[6] Free speech is "the only effectual guardian of every other right," Thomas Jefferson explained.[7] The public clashing of viewpoints is integral to the process of voters evaluating competing claims and arriving at judicious decisions. This is the heart of what it means for sovereignty to reside in the people. Jurist Robert Bork has noted that "representative democracy" is "a form of government that would be meaningless without freedom to discuss government and its policies."[8] Rather than voters keeping their opinions to themselves, the standard for U.S. democracy set by the Supreme Court is that "debate on public issues should be uninhibited, robust and wide-open."[9]

Creating an Informed Electorate through Equal Access to the Media

The framers of the Constitution held that public debate was necessary in order to enable common people to arrive at wise political decisions. "It is of particular importance," the Supreme Court has stated, "that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate ... their positions on vital public issues."[10] "Those who won our independence," explained Justice Brandeis, "believed that ... public discussion is a political duty."[11] For this reason, it was not enough for the founders that competing viewpoints be *available* or *accessible* to voters; they must be widely disseminated and, hopefully, vigorously debated.[12] In the words of the Supreme Court, the principle of free speech "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."[13] Thus, equal access to mass media is not only an issue of fairness to candidates; it is a prerequisite for enabling democratic citizens to make informed choices.

One of the implications of promoting free public debate is maintaining a strict separation between state and party. For the founders, the conflation of the state with a particular clique of rulers was part of the English system they repudiated. In modern times, this remains one of the key distinctions between genuine democracies and authoritarian regimes that seek to gain legitimacy through stacked elections. In the fall of 2004, for instance, Foreign Relations Committee Chairman Senator Richard Lugar condemned elections in the Ukraine for a "disregard for the fundamental distinction between the State and partisan political interests."[14] For a government to be responsive to its voters, public resources, including control of the media, cannot become the tool of one party.

Leveling the Playing Field by Controlling Campaign Finance

The importance of competitive elections and broad debate recently led lawmakers to adopt controls on the ability of wealthy candidates to so severely outspend their competitors as to prevent meaningful

debate. This is the driving motivation behind campaign finance regulations and federal matching funds. While the FEC does not require that opposing candidates have the exact same amount of money, the establishment of matching funds aims to create a roughly level playing field.

Protecting Voters from Economic Coercion

In our economic lives, we reside in a world of great inequalities. The realm of democracy is the one place where we are supposed to meet as equals. But while free speech lies at the heart of the U.S. political system, it cannot by itself guarantee a functioning democracy. In particular, if the country's wealthiest citizens were allowed to use their financial power to bribe or coerce others into supporting a particular party, the notion that government follows the will of the people would become meaningless.

In crafting the Constitution, the founders were so worried about the potential for undue influence on working-class citizens that many advocated restricting the vote to those who owned enough property to be economically independent.[15] In the debates leading up to the framing of the Constitution, framer Governeur Morris worried that those who "receive their bread from their employers" could not be "secure and faithful Guardians of liberty."[16] "Give the vote to people who have no property," Morris argued, "and they will sell them to the rich."[17] In response to these concerns, the country established an extensive body of law designed to guarantee that even propertyless voters would be protected against any form of politically motivated coercion. Thus, for example, FEC regulations prohibit corporations from soliciting employees for a company political action committee (PAC); federal officials may not require their employees to work on political campaigns; and a host of state laws bar employers from pressuring their workers to support a given candidate. All of these are reflections of the country's commitment to guaranteeing that even the worst-off of citizens can participate in the political system without fear of financial penalty.

Timely Implementation of the Voters' Will

Finally, U.S. democracy is based on a system of regular elections and fixed terms of office. While this principle may seem so obvious as to require no explanation, it was a novel innovation at the time of the nation's founding. The government of King George regularly decided to alter or extend the length of parliamentary terms. The founders were particularly concerned with preventing incumbents from manipulating the electoral system in order to extend their tenure in office. To this end, Thomas Jefferson went so far as to argue that the Constitution should limit presidents to one term. Otherwise, he worried, "if once elected, and at a second or third election out voted by one or two votes, [the president] will pretend false votes, foul play, hold possession of the reins of government..."[18] While this proposal was not ultimately included in the Constitution, the sentiment behind it informs our current system — including the principle that once a winner is certified in an election, he or she must take office promptly, and cannot be deprived of office on the basis of procedural delays.

Even when the electoral process is flawed, and challenges are raised concerning the legitimacy of the outcome, these challenges do not stand in the way of the winner taking office. This motive was embraced, for instance, by the Supreme Court in *Bush v. Gore*, and more recently in the certification of Washington governor Christine Gregoire.[19] In both cases, the election was characterized by unsettled procedural disputes with a potentially decisive impact on the outcome. Nevertheless, in both cases, it was deemed more important to have the apparent winner take office on a timely basis rather than facing a prolonged delay in the turnover of office.

These principles — competitive elections, free speech, broad public debate, the separation of economic from political power and of state from party, and the insistence on prompt implementation of the popular will — describe the core of our political system. As such, they also provide an effective yardstick with which to compare this system with that of union elections. In what follows, I will compare the procedures for NLRB elections with those for political elections, based on the principles articulated above. The analysis proceeds through a series of comparisons based on these key dimensions

of the electoral process. Finally, I will also compare the enforcement mechanisms underpinning the electoral standards in both the NLRB system and the U.S. system for political elections. Unfortunately, it appears that the secret ballot is the *only* point of agreement between U.S. electoral politics and union elections as they are currently conducted. In virtually every other aspect of the electoral process, union elections look more like those of discredited foreign regimes than those by which we elect our own senators and representatives.

Overview of Union Election Procedures

Before taking up the comparison of union and political elections, it may be useful to provide a brief overview of the NLRB's process for conducting union elections. Under federal law, an employer may recognize a union on the basis of any showing of majority support, including signed statements from employees, but an employer is not *required* to recognize a union unless it has been chosen through a secret ballot vote supervised by the Board. Thus, many unions are formed through such procedures.[20]

For a vote on unionization to be held, workers must first show the Board that they have the support of at least 30 percent of employees. Following that showing, the Board will set a date for an election and draw up a list of eligible voters. Both the employer and the union may contest the Board's determination of which employees should be included in the potential union, and the adjudication of such disagreements may delay the election. Once an election has been set, employees are free to recruit their coworkers either to support or to oppose unionization. In addition, both the union and the employer may contact employees, urging them to vote one way or the other. For the union, such contacts must occur away from the workplace — either at workers' homes or in restaurants, meeting halls, or other public venues. The employer (including all managerial employees) may communicate its views directly to employees at the workplace.

On the day of the election, the voting is generally held in the workplace, on the clock. One pro-union and one anti-union employee may be present to monitor the voting, and otherwise campaigning is generally restricted to outside the room in which voting booths are placed. During the organizing campaign, management can talk to workers anywhere on the premises, while employees can campaign only on break time and in break areas.

Following the vote, the Board counts the ballots and certifies an outcome based on a simple majority of votes cast. If there are no procedural challenges, the union is either certified or not, and the process is completed. However, if either the union or the employer challenges the results of the election, the outcome is suspended pending adjudication. In extreme but not uncommon cases, it can take several years for such a dispute to work its way through the Board and federal courts. During this time, the firm is governed as if the union lost the election.

Terms of Comparison

To compare the systems of union and political elections, it is first necessary to specify the terms of comparison. Some points are obvious: both systems have voters, ballots, and an election timetable. Beyond this, however, the parallels are less clear-cut. What, for example, is the "government" of a workplace? Who are the "candidates?" What are the "mass media?" There is not a simple and obvious correspondence between these features of U.S. politics and the cast of characters that animate a union election; yet to make any comparison of the two systems, we must determine which elements in one correspond to those in the other.

In the analysis that follows, I treat the management of a company as the "government" of the workplace. I believe that this reflects the reality of workplace governance, where management sets the policies, terms, and conditions according to which work life is run.

It is clear that the union, or at least the decision to unionize, is one of the "candidates." But who or what is the other candidate? Some analysts portray the vote to form a union as an election between the union (or workers who desire to organize) on one side and the company on the other. Indeed, this is often how union elections appear to play out. However, as a conceptual category, this cannot be right. The NLRA stipulates that employers may not "dominate or interfere with the formation ... of any labor organization."[21] Employers thus cannot possibly be a "candidate" in a union election: employees cannot vote for their employer to represent them, since a company-run or company-dominated union is illegal. Nor is this merely a technicality of the law. As John Adams noted, it is critical that representatives "should think, feel, reason and act like" the people they represent.[22] But there is only one function for which employees might want a representative — to represent them in negotiations with their employer. Since an employer obviously cannot negotiate with itself, it cannot be the "representative" of employees in such a process. Thus, the only two bodies that might sensibly be thought of as "candidates" are the group of employees who want to form a union and those who oppose unionization.

What, then, is the employer's role in a union campaign? Some have suggested that employers are akin to foreign observers of an election — ineligible either to vote or to hold office, and thus essentially outside the electoral process. This was the reasoning of the AFL's counsel in his testimony on the original Wagner Act, urging Congress to "suppose the United States and Mexico were seeking to adjust a boundary matter by negotiation through commissioners. How would it be regarded if the United States sought to influence the selection of certain commissioners to represent Mexico?"[23] To the extent that we think of employers as citizens of a different polity, they would be banned from any participation whatsoever in union elections, including financial support for one side or the other.[24]

We alternatively might think of employers as akin to financial backers of the anti-union employees in a workplace. There are, of course, numerous problems with this formulation — above all, the fact that in many instances, there *is* no significant or organized group of anti-union workers until the employer begins its own anti-union campaign. Nevertheless, the relation of financial backer to the "candidacy" of anti-union employees seems to be the best analogy through which to view the role of employers.

Thus, the employer occupies two distinct roles. First, the employer is the currently existing government of the firm. Second, the employer also functions as the primary supporter for the anti-union campaign. Here we have already run into a fundamental discrepancy between the two systems: if management acts as both the "government" of the workplace and an active partisan in the campaign, this violates the fundamental democratic principle of separating state from party. Unfortunately, this dual identity accurately captures the reality of employers' role in union campaigns, and thus the analysis that follows will track management behavior in both roles.

Finally, then, what is the workplace? I believe that it makes the best sense to think of the workplace as akin to general public space in a political election, and to think of workplace communication as analogous to the mass media in electoral politics. This is clearly not a perfect analogy. In campaigns to create unions, the workplace is not the only forum for partisan communications. Union organizers are free to visit workers in their homes, and both union and management representatives are free to talk with workers in restaurants, parks, shopping malls, or any other public place.[25] Moreover, both unions and employers are free to publicize their claims in the general media. Nevertheless, the workplace serves as a unique forum for union campaigns. Mass media provide an extremely limited opportunity to communicate with workers; they are prohibitively expensive and do not target the appropriate audience.

Conversations with individual workers away from the workplace may be significant — whether in their homes or in some public venue — but are generally difficult to arrange, and, therefore, are often quite limited. At a time when workers' homes may be spread across 50 or 100 miles, and in an economy where many hourly workers hold more than one job, it has become increasingly difficult to catch anyone at home or even set up an appointment to meet at a pre-established time. As a result, recent evidence suggests that in the majority of campaigns, union supporters are unable to visit even half of the employees.[26]

The workplace is the only place where workers see each other every day — the only place they are all together as a group. As the Board itself has noted, the workplace is "the one place where all employees involved are sure to be together ... the one place where they can all discuss with each other the advantages and disadvantages of organization, and lend each other support and encouragement."[27] The Supreme Court likewise has recognized that work is "the one place where [workers] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."[28] If management is the government of a company, then the workplace is the society that is governed. Thus, speech, media, and communication within the workplace must be compared with speech, media, and communication in the society at large during a political election.

Having established the terms of comparison, what follows is a detailed exploration of how NLRB procedures measure up against each of the democratic principles articulated above. In discussing each principle, I will first describe the standards established for political democracy and will then examine the corresponding standard enforced in union elections.

Under these conditions, it is understandable that anti-union employers have an incentive to pursue prolonged appeals, since the appeal itself will forestall unionization, and in the meantime many union supporters will get despondent or move, leaving a weakened workers' organization to pick up the pieces if it is ever recognized. But this process marks a dramatic departure from the norms that define U.S. democracy. It is inconceivable that we would allow a political election — whether for President of the United States or a local Justice of the Peace — to be upheld in this fashion. Yet these are the conditions that frame workers' efforts to represent themselves in collective bargaining.

Enforcement and Penalties

The final point of comparison between political and union elections is the manner in which each system enforces the rights and standards it has established. In electoral politics, the law provides a combination of fines and imprisonment for those who violate the norms of democratic process. Under federal election law, for instance, a radio or television station that refuses a candidate airtime may have its broadcast license revoked.[111] Similarly, violation of federal campaign laws is punished by a combination of financial penalties and imprisonment, with the penalty for illegal donations reaching up to ten times the amount contributed.[112] The IRS code additionally stipulates that candidates that "knowingly and willfully" exceed allowed expenditure limits are subject to a $5,000 fine and one year in prison. Those who "knowingly and willfully" make false or misleading statements to the FEC, with the goal of covering up illegal contributions or expenditures, are subject to a $10,000 fine and five years in prison.[113]

Nor are such penalties restricted to violations of campaign finances. A federal employee who "uses his official authority for the purpose of interfering with, or affecting, the ... election of any candidate for [federal] office" is subject to both fines and imprisonment.[114] Anyone who offers an economic incentive for someone else to vote, to avoid voting, or to support a particular candidate is subject to fines and up to two years in prison.[115] Finally, any individual who lies, conceals, or covers up information regarding attempts to intimidate voters is subject to fines and up to five years imprisonment.[116]

All of this is in striking contrast to union elections, where even employers who knowingly, willfully, repeatedly, and explicitly threaten employees, bribe employees, fund anti-union campaigns, destroy union literature, fire union supporters and lie to federal officials in an effort to cover up these deeds — even employers who commit all these acts in a single campaign and are convicted of having done so in federal court — can never be fined a single cent, have any license or other commercial privilege revoked, or serve a day in prison.

Compared with the enforcement mechanisms for electoral law, the process of enforcing labor law is complex, delay-ridden, and largely toothless. In the event that an employer illegally coerces employees in an election campaign, the employee must file a complaint with the local office of the Board. This office investigates the charge and, if it believes it to be meritorious, may issue a formal complaint. The complaint is heard by an administrative law judge. However, the judge's ruling here is not binding. Either party may file an appeal to this ruling, which will be heard by the Board itself. Again, Board decisions themselves are not self-enforcing; if an employer refuses to obey a Board ruling, the Board must go into federal court to seek enforcement. In 2003, the median wait for an unfair labor practice case pending a Board ruling was nearly three years from the filing of the charge;[117] employers who choose to appeal the Board's ruling to the federal courts could add years of delay to this process.

Furthermore, throughout this process, employees have no private right of action in seeking to redress illegal employer activity. If employees believe that their employer illegally sabotaged a union election campaign, they have no standing to bring this charge in open court. Instead, they must file a complaint with the Board, which makes an unreviewable decision on whether to take the case.[118] If political elections were run this way, it would mean that neither Al Gore nor George W. Bush would have had access to the courts in their battle over the results of the 2000 election. Instead, each would have had to file a complaint with the FEC; if the FEC chose not to pursue their complaint, the case would be dead, with no alternative possibility of redress or appeal. Finally, in the event that the NLRB decides to proceed with a case, the Board takes over "ownership" of the complaint. Thus, Board agents may choose to drop a case at any time, or to settle on unfavorable terms, even over the opposition of the original plaintiffs.

Beyond the delays and frustrations built into the prosecution of labor law violators, there are virtually no penalties for those ultimately found guilty. Employees who are fired for advocating unionization, for instance, bear the burden of proving that their termination was due to this activity.[119] If, after years of proceedings, an employer is found guilty of having illegally terminated union supporters, the maximum possible penalty is that the employer may be required to hire the worker back, and to provide backpay for the period the person was laid off, *minus whatever money the person earned at another job in the meantime.*[120] Since most individuals find another job, the total back payment may be quite small. If earnings in the replacement job equaled those of the former position, the employer may not owe any backpay whatsoever. It should be noted that the Board considers illegally fired employees to have an affirmative burden to seek work proactively; a fired worker who does not look for another job after being illegally laid off may find his or her backpay cut as a result, even after winning the case.[121]

It is unsurprising that this type of penalty is not an effective deterrent against illegal behavior. Rational employers might well decide that the modest penalty for firing a few union supporters was worth the benefit of scaring hundreds more into abandoning the cause of unionization. Nevertheless, even repeat offenders of labor law can never be subject to punitive fines of any amount by the Board.[122]

It is telling that even other areas of employment law provide stiffer penalties for illegal employer activities. For instance, the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination Employment Act all provide for attorneys' fees and punitive damages as a remedy for employer violations. Indeed, even administrative laws such as the Occupational Safety and Health Act or the Employee Retirement Income Security Act, provide punitive fines or allow for damages through private litigation. But in the most critical arena of workplace regulation, the law is virtually toothless.[123]

In the case of willful and egregious offenders, the Board has the power to issue an order compelling an employer to recognize a union and commence negotiations. However, the Board is extremely reluctant to use this power. Recently, the Board overturned just such an order that was issued by an administrative law judge. In the case in question, three-fourths of the engineering employees in South Florida's Hialeah Hospital signed cards indicating their support for unionization. Shortly thereafter, the hospital secretly videotaped and then fired a pro-union employee, threatened reprisals if workers voted to organize, and promised to promote an employee if he convinced others to vote against unionization. After these actions, a majority of employees ultimately voted against unionization. The Board found the employer guilty of multiple violations of the law but insisted that the only appropriate remedy was to rerun the election.[124]

Yet since there is no possibility of punitive damages under the NLRA, even when a bargaining order is imposed, an aggressively anti-union employer ultimately faces almost no sanction for flouting the law. When a union has been certified after winning an election, employers are legally required to negotiate a contract in good faith. However, if an employer refuses to bargain in good faith, the legal remedy is simply to order the employer, once again, to negotiate in good faith.[125] One of the most extreme such examples is the case of the Sparks Nugget casino. In 1977, the Board found that the Sparks Nugget had been guilty of bargaining in bad faith for the three previous years, and instructed the employer to return to the negotiating table in good faith. In 1980, the Court of Appeals enforced the Board's order, but the employer continued in its refusal to negotiate. In 1984, an administrative law judge once again found the employer was illegally bargaining in bad faith. In 1990, the Board upheld this decision, ordering the employer back to the table. Again, the employer appealed to the Ninth Circuit Court of Appeals, and in 1992, more than 17 years after the employer began disregarding the law, the court enforced another Board order requiring the company to return to the negotiating table.[126]

Thus, even those protections that exist on the books under labor law become illusory when one seeks to enforce them. But any electoral system that lacks effective enforcement cannot possibly safeguard the democratic rights of its participants.

How America Judges the World: Higher Standards Abroad than at Home?

One way to illuminate U.S. standards of what constitutes "free and fair" elections is to examine the criteria that our government uses to evaluate the legitimacy of other countries' elections.

The National Endowment for Democracy (NED) has been charged by Congress with the mandate to "strengthen democratic electoral processes abroad."[127] According to the NED, for elections to be legitimate they must be not only "free," but also "competitive."[128] In 2002, the State Department invoked this principle in criticizing the government of Ukraine for failing to "ensure a level playing field for all political parties" in its national elections.[129]

Among the criticisms leveled at Ukraine were that employees of state-owned enterprises were pressured to support the ruling party; mineworkers were pressured to withdraw from a trade union supportive of the opposition; faculty and students were instructed by their university rector to vote for specific candidates; ruling party candidates took advantage of public offices for meeting spaces while denying suitable meeting space to the opposition; and the governing party enjoyed "uncritical coverage from regional and local media outlets" while the opposition was faced with restricted access to billboards, local media, and state-funded television.[130] If transposed onto the grounds of a U.S. workplace, everything that occurred in this flawed election in Ukraine would be legal. Employers are perfectly free to use workplace space for partisan meetings while denying use of that space to union supporters, to monopolize communications media within the workplace, to instruct employees on how to vot,; and to pressure employees (in every way short of an explicit threat) to vote against unionization. It is particularly telling that the State Department never raised any doubt that the Ukrainian election was conducted by secret ballot. Such an election may be "free" in the sense that it ends in a secret ballot, but it is neither "fair" nor "competitive."

Similarly, in 2003 the State Department issued a statement criticizing the Republic of Armenia for an "election process [that] fell short of international standards."[131] The United States ambassador to the Organization for Security and Cooperation in Europe specifically cited "violations by state-run television of the principle of equal access for all candidates."[132] In addition, election monitors reported allegations that "public sector employees, factory workers, teachers, students and others were instructed to attend the incumbent's rallies."[133] Again, the same things that disqualify an election abroad — including forcing employees to attend partisan meetings or rallies — are perfectly legal in every private sector workplace across the United States.

In the leadup to 2004 elections in Ukraine, the House and Senate passed concurrent resolutions calling for electoral reforms in that country. Apart from the specific criticisms of Ukraine, the resolution outlines some of the core principles defining democratic elections:

> a genuinely free and fair election requires a period of political campaigning conducted in an environment in which ... the candidates [may present] their views and qualifications to the citizenry, including ... enjoying unimpeded access to television, radio, print, and Internet media on a non-discriminatory basis.[134]

In conclusion, Senator Ben Nighthorse Campbell insisted that "the Ukrainian authorities ... need to ensure an election process that enables all of the candidates to compete on a level playing field."[135] We can only hope that this same standard of democracy may one day be applied in the U.S. workplace.

Conclusion

At every step of the way, from the beginning to the end of a union election, NLRB procedures fail to live up to the standards of U.S. democracy. Apart from the use of secret ballots, there is not a single aspect of the NLRB process that does not violate the norms we hold sacred for political elections. The unequal access to voter lists; the absence of financial controls; monopoly control of both media and campaigning within the workplace; the use of economic power to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures — every one of these constitutes a profound departure from the norms that have governed U.S. democracy since its inception.

While the nation's elected officials include many talented and tireless campaigners, it is hard to imagine anyone — Republican or Democrat — who could win election under the conditions that workers must use to form unions. Indeed, almost any single one of the problems listed above would be enough to sink all but a handful of campaigns. If congressional elections were run just as they are now, except that a challenger was required to show signed statements of support from 30 percent of registered voters before the district would schedule an election, this by itself would make elections impossible in most of the country. Similarly, if the only change were that one candidate had access to voter lists and the other did not, this by itself would make victory virtually unattainable for the disadvantaged candidate. It is easy to imagine a similar result for each of these failures of the NLRB system: if the only problem was that one candidate had monopoly control over the media; if it was just that one could talk to voters every day at work while the other had to visit them at night in their homes; if it was only that local businesses threatened to lay off employees if a certain candidate was elected; or only that one candidate had the power to compel all voters to attend one-sided campaign rallies — any single one of these would result in certain defeat for the vast majority of candidates.

Intuitively, one would think that if there were any difference between union and political elections, it would be that union elections provided even greater protections to participants, out of recognition of their greater vulnerability. In political elections, the actions of either employer or employee are part of a much larger electorate and, therefore, contribute in a much more indirect way to the election's outcome. In addition, since most political campaigning — as well as the final act of voting itself — takes place outside the workplace, there is much less opportunity for employer surveillance of, knowledge of, and influence over employees' political behavior. In union elections, all of this is reversed; the campaign primarily takes place in the workplace, where employers know who is talking pro-union, who is wearing what kind of button, who has signed what petition, and who shows up to vote (and in whose company) on the election day. Given the far greater opportunity for undue influence in the workplace, one might suppose that protections against voter coercion would be more stringent in union elections than in political elections. Just the opposite is true.

The analysis above points to an inescapable conclusion. The high hopes and bold words that accompanied the passage of the Wagner Act have not been realized. It is possible for scholars, lobbyists, and lawmakers to hold widely divergent beliefs regarding how unions should be formed. But it is no longer possible to believe that the current system mirrors the procedures we use to elect public officials. Indeed, from the point of view of the framers of the Constitution, of U.S. jurisprudence, and of state and federal statute, the current NLRB system is profoundly broken — and profoundly undemocratic. Whatever path labor law reform may take, it must begin with this understanding.

References

[1] 79 Cong. Rec. 7565 (1935), reprinted in 2 Leg. Hist. 2321 (NLRA 1935).

[2] Senate Report No. 1184, 73rd Cong., 2nd sess. (1934) 4, reprinted in 1 Leg. Hist. 1103 (NLRA 1935).

[3] Office of Congressman Charlie Norwood, "Norwood Blocks Democrat Attempt to Steal Worker Voting Rights," News Release, 17 Feb. 2005, 7 Apr. 2005 <www.house.gov/norwood>.

[4] In Fiscal Year 2003, over 28,000 charges of unfair labor practices were filed with the NLRB. Of these, the Board found that over 10,000 had merit. Sixty-Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2003 (Washington: 2004).

[5] For one such example, see Bureau of African Affairs, Department of State, Zimbabwe: Initial Findings of U.S. Election Observer Team, Fact Sheet, 14 Mar. 2002 <www.state.gov/p/af/rls/fs/8781.htm>.

[6] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (New York: Harper & Bros., 1948); Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *47 Indiana Law Journal* 1 (1971) 20-35.

[7] Thomas Jefferson, "Madison's Report to the Virginia General Assembly" (1800), reprinted in Kenneth M. Dolbeare, ed., American Political Thought, (Chatham, NJ: Chatham House, 1989) 178, 182.

[8] Bork 23. Bork goes on to note that "Freedom for political speech could and should be inferred even if there were no first amendment." And indeed, even before the First Amendment was adopted, the Constitution established a standard of unlimited free speech for congressional debates, mandating that nothing said on the floor of the House or Senate could be used as the basis for slander or libel suits. (Article I, section 6 of the Constitution states that "for any speech or debate in either House, they shall not be questioned in any other place.") However, the founders repeatedly remarked that the only reason we have a representative government is that the country is too big for all citizens to participate in direct democracy. Ultimately, every citizen is charged with the same duty as representatives to debate all sides of an issue and vote wisely. Thus, while speech on the floor of Congress is provided an extra layer of protection, the principle of free, broad-ranging and uninhibited political debate applies to the population at large and is not restricted to its elected representatives (On this point, see Meiklejohn 35). The insistence that national sovereignty resides in the people rather than any elevated office led to the creation of an ambitious system of public debate that constitutional scholar Cass Sunstein has dubbed "government by discussion" (Cass Sunstein, Democracy and the Problem of Free Speech (New York: The Free Press, 1993) xvi).

[9] *New York Times Co. v. Sullivan*, 376 US 254, 270 (1964).

[10] *Brown v. Hartlage*, 456 US 45 (1982), quoting *Budkley v. Valeo*, 424 US 1, 52-53 (1976).

[11] *Whitney v. California*, 274 US 357, 375 (1927).

[12] Thus Thomas Jefferson insisted that "the diffusion of information and the arraignment of all abuses at the bar of public reason," was among the "essential principles of our government" that have "guided our steps through an age of revolution and reformation" (Thomas Jefferson, "First Inaugural Address" (1801), reprinted in Dolbeare 186).

[13] *New York Times Co. v. Sullivan*, quoting Judge Learned Hand in *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943).

[14] Organization for Security and Cooperation in Europe, "Statement of Preliminary Findings and Conclusions," International Election Observation Mission, Kiev, Ukraine, 22 Nov. 2004.

[15] This view was broadly held by the political thinkers of the 17th and 18th centuries who inspired the revolutionary generation. See, for example: C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962; New York: Oxford University Press, 1988) 222-231. Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York: W.W. Norton & Co., 1972) 169, notes

that for most of the founding generation, people without property were "supposed to have no will of their own."

[16] Morris, a delegate to the Constitutional Convention from Pennsylvania, is quoted in James Madison, Notes of Debates in the Federal Convention of 1787 (Athens: Ohio University Press, 1984) 402. Madison himself argued that if propertyless men were given the vote, they would inevitably "become the tools of opulence and ambition" (Madison 403).

[17] Ibid.

[18] Thomas Jefferson, "Letter to James Madison" (1787), reprinted in Dolbeare 191.

[19] On the Gregoire inauguration, see: Rebecca Cook, "Inauguration then litigation," *King County Journal* 12 Jan. 2005 <www.kingcountyjournal.com/sited/story/html/183039>.

[20] The NLRA only covers private sector employees. Public sector employee unions are certified through various state or federal procedures that are generally modeled on the NLRB election process.

[21] 29 USC §158(a)(2).

[22] John Adams, "Thoughts on Government" (1776), quote reproduced in Wood 165.

[23] In the same hearings, Twentieth Century Fund chairman William H. Davis explained by analogy that "we may be interested in a controversy between Belgium and England on the value of the belga today, but we are not parties to that controversy" (1935 Senate Hearings at 718, 750, reprinted in Craig Becker, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 *Minnesota Law Review* 495, (1993) 530.

[24] 2 USC 14, §441e(a) makes it illegal for a foreign national, "directly or indirectly," to make any contribution of "money or other thing of value," or even an "implied promise to make a contribution," "in connection with a Federal, State or local election." They are also banned from making an "independent expenditure, or disbursement for an electioneering communication."

[25] Unions have the legal right to visit employees in their homes, but employers do not have this right. This doctrine has been developed in *Plant City Welding and Tank Co.*, 119 NLRB 131, 133 (1957); and *Peoria Plastic Co.*, 117 NLRB 545, 547-48 (1957).

[26] Kate Bronfenbrenner and Tom Juravich, "It Takes More than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy," in Kate Bronfenbrenner et al. (eds.), Organizing to Win: New Research on Union Strategies (Ithaca, NY: ILR Press, 1998) 19-36.

[27] *May Department Stores Co.*, 136 NLRB 797, 802 (1962).

[28] *NLRB v. Magnavox*, 415 US 322, 323-24 (1974), quoting *Gale Products*, 142 NLRB 1246 (1963).

[29] *The Unanimous Declaration of the Thirteen United States of America*, 4 July 1776, 28 Apr. 2005 <www.earlyamerica.com/earlyamerica/freedom/doi/text.html>.

[30] For example, Texas law mandates that a complete voter list be provided to anyone who requests it, with no charge beyond the actual cost of reproducing the list, specifically requiring that no party be charged more than another for a copy of the list. Texas Election Code §18.008 and §18.010 (2004). The law mandates that lists must be provided "as soon as practicable" but not later than 15 days after the request, and must be provided "on magnetic tape" if available and requested.

[31] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[32] Ibid.

[33] Ibid.

[34] Sixty-Eighth Annual Report of the National Labor Relations Board.

[35] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[36] In *Washington Fruit and Produce*, 343 NLRB 125 (2004), the Board further undermined union access to employees by allowing the results of a "no union" vote to stand, despite the fact that the employer provided an *Excelsior* list with incorrect addresses for 87 employees. This case is described further in American Rights at Work's "Workers Denied Access to Critical Information Before Election," *Workers' Rights Watch: Eye on the NLRB*, Feb. 2005 <www.americanrightsatwork.org/workersrights/eye2_2005.cfm>.

[37] For example: John G. Kilgour, Preventive Labor Relations (New York: American Management Association, 1981) 210, stresses that "the important work of preventive labor relations takes place before the active campaign begins."

[38] *Brown v. Hartlage* 60.

[39] Committee on the Future of Worker-Management Relations, *Fact Finding Report* (1994) 81. Cited in Kate E. Andrias, "NOTE: A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections," 112 *Yale Law Journal* 2415 (2003).

[40] *Republic Aviation v. NLRB*, 324 US 793 (1945). Even then, the ability of employees to undertake such a task is impaired by their own job duties, by the ability of supervisors to transfer activist workers to more isolated workstations, and by their own fears of reprisal. If workers are allowed to talk about other non-work topics on the job, they must also be allowed to talk about unionization. On this point, see *South Nassau Hospital*, 274 NLRB 1181 (1985). However, if employers have a general rule prohibiting employees from talking about anything but work while on work time, employees are banned from discussing the union while working. This is true even if supervisors use work time as an opportunity to campaign against unionization.

[41] Federal Election Commission, Campaign Guide for Corporations and Labor Organizations (Washington: June 2001) 63-64, stipulates that if corporations allow any candidate for federal office to address rank and file employees, they must provide a similar opportunity to opposing candidates.

[42] *NLRB v. Babcock & Wilcox Co.*, 351 US 105 (1956).

[43] Alfred DeMaria, How Management Wins Union Organizing Campaigns. (New York: Executive Enterprises Publications Company, Inc., 1980) xvii.

[44] *Livingston Shirt Corp.*, 107 NLRB 400 (1953). The ban on captive audience meetings within 24 hours of the vote is established in *Peerless Plywood*, 107 NLRB 427 (1953). Employers retain the right to communicate individually with employees during the last 24 hours, even systematically speaking with every individual in the workplace, as long as they are not brought together in a group meeting. It is striking that federal courts have generally prohibited "captive audience" communications, except in the context of union elections. Thus, a Florida judge banned pornographic materials in a workplace on the grounds that offended female workers constituted "a captive audience in relation to the speech that comprises the hostile work environment" (*Robinson v. Jacksonville Shipyards, Inc*, 760 F. Supp. 1486 (N.D. Fla. 1991)). So too did a Pennsylvania court side with construction workers who had been the target of demonstrations and harassment at their worksite, because they could not escape the communication except by quitting their jobs and thus constituted a captive audience (*Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383 (E.D. Pa. 1980)). By comparison with worksite demonstrations, captive anti-union meetings might seem significantly more invasive; yet labor law remains the one area of the law where captive audience speeches are fully permitted.

[45] *Hicks-Ponder Co.*, 168 NLRB 806, 814 (1967).

[46] In *Litton Systems, Inc.*, 173 NLRB 1024 (1968), the Board supported an employer who fired an employee for discreetly leaving a captive meeting, affirming that employees have "no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiuion [*sic*] speech designed to influence the outcome of a union election." (reprinted in Becker 559). In one of the landmark cases concerning captive audience meetings, the Board acknowledged that an employer "did its best to inhibit the free play of discussion," but nevertheless ruled the behavior legal. *Luxuray of New York*, 185 NLRB 100 (1970).

[47] *Livingston Shirt* 406.

[48] John J. Lawler, Unionization and Deunionization: Strategy, Tactics and Outcomes (University of South Carolina Press, 1990) 145.

[49] Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing," U.S. Trade Deficit Review Commission (Washington: 2000). The prohibitions on employee free speech — the employer's right to ban union organizers from its property, to prohibit distribution of union literature even while actively distributing anti-union literature, and to require employees to attend anti-union meetings at which union supporters are prohibited from speaking — were codified in the Taft-Hartley amendments to federal labor law, enacted in 1947. It is telling that this law was established at the height of McCarthyist anti-communism. The bill's supporters argued that the constraints on union activity would prevent political mobilization on the left; without such a bill, they asserted, "it is inevitable that we will drift into a socialist dictatorship" (quoted in "House Bill Likely to Curb Walkouts," *New York Times* 21 Feb. 1947: 3, reprinted in Andrias 2427). Indeed, the bill included a prohibition on certifying a union if any of its officers had Communist affiliations. The authors of the law saw it as part of a broader agenda aimed, in part, at depriving free speech rights to those deemed un-American. Representative Hartley, for instance, promoted an additional proposal that would have banned newspaper editorial writers from joining the Newspaper Guild, arguing that with this measure "people ... will be able to get honest opinions, not influenced by communistic influence" (quoted in H. Walton Cloke, "Hartley Outlines Labor Law 'Equity,'" *New York Times* 26 Feb. 1947: 19, reprinted in Andrias 2428). Many of the McCarthy-era restrictions on free speech have since been rescinded; by 1961, for instance, the Supreme Court ruled that membership in the Communist Party, in and of itself, could not be grounds for criminal punishment (*Noto v. United States*, 367 US 290 (1961)). However, since Congress has not mustered the political support to amend the law, and since labor law provides no right of private action and, therefore, has not been developed through private litigation, the nation's labor laws remain uniquely fixed by the views of this particular historical moment. For a broader discussion of the Cold War context of the Taft-Hartley Act, see Andrias. In addition to making partisan speeches, the Board has supported the right of employers to show virulently anti-union movies in "captive audience" meetings. When one union objected to employees being required to watch a film depicting a union member shooting to death a non-striking employee and maiming a young child, the Board concurred that the film represented "antiunion propaganda at its effective best in creating feelings of revulsion and fear of unions and of the tactics of union sympathizers" — but permitted its screening. By analogy, if the 2004 presidential election were conducted under Board rules, every voter in the United States might have been required to watch only the Swiftboat Veterans for Truth's documentary *Stolen Honor* — or, if the Democrats controlled things, perhaps only *Fahrenheit 9/11* — with no airtime for alternative viewpoints. What would clearly be a travesty of federal electoral law is a perfectly legal and quite common feature of union elections.

[50] *Midland National Life Insurance Co.*, 263 NLRB 127, 129-30 (1982).

[51] Thomas Jefferson, "Notes on Virginia" (1785), reprinted in Dolbeare 182.

[52] For further discussion of these dynamics, see Becker.

[53] Committee on Commerce, Senate Report No. 92-96, 92nd Cong., 1st sess. (Washington: GPO, 1971) 20.

[54] 47 USC 5, §315(b). The same restriction applies to the 45 days leading up to a primary campaign.

[55] 47 USC 5, §315(a). Exceptions are for bona fide newscasts, interviews, documentaries, or on-the-spot coverage. In the 2004 presidential race, the Equal Time Rule gained national attention after the Sinclair Broadcasting Group announced plans to air a program critical of Democratic candidate John Kerry on its television stations. The legal arguments that ensued revolved around whether or not the program constituted legitimate documentary news coverage or whether it amounted to privileged airtime for the Bush campaign.

[56] The rule was first articulated as part of the Federal Radio Act of 1927. It was later incorporated into the 1934 Communications Act, and finally into the FECA in 1971. For a brief history of the legislation, see Thomas Blaisdell Smith, "NOTE: Reexamining the Reasonable Access and Equal Time Provisions of the

Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Fails?" 74 *Georgetown Law Journal* 1491 (1986).

[57] Justice Frankfurter explained that "unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation." *National Broadcasting Company v. United States*, 319 U.S. 190, 226-27 (1943).

[58] Statement of Representative Johnson, 67 Cong. Rec. 5558 (1926), reprinted in Smith 1520.

[59] Statement of Senator Holland, 105 Cong. Rec. 14, 1451 (1959), reprinted in Smith 1498.

[60] The only "media" right guaranteed to pro-union employees in the workplace is the right to hand out literature in a break room, and then only when both the distributor and recipient are on break time.

[61] On this point see *NLRB v. United Steelworkers, CIO (NuTone, Inc.)*, 357 US 357 (1958); *NLRB v. Babcock & Wilcox Co.* Management communication to employees — including anti-union campaigning — is treated as privileged. A company may not ban distribution of union literature if it allows distribution of other non-work-related literature; that would constitute discrimination. However, management communication is treated as a class of its own, whose one-sided distribution does not constitute discrimination as long as all other types of literature apart from management communication are treated the same.

[62] *NLRB v. United Steelworkers, CIO (NuTone, Inc.)*, reprinted in Becker 564.

[63] Senate Report No. 96, 92nd Cong., 2nd sess. (Washington: GPO, 1971) 1.

[64] 40 FCC 398, quoted in *Chisholm v. FCC*, 176 US App. D.C. 1; 538 F.2d 349, 355 (DC Cir. 1976).

[65] In *NLRB v. Babcock & Wilcox Co.* 112, the Court ruled that union organizers may be banned from company property "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."

[66] Similarly, the Board's logic in defending forced anti-union meetings in the workplace is that "The equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting ... to make the facilities of the one available to the other" (*Livingston Shirt Company* 407).

[67] *NLRB v. United Steelworkers, CIO (NuTone, Inc.)*.

[68] Committee on Interstate and Foreign Commerce, House Report No. 92-565 (accompanying HR 8628), 92nd Cong., 1st sess. (Washington: GPO) 4.

[69] Ibid.

[70] Committee on House Administration, House Report No. 92-564 (accompanying HR 11060), 92nd Cong., 1st sess. (Washington: GPO) 4.

[71] "The whole theory behind our law," explains the FEC, "is to prevent dominance in the economic sector from spilling over to dominance in the political sector." Interview with FEC Office of Election Administration Deputy Director William C. Kimberling, in Paul Malamud, "Keeping Track of Campaign Contributions," *Issues of Democracy: Free & Fair Elections* 1, No. 13 (Washington: U.S. Information Agency; Sept. 1996) 6.

[72] 2 USC Ch. 14, §441a(b). In presidential elections, any candidate who accepts federal matching funds must comply with specific limits on the amount of money that can be either raised or spent on the election.

[73] Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107-155, §304 (27 Mar. 2002), amending FECA (2 USC Ch. 14, §441a(i)). An outline of the amendment is available at <www.fec.gov/pages/brochures/millionaire.shtml>.

[74] 2 USC Ch. 14, §441a(i). These candidates still receive federal matching funds, but their fundraising and

spending limits are increased proportional to the size of the war chest of their wealthy opponents.

[75] Employers are required to file reports with the Department of Labor regarding the amount of money spent on anti-union consultants. However, the definition of "consultant" is sufficiently narrow that much anti-union advice and support work goes unreported. Apart from hiring such consultants, no other expenditure on anti-union efforts is reported. For more on this subject, see John Logan, "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal* 33 (2002) 197-214.

[76] Alexander Hamilton, "Federalist 73," The Federalist Papers, ed. Clinton Rossiter (New York: Penguin Books, 1961) 441.

[77] 18 USC, Ch. 29, §599.

[78] 18 USC, Ch. 29, §610: "It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of Title 5, US Code, to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both."

[79] In *United States Civil Service Commission et al. v. National Association of Letter Carriers, AFL-CIO, et al.*, 413 US 548; 93 S. Ct. 2880, 2885 (1973) , the Supreme Court explained the purpose of the Hatch Act as protecting, in part, against "the danger to the [civil] service in that political rather than official effort may earn advancement."

[80] 18 USC, Ch. 29, §600: "Whoever, directly or indirectly, promises any employment, position, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined under this title or imprisoned not more than one year, or both."

[81] On this point, see Pamela S. Karlan, "Not by Money But by Virtue Won? Vote Trafficking and the Voting Rights System," 80 *Virginia Law Review* 1455, Oct. 1994.

[82] 2 USC Ch. 14, §441b(b)(2)(A). The same restrictions apply in reverse to unions: a union PAC may solicit nonsupervisory employees at any time, but may only solicit managerial employees or shareholders twice a year, and under similar conditions to those applied to corporate PACs.

[83] 2 USC Ch. 14, §441b(b)(3)(C).

[84] 2 USC Ch. 14, §441b(b)(4)(B). The one exception to this rule is for employees making donations of $50 or more. The identity of all such donors must be reported under federal law.

[85] 2 USC Ch. 14, §441b(b)(6). The company may charge the union only for its actual costs in providing this service.

[86] Michigan Election Law, Act 116 of 1954, §168.931 (1)(d). Among other states with similar laws is Louisiana Revised Statute 23 §961, mandating that "no employer having regularly in his employ twenty or more employees shall … adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character."

[87] See, for example: Rhode Island Code, Title 17, §17-23-6 (violators permanently forfeit the right to vote or hold public office, and corporations forfeit their charters); Maryland Code §13-602 (a)(7) (violators face

a fine of up to $1,000 and up to one year in prison, and are banned from holding office for four years); Arizona Code §16-1012. Ten other states have similar statutes.

[88] Legal scholar Cynthia Estlund notes that other areas of employment law, such as anti-discrimination statutes, recognize much more subtle forms of coercion than does labor law. Indeed, the entire framework of anti-discrimination law bans expressions in the workplace that are legal outside the workplace. These laws implicitly acknowledge that the workplace as a whole is a place of coercion, where one cannot simply walk away from hostile statements without unacceptable repercussions to one's livelihood (Cynthia Estlund, "Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment," 75 *Texas Law Review* 687, 692, Mar. 1997).

[89] The Taft-Hartley Act specifies that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit. 29 USC §158(c) (2000). This view was affirmed by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575, 618 (1969), where the Court found that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit."

[90] *NLRB v. Gissel Packing Co.* 618-619.

[91] DeMaria 68.

[92] Bronfenbrenner (2000).

[93] Arizona Code 16-1012. Violators of this statute are guilty of a class 1 misdemeanor. Maryland §13-602 (a)(8) includes identical language (violators are subject to $1,000 fine and/or one year in prison, and are banned from holding office for four years). Similar language is found in the state codes of Colorado, Indiana, Montana, New Jersey, Ohio, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

[94] *NLRB v. Champion Labs, Inc.*, 99 F 3d 223 (7th Cir. 1996).

[95] *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

[96] *NLRB v. Golub Corp*, 388 F.2d 921, 920 (2d Cir. 1967).

[97] *NLRB v. Champion Labs, Inc.*

[98] *Kellwood Co.*, 299 NLRB 1026 (1990).

[99] Paul C. Wiler, "Governing the Workplace: Employee Representation in the Eyes of the Law," Employee Representation: Alternatives and Future Directions, eds. Bruce E. Kaufman and Morris Kleiner (Madison, WI: Industrial Relations Research Association, 1993) 85.

[100] Richard Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion Labor Market," Employee Representation: Alternatives and Future Directions, eds. Bruce E. Kaufman and Morris Kleiner (Madison, WI: Industrial Relations Research Association, 1993) 29.

[101] Andrias.

[102] The NLRB Casehandling Manual of 1989, pt. 2, § 11302.2, instructs Board agents that the "best place to hold an election" is the worksite and that absent "good cause to the contrary," it must be held there, reprinted in Becker 566.

[103] *Red Lion*, 301 NLRB 7 (1991).

[104] FEC staff, interview, by Elizabeth Conklin Dority (research assistant to the author), 6 Oct. 2004. United States Election Assistance Commission, Best Practices Tool Kit (Washington: 30 July 2004) 2, similarly describes the "most likely polling place[s]" as being in "public schools, churches, and community centers."

[105] Texas Election Code §43.031 (2004). Polling places are prohibited at the residence of anyone "related within the third degree by consanguinity or the second degree by affinity" to a candidate.

[106] Texas Election Code §43.032(a) (2004).

[107] John G. Kilgour, Preventive Labor Relations (New York: AMACOM, 1981) 260.

[108] Michael Goldfield, The Decline of Organized Labor in the United States (Chicago: University of Chicago Press, 1987) 201-202.

[109] Texas Election Code Ann. §221.051 states that "If the official result of a contested election shows that the contestee won, on qualifying as provided by law the contestee is entitled to occupy the office after the beginning of the term for which the election was held, pending determination of the rightful holder of the office."

[110] *John D. Stevens, Relator v. Honorable Don E. Cain, Judge, Respondent,* 735 S.W.2d 694 (Tex. App. – Amarillo, 1987).

[111] 47 USC 5 §312 states that the FCC may revoke any station license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office."

[112] 2 USC 14 §437. To date, the Commission has issued fines of up to $850,000 for campaign funding violations. FEC fines of $50,000 or more are available at <www.fec.gov/press/bkgnd/history.sthml>.

[113] 26 USC 95, §9012.

[114] 18 USC 29, §595.

[115] 18 USC 29, §597.

[116] 18 USC 29, §1001.

[117] Sixty-Eighth Annual Report of the National Labor Relations Board.

[118] The decision of a Board agent not to take a case is not appealable to any authority. *Detroit Edison Co. v. NLRB,* 440 US 301, 316 (1979).

[119] 29 USC 169 (c) (2000).

[120] *Phelps Dodge Corp. v. NLRB,* 313 US 177, 198-200 (1941); *Retailer Delivery Systems, Inc.,* 292 NLRB 121, 125 (1988).

[121] *Tubari Ltd., Inc. v. NLRB,* 959 F.2d 451, 454 (3d Cir. 1992).

[122] The ban on punitive damages for repeat offenders was established in *Ex-Cell-O Corp.,* 185 NLRB 107, 108 (1970). Board remedies are limited to backpay, requiring employers to stop illegal activities, and requiring them to post notices acknowledging that certain practices are illegal. If employers continue to violate such orders, the Board can go into federal court to seek a contempt order. However, the Board never has the option of imposing punitive fines.

[123] Labor law is unique even among employment regulations in prohibiting any form of punitive damages, providing no right of private action, and precluding states from enacting parallel statutes with stricter enforcement mechanisms. On this point, see: Cynthia Estlund, "The Ossification of American Labor Law," 102 *Columbia Law Review* 1527, 1553-54, 1612, Oct. 2002.

[124] *Hialeah Hospital,* 343 NLRB 52 (2004). This case is described further in American Rights at Work's "Is Another NLRB Election Really A Solution For These Workers?" *Workers' Rights Watch: Eye on the NLRB,* Dec. 2004 <www.americanrightsatwork.org/workersrights/eye12_2004.cfm>.

[125] In *H.K. Porter Co. v. NLRB,* 397 US 99, 102 (1970), the Supreme Court found that even when a company refuses to bargain in good faith, the NLRB is powerless to "compel a company ... to agree to any substantive contractual provision of a collective bargaining agreement."

[126] See *Sparks Nugget, Inc. v. NLRB*, 968 F. 2d 991 (9th Cir. 1992) and related discussion in Andrew Strom, "Rethinking the NLRB's Approach to Union Recognition Agreements," 15 *Berkeley Journal of Employment and Labor Law* 50 (1994) 86.

[127] National Endowment for Democracy, "Statement of Principles and Objectives," 21 Nov. 2003 <www.ned.org/about/principlesObjectives.html>.

[128] Ibid.

[129] Philip T. Reeker, Deputy Spokesperson, U.S. Department of State, "Ukrainian Parliamentary Elections," Press Statement, Washington, DC, 1 Apr. 2002.

[130] These problems are detailed in Organization for Security and Cooperation in Europe, "2002 Elections to the Verkhovna Rada of Ukraine: Statement of Preliminary Findings and Conclusions," International Election Observation Mission , Kiev, Ukraine, 1 Apr. 2002 <www.osce.org/documents/odihr/2002/04/1292_en.pdf>. The State Department's Press Statement of 1 Apr. 2002 affirms that "the United States concurs with the OSCE mission's preliminary statement."

[131] Stephan M. Minikes, U.S. Ambassador to the Organization for Security and Cooperation in Europe, "Statement to the OSCE Permanent Council," Vienna, Austria, 27 Feb. 2003 <www.state.gov/p/eur/rls/rm/2003/19833.htm>.

[132] Ibid.

[133] Quote is from Organization for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights, Preliminary Statement on Presidential Elections in Armenia, February 19, 2003, 20 Feb. 2003 < http://www.osce.org/odihr/>. The Feb. 2003 statement of U.S. Ambassador Minikes states that "The United States agrees with the preliminary joint assessment of ODHIR."

[134] Senate Concurrent Resolution No. 106, 108th Cong., 2nd sess. (Washington: GPO, 12 May 2004). The resolution was introduced in the Senate by Senator Ben Nighthorse Campbell (R-CO), co-chairman of the United States Helsinki Commission. The House version was introduced by Representatives Henry Hyde (R-IL), Chairman of the International Relations Committee, and Chris Smith (R-NJ), Chairman of the Helsinki Commission.

[135] Statement of Senator Ben Nighthorse Campbell, reported in *BRAMA News and Community Press: News from and about Ukraine and Ukrainians*, 12 May 2004 < www.brama.com>.

UNION ORGANIZING UNDER NEUTRALITY AND CARD CHECK AGREEMENTS

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Collectively bargained language concerning union organizing has become increasingly common. Typically included in such language is the employer's agreement to remain neutral in the organizing process, or to recognize unions based on card checks by neutral third parties (as an alternative to NLRB elections), or both. The authors examine the content of and organizing experience under 118 separate written agreements of this kind. They find strong evidence that card check agreements reduced management campaigning, as well as the use of illegal tactics such as discharges and promises of benefits, and also substantially increased the union recognition rate. Neutrality alone apparently had much less effect, but agreements containing only neutrality provisions have sometimes led to card check agreements. Two less common provisions of organizing agreements that appear to have increased organizing success were campaign time limits and requirements that employers provide unions with employee lists.

Collectively bargained language to address the process of organizing new workers is increasing in frequency and importance. Rooted in the labor movement's view that management opposition is the key factor explaining union losses in representation elections, such language seeks to alter the organizing process and to boost the rate of union success. Typically, it does so through a pledge by the employer to remain neutral in the organizing process, or through the establishment of card check procedures to avoid National Labor Relations Board elections, or both. Despite a long stream of industrial relations research demonstrating the role of employer opposition in union election losses, there has been almost no academic research on neutrality, card check, or similar agreements.

This study begins to fill that void. Using the content of and organizing experience under 118 separate written agreements between unions and management concerning organizing, we seek to answer three questions. First, how are neutrality and card check arrangements defined and what other components are found in organizing

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Copies of the surveys used to collect the data analyzed in this paper are available from the first author at Labor Studies and Employment Relations Dept., Labor Education Center, Rutgers University, 50 Labor Center Way, New Brunswick, NJ 08901–8553. The authors are willing to discuss sharing the data but reserve the right not to do so. The analyses discussed in the paper were performed using SPSS.

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agreements? Second, do either neutrality or card check agreements limit illegal or legal management resistance? And third, how do the unions' success rates under these agreements compare with the experience under NLRB elections? Finally, based on the answers to these questions, we suggest a future research agenda.

Literature Review

A substantial empirical literature in industrial relations establishes employer opposition as a major contributor to union losses in certification elections and, ultimately, to the decline of the unionization rate in the United States. Dickens (1983), Cooke (1985a), Lawler and West (1985), Freeman and Kleiner (1990), Comstock and Fox (1994), Fiorito, Jarley, and Delaney (1995), and others have detailed the negative impact from employer Unfair Labor Practices (*ULPs*) in general or employment discrimination, including discharge, specifically. Others have similarly documented the adverse effects of legal employer opposition on union elections (Lawler 1984; Lawler and West 1985; Dickens 1983; Bronfenbrenner 1994; Freeman and Kleiner 1990; Getman, Goldberg, and Herman 1976). Still other work has identified the negative impact of management campaigns on the negotiation of first contracts (Cooke 1985b; Bronfenbrenner 1994; Pavy 1994). From the trade union perspective, this literature supports the need for employer neutrality and card check language.

The Emergence of Organizing Agreements as a Union Strategic Response

Lawler and West (1985) drew on the strategic choice literature to posit that both employer and union strategies related to organizing fall into two "major classes," internal and external. "External strategies" are those that seek to alter the context in which an organization operates. The American labor movement has recently begun to develop new, structurally oriented, internal strategies to deal with its organizing failures (Fletcher and Hurd 1998; Nissen 1999). However, it has had a much longer, more sustained external strategy focused on shifting the context in which organizing takes place, specifically by neutralizing employer opposition. It has pursued two separate tracks in this regard, one legislative, the other contractual.

In the late 1970s, at about the same time as an attempt at labor law reform ended in failure, several major industrial unions bargained agreements with management that represented a new external strategy. Through contract language, management agreed to remain neutral in certification elections, to conduct expedited elections, or to recognize the union based on the presentation of a sufficient number of signed membership cards (Craft 1980). In addition, the number of union and management partners seeking to create more collaborative relationships increased throughout the 1980s and into the 1990s. As unions grew more sophisticated in identifying and trying to meet their institutional needs through these relationships, they increasingly extracted employer commitments in regard to organizing (Eaton and Kriesky 1997). At the same time, a growing number of unions were able to negotiate stand-alone organizing agreements with employers with whom they had no prior bargaining relationship. Most recently, the AFL-CIO has promoted this contractual approach for shifting the organizing context through the publication of a "how to" manual for affiliates (AFL-CIO 2000).

Existing Studies on Neutrality and Card Check Language

Despite organized labor's growing interest in and use of organizing agreements, there has been little scholarship dealing with them. Recent books examining "mutual gains" labor relationships either simply mention neutrality (Walton et al. 1994) or fail to deal with it at all (Kochan and Osterman 1994; Cohen-Rosenthal and Burton 1993). The research that does exist has focused on a limited number of cases. Craft (1980) described the bargaining context

and content of the early agreements in manufacturing. Three more recent case studies have looked at either the bargaining or operation of card check agreements in a limited context. Green (1997) described the role played by neutrality language in creating a partnership between the Service Employees International Union (SEIU) Local 509 and private human services agencies in Massachusetts. Nissen (1998) examined the difficulties the Communications Workers of America (CWA) had both in organizing and bargaining neutrality at the one-time AT&T subsidiary, NCR, despite the partnership between AT&T and CWA in other business units. Budd and Heinz (1996) described a somewhat higher level of union success in negotiating organizing agreements in two Minneapolis hotels and, subsequently, in organizing under these agreements. Perhaps the most comprehensive description of the evolution of neutrality and card check strategies appears in a Communication Workers of America (1997) publication describing its experiences in securing such agreements with SBC in the early 1990s.

Benz (1998) examined the role of card check agreements in organizing new union members in multiple cases and concluded that "card check campaigns have yielded some significant victories, and they are an indispensable weapon in the struggle to build a resurgent labor movement" (1998:119–20). She admitted, however, that the lack of data prohibits us from knowing how a union can secure such an agreement and whether the strategy is widely applicable among various employers and industries.

Indeed, the only quantitative research that examines an organizing context that differs substantially from the NLRB process has focused on Canada, where the recognition procedures used include card check. Thomason (1994) and Thomason and Pozzebon (1998) found substantially lower rates of ULPs as well as legal employer tactics, including those listed above, and much higher rates of certification, in both Ontario and Quebec than in the United States. Using data from Ontario, Thomason (1994) found a lower rate of ULPs in card check than in regular election campaigns. As in the United States, management opposition did reduce the probability of success, but to a much lesser degree. The Ontario-only study found a similar result concerning delays in the certification process, although the timing and source of those delays were not directly comparable given differences in administrative procedures (Thomason 1994:224). Finally, unions had a higher rate of success with card check recognition than in elections (Thomas and Pozzebon 1998).

The research presented here begins to close the data gap identified by Benz. We examine the effectiveness of neutrality and card check agreements as a union strategy to bring about a positive shift in the external context for organizing (Lawler and West 1985). We look at the various types of language and how they seek to shift that context. We then examine the impact of these agreements on specific employer tactics. We hypothesize that both neutrality and card check agreements will reduce the use of employer tactics, although, consistent with the Canadian findings, card check is likely to have the greater impact.[1] We then look at union recognition outcomes under both types of agreements. We hypothesize that they will result in much higher rates of union success than are currently found in regular NLRB elections. Again, card check should be more effective in this regard (see note 1).

[1]The labor movement emphasizes the positive aspects of card check campaigns in speeding up the process and thus reducing the opportunity for employer opposition. At least a portion of the employer community has a different view. Both neutrality and card check arrangements are seen as preventing employees from "getting the full story" (Kramer, Miller, and Bierman 1981:79; see also Yager, Bartl, and LoBue 1998). Card check procedures are argued to increase the possibilities for union coercion and misrepresentation in obtaining worker signatures (Yager, Bartl, and LoBue 1998:77).

Research Methods

Identifying Agreements

In the first stage of this research project, we sought to identify how many neutrality and card check agreements exist and who the parties to those agreement are. Focusing on international unions with 10,000 or more members primarily in the private sector, we identified 57 national unions to survey. We mailed a brief survey to union representatives, typically either the Research Director or President. The instrument sought to identify any neutrality or non-interference agreement (including a definition) and any other agreements "regarding organizing unorganized workers such as card check arrangements, unit accretion, physical access, and so on" to which their union had been or currently was a party; whether their union had a policy to encourage the negotiation of such agreements; and whether they had experienced failures in attempts to negotiate agreements.[2] We also asked for the name of a contact person who could provide us with further information. At the same time, we conducted an extensive search of other sources, including BNA materials and online databases of business periodicals. This effort was completed early in 1997. Other methods were used to extend the list throughout 1997 into the fall of 1998. These methods included "snowball" sampling (leads provided by respondents to a second survey described below) and investigation of published sources, including the AFL-CIO's *Work in Progress* news service and relevant legal decisions. We eventually obtained information on organizing agreements from 36 different national unions, 23 of which had at least one such agreement. Altogether, these efforts netted a total of 132 agreements.[3]

For all 132 agreements, we were able to identify the parties to the agreement and the sector in which they were located. Half were in the service sector, the majority in hospitality, gaming, and telecommunications. Steel and auto predominated within manufacturing. Basic contextual information, such as the date and coverage of the agreement, was available for slightly smaller subsets. A few of the agreements were more than twenty years old (see Craft 1980 for a description of early agreements), but the overwhelming majority (about 80%) emerged in the 1990s. While the older agreements emerged out of centralized, national agreements, more recently some unions have managed to obtain organizing agreements with companies with whom they have no existing bargaining relationship or, at best, a local relationship here and there. Many, though by no means all, of the Hotel and Restaurant Employees' (HERE's) agreements fell into this category. A handful of agreements were bargained with multi-employer associations.

[2]In determining which agreements to include in the data base, we chose to exclude three specific types of information. First, we excluded cases of ad hoc card check recognition by employers. Although interesting, these events are difficult if not impossible for an outside researcher to track systematically. Second, although we collected some information on oral agreements, their somewhat informal and illusory nature led us to eliminate them too from the quantitative analysis described below, and we made no systematic effort to identify them. Third, we did not attempt to identify every agreement ever negotiated by the unions surveyed. Thus, the list is somewhat time-limited. It includes both current agreements and some agreements that have expired. We attempted to limit the latter category to recent expirations (within the five years preceding the beginning of our data collection), although it was not always possible to determine the exact date of expiration.

[3]The number 132 is imprecise. The list includes two single entries for agreements that mix some multi-employer and single-employer agreements in the hotel industry in New York City and Las Vegas. These entries include single-employer agreements that are heavily patterned on the major multi-employer agreements and that contain identical language. Using separate entries for each would have been unwieldy and would have caused these two cities, in which HERE has dozens and dozens of establishments under contract, to overwhelm the rest of the data set. On the flip side, three companies have multiple entries, reflecting sharp and substantial changes in the coverage and language of the agreement over time.

The language of the agreements was explicit regarding their coverage. Two-thirds of the sample agreements were limited to specific business units, facilities, or occupational groups covered. Business unit exclusions have been common, and a source of conflict, in both telecommunications and steel. Exclusions based on occupations tend to confine the agreement to job classifications that have traditionally been organized. In the vast majority of our cases, where a single union was signatory to the agreement, respondents reported that the agreement covered only organizing by the signatory union.

Although our data set represents the most comprehensive collection of agreements and experiences under them assembled to date, there are three gaps. First, it contains very few examples from the United Food and Commercial Workers, a union that claimed to have organized 70,000 new workers in 1996 (Yager, Bartl, and LoBue 1998) and almost 74,000 in 1997 (Benz 1998) by card check alone.[4] Second, while we have obtained information on HERE's use of organizing agreements in the largest, non-tribal gaming centers and in hotels and restaurants in several large cities or geographic regions, we have learned of a handful of additional agreements negotiated by HERE with hotels in some smaller cities since closing our data set. Thus, even though HERE is the union with the single largest number of agreements in our sample (27.5% of the sample), its activities are also under-represented. Third, we are also aware of several agreements negotiated by the International Longshore and Warehouse Union in Hawaii, primarily in the hospitality sector, but have been unable to collect information about them systematically given confidentiality arrangements between the union and employers.

Data Collection on Agreement Content and Use

In the second phase of the project, we examined the negotiation, content, and utility of these agreements in detail. We took two primary, interconnected approaches to collecting these data: obtaining the agreement itself, and conducting structured phone interviews with union representatives familiar with the agreement. Typically, the person who supplied the language was also the person we interviewed, although occasionally contract negotiators sent language and organizers provided information on its use. In two cases, we relied exclusively on a published report about the organizing agreements (Budd and Heinz 1996). In other cases, we supplemented our interviews with published accounts. Through these multiple methods, we collected some data for 118 of the 132 agreements in our list. As is typically the case with survey research, lack of response or incomplete answers reduced the sample size further for particular variables.[5]

Results

Language

The core provisions of most organizing agreements included the statement of neutrality and the specifications of card check procedures. We describe those in some detail below. We also examine the use of other elements of these agreements. Table 1 presents the frequency of use of neutrality provisions, card check provisions, and their combination, as well as other specific elements covered by the survey.

[4]Much of this activity has been through accretion or "additional store" agreements with organized grocery or retail store chains, a method not fully analyzed in this study. However, because we do not know what portion of this growth has come through formal neutrality agreements, card check agreements, or both, the United Food and Commercial Workers' (UFCW's) experience is under-represented in our sample.

[5]It should be noted that some of the 14 agreements about which we could collect no information may turn out to be informal agreements that do not in fact belong in the data set.

Table 1. Frequency of Use of Particular Types of Language.

Language	*Overall N*	*Number of Cases in Which Language Is Present*	*Pct. Cases in Which Language Is Present*
Neutrality	113	105	92.9
Card Check	111	81	73.0
Neutrality without Card Check	111	30	27.0
Card Check without Neutrality	111	9	8.1
Neutrality and Card Check	111	72	64.9
Non-NLRB Election	108	12	11.1
Access to Employee Lists	98	35	35.7
Physical Access to Employer's Property	101	67	66.3
Accretion in N/CC Agreement	99	36	36.4
Language Specifies Union Behavior:	104	82	78.8
—Will not attack management	101	60	59.4
—Will give management notice	94	19	20.2
—Time limits on organizing	94	16	17.0
Any Dispute Resolution Language	100	93	93.0
Dispute Resolution for Non-Card Disputes:	95		
—None		14	14.7
—Final step is joint		12	12.6
—Final step is 3rd party neutral		69	72.7

Defining neutrality. About 93% of the agreements included in the study contained explicit neutrality language. Most agreements included some definition of the concept. However, these definitions varied widely. A few of them simply stated, without further explanation, that the employer would remain neutral. One typical pattern, found in most Communications Workers (CWA), United Auto Workers (UAW), and Steelworkers (USWA) agreements, defined neutrality as "neither helping nor hindering" the union's organizing effort but also allowed managers to communicate "facts" to workers, in some cases only in response to inquiries. A different approach, typical of HERE agreements, was language that made clear that the employer would not communicate opposition. Less typical were statements that management would tell employees that it welcomed their choice of a representative.

Some agreements fleshed out these definitions with additional specifications about the content of employer communication. Many agreements contained provisions that the union would not be referred to as a "third party." Many also stated that the employer would not attack or demean the union or its representatives. Some agreements, including some with relatively weak definitions of neutrality, stated that the parties would strive to create a climate free of fear, hostility, and coercion. Similarly, some emphasized that the parties would campaign in a "positive" manner: the company would keep its statements "pro-company" and the union would be "pro-union." A few agreements required that employees not be told that it was corporate policy to encourage voting against unionization. Three agreements stated in different levels of detail that the employer would not make any statements regarding potential effects or results of unionization.

The interpretation of this language, particularly the general statements and those that preserved some "right" to communicate, had been a source of conflict in many cases. When unions have challenged employer conduct, the challenge typically has focused on the content of the communica-

tion, with the method a secondary issue (for a discussion and analysis of these arbitration cases, see Eaton and Casey 2001). Nevertheless, a few agreements addressed specific methods of communication. A relatively common clause, appearing for instance in most Steelworkers agreements, prohibited the employer from providing support for anti-union individuals or groups. Rarer was language specifying that the employer would not conduct one-on-one meetings (two examples) or captive audience meetings (two examples), communicate in writing or by telephone with employees about the organizing drive (two examples), hire a consultant (one example), or question employees about union activities or membership (one example).

Card check. A large majority of the agreements—73%—called for card check arrangements. The language on card check was fairly simple and standard, typically calling for a third party neutral to validate the cards.[6] Twelve agreements specified procedures for a non-NLRB election in addition to either neutrality or card check. In the latter situation, different thresholds led to different procedures: over 65% cards signed triggered a card check, 50–65% triggered a non-NLRB election, and below 50% (but above 1/3) led to a standard Board election.

Other language: access, union behavior, dispute resolution, and first contracts. Somewhat more than a third (35.7%) of the agreements included broader union access to lists of employees than was provided in the law. About two-thirds (66.3%) of the agreements called for union access to the physical property of the employer. More than three-quarters of the organizing agreements we examined set limits on the union's behavior. Most commonly, the union agreed not to attack management. Far less frequently, the language required the organizer to notify management of the union's intention to initiate a specific campaign or to conduct the campaign over a specified length of time.

More than 90% of agreements studied called for some form of dispute resolution. Card check agreements frequently specified a method for resolving disputes over unit determination. The process most frequently stipulated was arbitration. For other types of violations and disputes—usually allegations of non-neutral behaviors by one of the parties, or the employer's denial of an agreement's coverage of unorganized employees—roughly 15% of agreements had no dispute resolution procedure. In 12.6% of cases, the final step of the procedure was a high-level, joint labor-management panel. The remaining cases (nearly three-quarters) called for resolution by an arbitrator as the final step, often on an expedited schedule.

There were some examples of language that encompassed the "other" organizing problem facing unions in the NLRB context—the difficulty in negotiating first agreements. About one-third of the arrangements (but 1/2 of multi-site agreements) explicitly addressed the possibility of accretion of any newly organized workers into an existing bargaining unit's agreement. Several agreements indicated that bargaining would begin immediately after the union was recognized. A few Steelworkers agreements called for arbitration of first contracts if the negotiations were not concluded within a tight time frame.

Management Tactics

The tactic of negotiating neutrality and card check agreements is predicated on both the findings of previous research and the experience of union organizers that employer opposition is a significant barrier to organizing. Thus, an important focus of our research is to what extent, in the union's view, management used the tactics that are typical in anti-union campaigns. In particular, we were interested in comparing

[6] Variation occurs in the percentage of the unit the union had to sign up before management would recognize the union just on the basis of signed cards. For instance, the employer may have required signatures of at least 65% of a unit's employees before it would recognize the union on this basis alone. Similar variations exist across Canadian provinces (Thomason 1994; Thomason and Pozzebon 1998).

Table 2. Management Tactics.

Management Tactic	*Pct. Cases Used under Neutrality Only Language (N in Parentheses)*	*Pct. Cases Used under Card Check Language (N in Parentheses)*	*Pct. Used in Campaigns Overall*[a]		
			Private Sector	*Public Sector*	*Canada*
Any Management Violations of N/CC Agreement Alleged	90.5 (21)***	42.9 (56)	—	—	—
An Employer Campaign	—	—	100[b]	76	—
Discharge of Union Supporters	33.3 (18)**	8.7 (46)	24–32	5	—
Consultants Hired	44.4 (18)***	10.9 (46)	20–71	49	33
Captive Audience Meetings	61.1 (18)***	21.7 (46)	65–91	36	41
Anti-Union Letters Sent	55.6 (18)**	23.9 (46)	70–91	36	24
Supervisors One-on-One	61.1 (18)***	21.7 (46)	79–92	43	22
Promises of Wage Increases or Other Improvements	50.0 (16)***	10.9 (46)	56[b]	27	38
Other	66.7 (18)**	38.8 (49)	—	—	—

[a]*Sources:* for the public sector data, Bronfenbrenner and Juravich (1995); for the private sector data, Lawler and West (1985), Freeman and Kleiner (1990), and Bronfenbrenner and Juravich (1995); for the Canadian data, Thomason and Pozzebon (1998). Thomason and Pozzebon (1998) includes organizing campaigns from Ontario and Quebec, the vast majority of which were resolved via card check. The tactics described in the Canadian study are slightly different: "anti-union literature," "promise of wage increases," "training of supervisors."

[b]Only Bronfenbrenner and Juravich (1995) report these numbers.

**T statistic for differences between neutrality and card check is statistically significant at the .05 level; ***at the .01 level.

union reports of the specific tactics used by management to oppose union drives in general (as reported in previous studies) and under organizing agreements. We hypothesize that both neutrality and card check agreements reduce the use of those tactics, and that card checks are the more effective type of agreement since they allow the union to organize quickly and, often, without the employer's knowledge.

The top row in Table 2 provides the rate of management violation of the agreements alleged by the unions separately for neutrality-only and card check agreements (with or without neutrality). The union alleged management violations of these agreements in almost all (90.5%) of the neutrality-only cases where the respondent answered this question, but in less than half of the card check cases, a difference that is statistically significant at the .01 level. The specific types of violations vary widely and are discussed further below.

The other rows in Table 2 present union reports of the tactics used to combat union organizing drives. It is important to note that, given differences in language, the specific tactics reported were not necessarily viewed by respondents as "violations," although they often were. The rate of usage reported for neutrality-only language was significantly higher than that for card check for each tactic, sometimes at the .01 level of statistical significance, sometimes at .05.

Table 2 also lists the frequency of management tactics across union organizing campaigns more generally, as reported by a number of earlier studies. These data are not directly comparable, since our respondents did not report these tactics for each campaign, as the other studies did, but rather for all campaigns under a particular agreement.[7] For this reason, as well as

[7]Given the number of cases with single campaigns and the frequent, though not universal, consistency in employer behavior across multiple campaigns, this is unlikely to bias the data too greatly. Most likely, the

because of some variation in the precise definition in the tactics described (see Table 2, note a), we did not conduct significance tests for differences between our findings and previous findings. It should also be noted that employers reported much less use of some of these same tactics (Freeman and Kleiner 1990). For these reasons, the comparisons should be interpreted with care.

Bronfenbrenner and Juravich (1995) reported finding some sort of management campaign in a full 100% of the private sector organizing drives they studied. This can be compared to our question about any management violation; although there is some difference in meaning, in most cases it captured the same information. Thus, card check, but not neutrality, seems to have cut almost in half the numbers of employers running anti-union campaigns. And card check clearly reduced the intensity of those campaigns, as evidenced by the more detailed examination of particular tactics, legal and illegal.

The rates of usage of particular tactics under card check arrangements were consistently well below that reported in other studies for the private sector, generally providing support for our hypothesis. For each tactic except discharge, the rate was also lower than the public sector rate reported by Bronfenbrenner and Juravich. The comparisons with Canada—actually Ontario and Quebec—may be the closest contextually, since only 18.7% of the Ontario drives and 5.7% of Quebec drives were resolved through an election (rather than a card check procedure). For the most directly comparable tactics, captive audience speeches and consultants, the card check usage rate fell well below the Canadian rate.

The comparisons of the use of management tactics under neutrality alone present a more complicated pattern. The rate of discharge among our neutrality-only respondents (33.3) was just above the range of rates reported in previous private sector studies in the United States. The reports of consultant usage in our study lie within the range reported for the private sector generally but below that for the public sector. The rates of use of captive audience meetings, anti-union letters, supervisor one-on-one meetings, and promises of wage increases or other improvements reported here fall below those for the private sector (with only slight differences in some cases) and above those for the public sector. Not surprisingly, the neutrality-only rates for comparable tactics were all above the Canadian rates. The rate of "other" violations or tactics was substantially higher for neutrality than card check. Thus, there is support for the hypothesis that neutrality language reduces the use of some, but not all, management tactics.

Given that the "other" category had the highest frequency, it is worth exploring that category in more detail. It included tactics that have been noted in other studies, but about which we had not specifically asked. For instance, a number of respondents alleged that the employer had either sponsored an anti-union employee group or set up an employee involvement program to undermine interest in a union. Again, sometimes this was viewed as a violation of the agreement, sometimes not. Other tactics reported include threats to close facilities if workers organized (3 cases), manager-organized card revocation or decertification campaigns, and problems related more directly to the organizing language itself, like failure to provide complete or timely lists or physical access.

The single most common type of "other" tactic reported (approximately 10 cases)—and always viewed as a violation—occurred when employers simply declared that the facility or occupation the union was seeking to organize was not covered by the language. As described above, language often specified the occupations or facilities or business units covered. Nonetheless, in many cases there was ample room for dif-

bias that exists is in overestimating the frequency of violations. For instance, in some long-term, multi-campaign cases, local managers engaged in several traditional anti-union tactics in the early days of an agreement, but over time they began more systematic compliance.

ferences in interpretation. In one case, for instance, the employer denied coverage because the facility was not making the product that was its core business. More typically, however, the employer did not recognize coverage of a particular occupational group.

Finally, an interesting pattern emerges from the data identifying the level of management at which violations typically occurred. We have information on this issue from 17 of the cases involving centralized bargaining with a single employer. Twelve of the 17 reported that campaigns and, thus, organizing agreement violations were driven by local management. Overall, the relationship between the local violators and corporate management varied. Sometimes top level managers reacted swiftly to union complaints and stopped the violations. Equally as common, however, were cases in which corporate managers, especially labor relations managers, either could not or would not stop the local violations. In these cases, corporate labor relations managers would respond to union complaints by meeting with local officials and telling them to stop. But such efforts were perceived as ineffectual. In at least one case, the respondent pointed to the changing relationship between corporate labor relations management and line management as the source of the problem. In this company, as in many, power and authority over labor relations issues had been transferred either to line managers or, within labor relations management, from the corporate to the business unit level. Business units are labor relations management's "clients," and labor relations managers must continually justify their existence in terms of value-added to the business unit's performance. Labor relations managers can "advise" clients but not demand specific behavior. All of these factors weaken the managers traditionally closest to the union and most likely to defend neutrality.

Organizing Experience

The above analysis provides support for the first hypothesis, that card check arrangements and, to a much lesser degree, neutrality provisions are associated with reduced use of anti-union tactics by management. This justifies an examination of the second hypothesis—that unions will experience higher rates of success in organizing with neutrality/card check than in standard NLRB elections. We have collected some information on organizing for 100 out of the 132 agreements (75.8%) in our data set. At a most basic level, we have found a fairly high level of organizing under these agreements. Unions had attempted organizing in 86 out of the 100 cases.[8]

Success rates as measured by the percentage of campaigns resulting in recognition were high, although again, experiences differed under neutrality and card check. Table 3 presents results for three types of organizing outcomes, both for the entire data set and under three sets of circumstances: neutrality only, card check with neutrality, and card check only. Looking across all of the campaigns we identified, the success rate overall was 67.7%. But the neutrality only success rate was 45.6%—the same as the overall NLRB election win rate

[8]We have these data for 100 agreements, because in several cases we were able to collect the organizing agreement but could not arrange an interview with anyone who could tell us about the organizing experience. It is possible that the unions that fall into this category either had not used their language or had been less successful in using it, and that our results are biased upward. For the 14 cases where the union had not attempted organizing, a variety of explanations exist. In half, there was no one to organize under the language for various reasons. In a couple of manufacturing cases, the employer had been shrinking since the negotiation of the agreement. In some of the HERE cases, the agreement was negotiated to cover a hotel that was currently under construction or renovation and therefore without a work force. In three cases, the union thought the agreement was so lacking—either because it did not cover a significant body of nonunion workers or because its definition of neutrality was weak—that there was no point in attempting to organize. The other reasons given for not organizing included shortness of time since the agreement was reached, lack of union resources for organizing, and good employer behavior, which kept interest in organizing low.

Table 3. Organizing Outcomes.

Measure of Success	*Overall*	*Neutrality Only*	*Card Check with Neutrality*	*Card Check Only*
Percentage of Total Campaigns Resulting in Recognition (N of campaigns in parentheses)	67.7% (294)	45.6% (68)	78.2% (170)	62.5% (56)
Mean Percentage of Campaigns Resulting in Recognition by Agreement (number of agreements in parentheses)	70.6 (78)	31.1† (17)	83.3 (49)	80.3 (8)
Percentage of First Contracts Negotiated *(number of contracts in parentheses)*	96.5 (199)	100 (31)	94.7 (133)	100 (35)

†Significantly different from Card Check without Neutrality at the .01 level, and from Neutrality and Card Check at the .001 level.

for 1983–98, 45.64% (Food and Allied Service Trades 1999). The rates across card check–only campaigns and under card check with neutrality—62.5% and 78.2%, respectively—were both well above the NLRB rate.

Under the 78 individual agreements for which success rates were available, the success rate ranged from zero to 100%. We again conducted t-tests for differences in this category across the different types of language. The mean was 70.6%, although again the rates varied considerably and at statistically significant levels between neutrality and card check (at $p < .01$ for card check only and $p < .001$ for card check plus neutrality). The very low rate for neutrality-only reflects a highly skewed distribution within this category, with about half of the cases (8) having no successes at all. The card check success rates are particularly striking when one considers that these rates are negatively biased compared to NLRB election data: "losses" in our study encompass situations in which the union began organizing (usually by gathering cards) and found insufficient interest to pursue a full card check or election campaign. Such events are not included in the NLRB statistics.

The card check success rate in our data was still below that reported by Bronfenbrenner and Juravich (1995) for public sector elections (85%), where, in the years examined, management engaged in far less organized resistance than in the private sector overall. It was also below that reported by Thomason and Pozzebon (1998) for Quebec (83%) and Ontario (78%), where card check was the predominant method of recognition. The finding of both less management opposition and less organizing success in our cases than were found in cases examined by the public sector and Canadian studies suggests that there were factors beyond management opposition driving differences in success rates across these various contexts.

The results for first contract negotiations are even more striking. The rate at which a first contract was achieved after recognition was gained approached 100%. Of the 199 successful organizing campaigns, only seven failed to conclude with a first contract. In five of those, the parties had only recently begun negotiations at the time of our survey and were likely to conclude them successfully. In one case, though negotiations had begun, there was a decertification campaign under way. In one last case, the employer had been found guilty by the NLRB of violating good faith bargaining requirements and negotiations had been going on for years with no conclusion. This first-contract success rate under organizing agreements is well above the figures cited in prior research, which range from roughly 2/3 to 80% (Freeman and Kleiner 1990; Bronfenbrenner 1994; Pavy 1994). Moreover, even if 80% of bargaining units formed under successful NLRB elections produced contracts, the net result in terms

Table 4. Organizing Campaign Success Rates under Different Types of Language.[a] (N in Parentheses)

Language:	*Neutrality Only Success Rate:*		*Card Check Success Rate:*	
Description	*With Language*	*Without Language*	*With Language*	*Without Language*
All	31.1% (17)		82.9 % (57)	
Non-NLRB Election	57.1 (3)	27.6 (13)	94.4 (6)	81.1 (47)
Access to Employee Lists	52.3 (3)	30.2 (9)	94.2 (23)***	69.1 (26)
Physical Access to Employer's Property	47.5 (9)	33.8 (3)	81.8 (37)	82.2 (14)
Language Limits Union Behavior in Some Way:	34.6 (12)	28.6 (4)	80.5 (40)	84.0(12)
—Language says union will not attack employer	42.9 (12)***	4.8 (3)	71.1 (25)**	90.3(26)
—Union must give notice of intent to organize	22.2 (3)	32.2 (10)	76.6 (10)	84.6(37)
—Time limits on organizing drives	57.0 (1)	30.2 (11)	96.1 (11)**	78.9(36)
Any Dispute Resolution Language	44.9 (10)*	10.0 (4)	82.0 (47)	100 (3)

[a]An organizing campaign is defined as successful if it resulted in recognition by the employer either through an election or through card check.

*Borderline statistical significance—.052; **statistically significant difference in success with and without language at the .05 level; ***statistically significant difference in success with and without language at the .01 level.

of new collective bargaining agreements for workers is only 36% to 40% of those who sought certification with the NLRB. This figure is about half of that produced through card check and somewhat lower than gains made through neutrality only, although, again, the time-based nature of our definition of a campaign is different.

Table 4 presents the mean success rates by neutrality and card check (this time combining all card checks, with and without neutrality, for ease of exposition) for specific types of language. Because the number of observations drops when the data are divided in this way, it is difficult to generate statistically significant differences in the t-statistics comparing success rates with and without the language, and the danger of Type II error is great. Even so, a few types of language did produce statistically significant differences in organizing outcomes, particularly under card check arrangements. Card check arrangements that included either access to employee lists or time limits on organizing drives yielded significantly higher rates of organizing success than when the language was absent (at $p < .01$ and $p < .05$, respectively). There were similar, substantial differences in the neutrality-only cases, but they were not statistically significant.

Card check agreements that limited union attacks on employers produced significantly fewer union victories than those that did not curtail use of this tactic ($p < .05$). This result may emerge because a negative campaign against management was effective in organizing workers, and some respondents acknowledged that they did have to tone down their rhetoric. But at least an equal number indicated that they typically did not attack the employer in any case, so this language made no difference. Another interpretation of this result is that the language was related to employer behavior. The provision requiring the union not to attack the employer often explicitly stated that if the union failed to abide by this rule, management was released from its neutrality obligations. Our review of several arbitration cases indicates that the employer, when accused of not remaining neutral, frequently blamed union provocation for its behavior. Thus, this provision

may be a proxy for active management campaigns. And indeed, both bivariate and multivariate analyses not reported here indicate a continued, strong relationship between management campaigns and union success. Strangely, however, unions were significantly more successful (.01) when this language was present under neutrality-only agreements.

There is some evidence that dispute resolution procedures did make a difference under neutrality agreements. The average win rate under neutrality-only agreements with any form of dispute resolution was 44.9%, while without dispute resolution it was only 10%, a statistically significant difference at $p = .052$. The influence of dispute resolution under card check agreements is in the opposite direction, but was not statistically significant. It is important to note that we examined the frequency of management violations and use of tactics under different forms of dispute resolution and found no statistically significant differences. Indeed, our review of several arbitration agreements indicates that while unions often won favorable judgments on at least some of their allegations, a win in arbitration did not translate into a successful certification. Further, the agreements were rarely specific as to the remedies that arbitrators might order, and arbitrators arguably have been quite conservative in the remedies they have, in practice, ordered (Eaton and Casey 2001). As one neutral recently put it, "Resorting to arbitration [over neutrality] in the middle of an organizing campaign is a bad omen" (Mastriani 1999).

Other Factors

Although labor and management observers disagree about whether card check and *neutrality increase or decrease employee* free choice, all agree that changing the rules by which union recognition takes place is likely to increase union success (Yager, Bartl, and LoBue 1998; AFL-CIO 2000). Nevertheless, one must consider the possibility that the higher success rates we identify for unions using neutrality or card check language are a result of factors beyond the agreements themselves. For instance, factors particular to a union may have increased both its likelihood of obtaining an organizing agreement and its success in organizing. These could include organizing effectiveness or competence, innovativeness, and power.[9] On the flip side, characteristics of management might explain its reduced opposition to unionism, its greater acceptance of organizing language, its reduced use of campaign tactics, and, therefore, greater union success.

Although our data and methods do not allow us to model and to correct statistically for sample selection bias,[10] we do briefly explore these alternative explanations below. We first examine, in a limited way, the labor-management context in which the union obtained the organizing agreement (for more information on the negotiation of these agreements, see Eaton and Kriesky 1999). Although this analysis is limited to cases in which the union successfully secured the arrangement, we can at least examine whether there was variation in outcomes based on the method the union used to obtain the agreement. Organizing agreements obtained outside an existing bargaining relationship produced significantly better organizing results for the union. The win rate for agreements ob-

[9]Some might argue that the factor most important to negotiating a neutrality or card check agreement—a high degree of skill in bargaining contracts—is missing from this list. We have purposely excluded it based on a widely held understanding that rather than operating as complementary functions, the servicing (negotiating and grievance handling) and organizing functions of many unions coexist in a state of considerable tension as they compete for the organization's resources and attention. For a comprehensive study of this phenomenon, see Fletcher and Hurd (1998).

[10]Indeed, statistically modeling the negotiation of organizing agreements would appear to be a very daunting task. Such a negotiation is a rare event, and is not systematically recorded by any organization. It is also a phenomenon not confined only to labor-management pairs in collective bargaining relationships and is thus, theoretically, a possibility for any employer approached by a union.

Table 5. Organizing Effectiveness and Innovativeness among Unions That Have and Have Not Obtained Organizing Agreements. [Mean (SD)]

Variable	*Unions with No Organizing Agreements*	*Unions with at Least One Agreement*	*Non-Respondents*	*Heavy Users (5 or more)*[a]
Organizing Effectiveness	16.680 (5.17) N = 10	17.884 (5.06) N = 19	18.936 (3.90) N = 11	20.100 (7.84) N = 5
NLRB Election Win Rates	45.01 (12.64) N = 10	45.13 (7.44) N = 21	40.69 (16.67) N = 19	46.97 (7.9) N = 6
Innovativeness	3.090 (.655) N = 10	3.424 (.435) N = 19	3.027 (.539)** N = 20	3.76 (.387)† N = 6
1985 Membership Level	49,125 (31,216)*** N = 8	378,842 (328,532) N = 19	88,500 (92,902)*** N = 18	679,000 (261,757) N = 6

Sources: for Organizing Effectiveness and Innovativeness, Fiorito, Jarley, and Delaney (1995); for NLRB Elections, Food and Allied Service Trades Department, AFL-CIO (1999); for 1985 Membership Levels, Bureau of National Affairs (1996).

[a]UAW, CWA, UFCW, HERE, SEIU, USWA. *Note: there are not 5 or more UFCW agreements in the dataset,* but as discussed above, there is strong reason to think that the UFCW is under-represented.

***Significantly different from unions with at least one agreement at the .05 level; ***significantly different* from unions with at least one agreement at the .01 level; †heavy users significantly different from unions with *at least one agreement* but less than 5 at the .05 level.

tained this way was .92 versus .65 otherwise, a difference statistically significant at p = .009. These agreements were typically leveraged through political connections, a type of leverage that appears to have had strong follow-through in terms of eventual union success, even after we control for management tactics.

On the other hand, the negotiation of organizing language in the context of a labor-management partnership seems to have had no impact on union success, suggesting that greater formal cooperation was not an explanatory factor. The win rate for agreements negotiated in this context was .68 versus .74 otherwise. In fact, some partnerships had actually collapsed over this issue, most recently that between AT&T and CWA.

In Table 5, we look at union innovativeness and organizing effectiveness. This table makes use of the union-level data collected in the first phase of the study. It divides unions into three groups—those that indicated they did not have any organizing agreements, those identified as having either card check or neutrality agreements, and non-respondents.[11] We examine differences across these three groups in organizing effectiveness, NLRB election win rates, innovativeness, and membership size in 1985. The organizing effectiveness and innovation scores were calculated by Fiorito, Jarley, and Delaney (1995). The organizing effectiveness scale consists of seven items (alpha = .77): a self-rating, an external union leader rating, NLRB certification outcomes (win rate, vote share, share won), changes in primary jurisdiction coverage, and overall membership growth (Fiorito et al. 1995:629). The innovation scale consisted of eleven items (alpha = .77) ranging from associate membership programs to the use of new media and corporate campaigns. It did not include bargaining over organizing (see Fiorito et al. 1995:626 for a full list). The innovation scale was a strong, positive determinant of organizing effec-

[11]A few unions initially indicated that they did not have any such agreements, but were later found to have one or more.

tiveness in the regression analyses reported by Fiorito, Jarley, and Delaney (1995). We included NLRB win rates (1983–98) as a separate measure because of their conceptual clarity and because they are uncontaminated by non-NLRB membership growth.

In our data, non-respondents appear to have behaved more like unions with no agreements than like unions with neutrality/card check on two of the four measures reported. This provides some assurance on the question of bias resulting from non-response. Moreover, there are no statistically significant differences among the groups on general organizing effectiveness or NLRB election wins, suggesting that competence in organizing is not the explanation for greater success under neutrality/card check language that we report above. Although "heavy" users of neutrality/card check language scored somewhat higher on both measures of organizing effectiveness than unions with only a few organizing agreements (not shown), the differences are not statistically significant. With the single exception of SEIU, the heavy users were average or poor performers in NLRB elections (44.2% wins, not including SEIU). The most dramatic case is a service sector union that recorded a win rate of 94.6% in our sample, but a win rate of only 37% in NLRB elections over roughly the same time period (1983–98). If anything, this outcome suggests that our comparisons to overall NLRB union win rates understate the effectiveness of organizing agreements as a tool for the particular unions using it.

Unions using neutrality agreements were more innovative than others, although the difference between the reported users and non-users was not statistically significant. Heavy users were also more innovative than those unions with few agreements, in this case significantly so at $p < .05$. (Users were also significantly larger than non-users, at $p < .01$.) But given the lack of differences in organizing effectiveness, it is hard to see how innovation might explain both the successful negotiation of organizing language and organizing success with that language. In the list of eleven innovations, the only strong candidates for influencing both the negotiation and successful use of organizing language are probably the use of corporate campaigns and formal staff training. Thus, it is unclear whether innovativeness is contributing to selection bias or, alternatively, the negotiation of organizing language is itself simply a measure of union innovativeness.

Finally, aside from the impact of partnerships within the dataset, our information does not allow us to test whether organizing agreements essentially served as a proxy for some underlying management opposition. Freeman and Kleiner's work (1990) suggested that employers with "more to lose" in terms of increased wages, benefits, and costly changes in working conditions that unions might negotiate will oppose unions to a greater degree, as measured by unfair labor practices and the use of supervisors in campaigns. We can see a similar effect in some of our cases where the existence of organizing language or its specific conditions varied by business units or occupations within firms. The telecommunications companies, for instance, had been more resistant to bargaining organizing language, especially card check, for their newer businesses (like wireless) than for their older, heavily unionized businesses. On the other hand, unions often had to push very hard to get language and incurred significant costs, including those associated with work stoppages and corporate campaigns, to do so (Eaton and Kriesky 1999; AFL-CIO 2000). It seems unlikely that unions would have been willing to absorb these costs if the agreements served only as a proxy for weak management opposition. But even if these agreements were to some degree proxying for the strength of management opposition to unionization, they may have been a very important proxy. To the extent they signal the likelihood or level of management opposition, they can provide a valuable tool in helping unions target their organizing efforts.

Conclusions

This study takes an important first step toward systematically examining the use of

negotiated organizing agreements to shift the context for union organizing. We found strong support for the notion that card check agreements reduced management campaigning. Indeed, comparisons with Canadian data, where the context is most similar, suggest that voluntary card check agreements in the United States produced lower use of union opposition tactics by management than did the Ontario or Quebec regulatory environment. While employers may continue to argue that these agreements hamper free choice by silencing one point of view, we found that they reduced the use of *illegal* tactics such as discharges and promises of benefits, as well as the supervisory one-on-one campaigns that are destructive of relationships and emotionally traumatizing. These findings would appear to bolster the case for card check as public policy.

Card check agreements, as expected, also substantially increased the rate of union recognition. Neutrality alone, however, appears to have been much less successful in shifting the organizing context. While management campaigning was somewhat reduced, union success rates under neutrality-only agreements were about the same as those under NLRB elections overall. It is not clear whether this means unions should abandon this type of agreement, however, since further analysis of these stand-alone provisions suggests they are sometimes a stepping stone to card check agreements (Eaton and Kriesky 1999).

Aside from these core provisions of organizing agreements, two other types of language appear to have affected organizing success. Requirements that employers provide unions with employee lists and time limits to campaigns were both associated with greater union success. Our results also suggest, although only weakly, that the greatest problems in making organizing agreements "work" came in large, complex organizations, where local managers often failed to honor the language bargained by their far-removed superiors.

Although we have made a start in answering some basic questions concerning the impact of organizing agreements, this research has not addressed, and in fact has raised, many additional questions. Some of our analyses suggest that the leverage used by the union in negotiating the agreement might well explain differences in success. This issue needs further exploration. Notably, it would be interesting to follow up on the intriguing result regarding how negotiated time limits on campaigns affect union success. Our study also did not examine directly the impact of time on card check or neutrality campaigns, an issue the literature has identified as important in the NLRB context. Nor did we explore possible interactions between the altered organizing context and demographic characteristics of the bargaining unit, something that might best be addressed in the context of modeling the impact of organizing language on individual campaigns. Finally, our data are drawn primarily from union sources. It will be important for future research to explore issues related to organizing agreements from the management side as well.

The increasing frequency with which unions are demanding and applying card check and neutrality language suggests that continued data collection will be necessary simply to keep abreast of innovative provisions that may emerge. Indeed, given the prominence of these weapons in organized labor's arsenal as it seeks to regain its strength in the next century, their development and use deserve close scrutiny in the future. We intend to continue that scrutiny.

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