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THE EMPLOYEE FREE CHOICE ACT: POLITICAL POSSIBILITIES AND REGULATORY REALITIES

By

Donna J. Cunningham, J.D.[*] and Mel E. Schnake, D.B.A.[**]

ABSTRACT

Since 2003, with their competing bills, Democrats and Republicans have been at odds over whether to amend the National Labor Relations Act governing the formation of unions, either to require employers to recognize "card-check" elections, or to forbid such elections and recognize only National Labor Relations Board "secret ballot" elections, among other provisions. While the Republicans controlled Congress, neither bill could pass because of the Senate's rules governing debate, which require a 3/5 majority vote to end a filibuster and call a vote on the bill. Now, the Democrats may have a filibuster-proof majority, and may call to a vote their Employee Free Choice Act. Although there are rumors of a compromise as to the card-check provisions of the legislation, the question remains whether that Act, as finally composed, would solve the problems with NLRB enforcement, or create more of its own. In the belief that it would create such problems, we propose our own contrarian recommendation.

BACKGROUND

The current National Labor Relations Board (NLRB) union representation election process suffers from the significant problems of delay, ineffective penalties, and a decline in enforcement for most of this past decade.[1] Two new and competing laws to amend the National Labor Relations Act, namely, The Employee Free Choice Act,[2] and the Secret Ballot Protection Act,[3] have been introduced into Congress repeatedly since 2003, but neither has passed. Each has been introduced again in 2009.

The Employee Free Choice Act (EFCA), supported by pro-labor groups and most Democrats, proposes to amend the National Labor Relations Act, most significantly, to *require*[4] employers to recognize "card-check" elections, a method of choosing union representation without going through

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[*] Associate Professor, Business Law, Valdosta State University

[**] Associate Professor, Management, Valdosta State University

[1] Indicative of the inaction and political stalemate concerning the NLRB and its mission, a legal issue has arisen regarding the authority of the NLRB to act with only 2 of its 5 board members. The terms of the remaining 3 board members expired, and they were not replaced. Since a majority of 3 is required to establish a quorum in order to conduct business, the hundreds of decisions of the NLRB since January, 2008, which were decided by 2 board members, is now in dispute. Ashby Jones, *Sixteen Months of Rulings Down the Drain at NLRB?,* WALL STREET JOURNAL, May 4, 2009, Law Blog. *NLRB Remains ineffective, caught in political limbo*, VINDY.COM, September 7, 2009, *at* http://www.vindy.com/news/2009/sep/07/nlrb-remains-ineffective-caught-in-political/ . A The U.S. Supreme Court has granted certiorari to the Petition filed by the NLRB on September 29, 2009, and has consolidated opposing cases from the First and Seventh Circuits. *Laurel Baye Healthcare v. NLRB,* (D.C. Cir. 2009), cert. granted, _____ U.S. L. W. ____ (U.S. September 29, 2009) (No. 09-377)

[2] THE EMPLOYEE FREE CHOICE ACT (H.R. 1409), was introduced in the House by Representative George Miller, Georgia, and in the Senate (S. 560), by Senator Edward Kennedy, Massachusetts on March 10, 2009.

[3] THE SECRET BALLOT PROTECTION ACT (H.R. 1176), was introduced in the House by Representative John Kline of Minnesota, and in the Senate (S. 478) by Senator Jim DeMint, South Carolina, on February 25, 2009. THE EMPLOYEE FREE CHOICE ACT (H.R. 1409), was introduced in the House by Representative George Miller, Georgia, and in the Senate (S. 560), by Senator Edward Kennedy, Massachusetts on March 10, 2009.

[4] Currently, employers may voluntarily recognize such elections, but are not required to do so.

the traditional NLRB election procedure. Instead, in the words of the Act, employees could "sign[ed] valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative…" thereby electing union representation. Opponents characterized the concept of the card-check election as a denial of the right to a secret ballot, and in opposition, proposed the Secret Ballot Protection Act (SBPA), a bill which would make it illegal to vote to unionize in any manner other than by an election conducted by the NLRB. The SBPA is supported by pro-business groups and Republicans.

INTRODUCTION

For several weeks during the spring of 2006, janitors at the University of Miami went on strike. The janitors were employed by the university's cleaning contractor, Unicco Service Company (UNICCO). They were not represented by a union. The strike centered around three major issues: (1) pay rates, (2) health care coverage, and (3) a card check election. After several weeks of protests, in May, 2006, UNICCO agreed to raise wages by at least 25% and offered healthcare coverage at reasonable rates.

However, the card check election issue caused the strike to continue.[5] Workers and the Service Employees International Union (SEIU) wanted union representation to be determined by means of a "card check election" so that if a majority of the workers signed authorization cards, the company would agree to recognize and bargain with the union. But the management of UNICCO wanted a representation election to be conducted by the National Labor Relations Board (NLRB).

Finally, on May 2, 2006, UNICCO agreed to a card-check election to be verified by the American Arbitration Association. The agreement stipulated that if at least 60% of the employees signed the cards by August 1, 2006, UNICCO would agree to recognize the union as the exclusive bargaining agent for the janitors. By June 15, 2006, 75% of the janitors (290 of the 385) janitors had signed cards electing the SEIU as their union, and the American Arbitration Association certified the results. On August 23, union members voted to ratify a 4-year contract with UNICCO that would raise their wages by as much as 51% above their pre-strike levels, guarantee "secure, affordable health care," and increase paid vacation time.[6]

The timeline of this experience lies in stark contrast to the timeline of a typical NLRB representation election. The differences can be seen in Chart 1 below.

Chart 1:

Number of Days	Card-Check	NLRB Election[7]
From Petition to Election	44	81.79
From Election to 1st Contract	69	351.43

Given this experience, one can see why the card-check election has become the primary focus of union organizers.

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[5] Abby Goodnough and Steven Greenhouse, *Anger Rises at both Sides of Strike at University of Miami*, N. Y TIMES, April 2006.

[6] Press Release, http://www.yeswecane.org/index.asp?Type=B_BASIC&SEC={034B94D6-F564-4F93-909B-B774A54F1102}&DE={FC3F0E26-27BD-4803-98C9-D36DA6A47305} link no longer available

[7] Bronfenner, K. (2001) *Uneasy terrain: The impact of capital mobility on workers, wages, anti-union organizing. Part II: First contract supplement.* Table 9

SIGNIFICANT PROBLEMS OF THE CURRENT NLRB REPRESENTATION ELECTION PROCESS

The current NLRB process results in several significant problems to the representation election process, including delay, ineffective penalties, and a failure of enforcement for much of the past decade. There are several kinds of delay endemic to the current legislative system, and delay occurs in several phases of the process.

1. Delay: Representation Elections

The process of determining whether employees wish to be represented by a union in negotiating with their employer is governed by the National Labor Relations Act (NLRA)[8]. A union may make a Demand for Recognition based on evidence of support by a majority of employees, but under the NLRA, Management is not required to recognize a union based on this demand.[9] Unless Management agrees to such an election, the NLRB Representation Election process must be used. The NLRB process begins with authorization cards.

Authorization Cards

After union organizers have garnered sufficient employee interest in being represented by their union, they will typically ask employees to sign authorization cards expressing an interest in being represented by a union. (This is to be distinguished from the card-check election, in which, by signing a card, a worker actually *elects* union representation.) If at least 30% of the employees in the proposed bargaining unit sign authorization cards, the union may present them to the NRLB as evidence of sufficient interest and ask that a representation election be held. In practice, many unions will not petition the NLRB for a representation election unless more than 50% of employees in the proposed bargaining unit sign authorization cards. This is due to the typical erosion in support for unionization that occurs between the time of the authorization card drive and the representation election. After authorization cards are collected, the labor union must file a Petition before the NLRB.

It is currently possible for the union to present to management evidence that they represent a majority of the employees in the proposed bargaining unit, and for management to voluntarily recognize the union as the exclusive bargaining agent of these employees and agree to bargain with it. Thus, a "card-check election" is currently possible, but dependent upon voluntary recognition by management.

Filing of Representation Certification Petition

A proceeding begins when a labor union as Petitioner files a Representation Certification Petition with the NLRB. Upon filing, the Board will attempt to negotiate an election agreement between the union and the employer, setting forth an appropriate unit of employees in which to hold the election, a list of eligible voters, and the logistical decisions necessary to hold the election, to be scheduled within 42 days from the filing of the petition. However, if the parties cannot agree to the terms necessary to hold an election, the Board will conduct a pre-election hearing to determine whether

[8] THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §§ 151-169

[9] *NLRB v Gissel Packing*, 395 U.S. 592-596 (1969), (recognizing the abrogation of *Joy Silk Mills*, 85 NLRB 1263 (1949)).

an election is appropriate.[10] Common to such proceedings is the issue of whether the bargaining unit petitioned for is an appropriate one for purposes of collective bargaining. An "appropriate bargaining unit" must consist of employees that share an identifiable community of interest.[11] Employees with the same or similar jobs have a community of interest and constitute an "appropriate bargaining unit." In practice, the most common objection of management to a Representation Certification Petition is that the proposed bargaining unit is not "appropriate." But even if such an objection fails, its making typically adds weeks or months to the resolution of the case.

The Pre-Election Hearing

A typical pre-election hearing takes place from 7-14 days after the filing of a Petition. A hearing officer is appointed by the Regional Director in the area where the employees work, to hear the case. A typical hearing lasts from one day to one week. Following the close of evidence, but before a decision is rendered, the parties may file briefs in support of their position. The normal time in which to file a brief is 7 days from the close of the hearing, but the time may be extended for an additional 14 days, for good cause shown. No reply brief is permitted, unless with special leave of the Regional Director. The Regional Director usually issues a decision based on the evidence and briefs, within about 7 to 10 days thereafter. If the Regional Director finds an election appropriate, it is scheduled for a date between 25 and 42 days from the date of the Petition.

A party objecting to the decision to hold an election has 5 days to file a Petition for Review by the Board in Washington, D.C., and a brief in support of its position.[12] This is essentially an appeal from the decision of the Regional Director. Most Petitions for Review are denied. If the review is denied, the election will be held on the appointed day. If the Petition for Review is granted, either the election may be held and ballots impounded, or the Board may order the election stayed until it renders a decision. It can take up to a year or more for a decision to issue once the Board has granted a Petition for Review. After that Petition for Review has been resolved, another Petition for Review on another question may be filed, beginning the appeal process again, and further delaying the process and a resolution of the case. This procedure lies in stark contrast to the basic foundations of judicial economy adopted by both Federal and State courts that all existing causes of action existing be brought at the same time, and not sequentially.

Before the Election

Once an election is scheduled, or during an appeal, management and labor are free to make their arguments to the employees, for and against unionization. Union supporters contend that during this time, management exerts undue pressure, and threatens and harasses employees. Management denies this. However, it is true that more employees typically sign authorization cards than actually vote for union representation, leading to the erosion in support for the union cited *supra*. It is also true that during this time, management can require attendance by employees at anti-union informational sessions, seminars, and the like, known as "captive audience" sessions. An Employer can require employees to attend these meetings regardless of whether they support or do not support the union.

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[10] Notice of Hearing and Hearings; 3-800, *at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap3.html .
[11] *Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962).
[12] For procedure, see generally, 29 C.F.R. § 102.67, revised July 1, 2006.

Employees are paid their usual wages for attendance at these sessions, since they are held at work during work time. If the employee does not attend, he or she can be fired. Union organizers have no equivalent "captive audience" opportunities.

Some employers develop very professional anti-union messages, including video presentations by independent firms.[13] If a firm is hired for the purpose of deterring union representation, it is called, in NLRB parlance, a "direct persuader," and is regulated by the Labor Management Reporting and Disclosure Act of 1959, as administered by the U.S. Department of Labor. One such firm, Projections, Inc. was sanctioned for its video entitled, "Little Card, Big Trouble," which violated Section 8(a)(1) of the NLRA. The video had been used at several other businesses.[14]

Additionally, under current law, an employer can limit election campaigning by union supporters to times when employees are on breaks and in non-working areas, as long as the restrictions are applied to both pro-and anti-union employees. After working hours, union organizers may contact employees, but in order to do so, must largely rely on contact information provided by management which is issued only after an election has been agreed to or ordered by the NLRB. A continuing union complaint is that such contact information is often late, and deliberately incorrect.[15]

In the current business climate, the threat of plant closing has had a significant impact on election outcomes. Using NLRB data, a study of a random sample of more than 400 NLRP certification campaigns that took place between January 1, 1998 and December 31, 1999, found that the union success rate dropped from 51%, where no such threats were made, to 38% when such threats were made.[16]

The Election

An election is held at any time between 42 days from the date of the filing of the Petition to more than a year afterwards, depending upon whether the parties agreed to an election, or if a pre-election hearing was held and the results appealed. In the election, if a simple majority of the eligible voters cast votes in favor of the union (50% plus 1 vote), the NLRB will certify it as the exclusive bargaining agent for the employees in the bargaining unit. The NLRB does not, however, routinely order the parties to negotiate. After the union is certified, the union generally contacts management with specific demands for a first contract, with the hope that negotiations begin.

Post Election

However, if objections are filed after an election, the election is not certified, and thus is not given effect until the objections are ruled upon. Those objecting to the election results must file their objections within 7 days of the date of the election. If the objections are dismissed, the election is certified and negotiations should begin. But if the objections go to a hearing and are then appealed to the Board, it will be 1-2 years, or longer, before the objections are resolved. During this time, management may continue to require employee attendance at anti-union meetings, and to persuade

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[13] See the website of Projections, Inc., *at* http://www.projectionsinc.com .

[14] NLRB shared files; http://www.nlrb.gov/shared_files/OM%20Memos/2001/om01-39.htm , no longer available; the video has now been modified to comply with Section 8 (a)(1).

[15] American Rights at Work, *at* http://www.americanrightsatwork.org/.

[16] Kate Bronfenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, *available at* http://digitalcommons.ilr.cornell.edu/reports/3/ .

employees to reject the union. Labor is also free to try to persuade employees to hold on, and wait until the objections process is concluded. But delay works in favor of management and against labor.

Even after a hearing on the objections and an appeal to the board, an employer can also seek review of the Board's certification of the union. In practice, management would simply refuse to negotiate with the union, thereby testing the certification. The union must then bring an action charging an unfair labor practice with the Regional Director. An investigation is undertaken, and if the charge is credible, the Regional Director files a Motion for Summary Judgment with the Board. If the Board rules in favor of labor and management disagrees, it files an appeal with the U.S. Court of Appeals in the appropriate district. That proceeding can delay bargaining for a first contract by a year or more *after* the Board certifies the union as the collective bargaining representative.

Cumulatively, all of these delays extend the time between the original filing of a Representation Certification Petition, and final resolution of the case. During argument on the EFCA on the floor of the Senate, delays of up to 12 years were reported in cited cases.[17]

After Resolution of Appeal from Election Results

Of those cases appealed all the way to the National Labor Relations Board, the eventual resolution of representation elections are computed and reported monthly, with 6-month summaries posted between annual reports. The following results, shown in Chart 2, display the Summary Reports for five 6-month periods over the past five years for new certification elections.

Chart 2:

Time Period	% Union Wins	% Union Losses
Oct, 2004 thru March 2005[18]	57.1	42.9
Oct, 2005 thru March 2006[19]	49.6	50.4
Oct, 2006 thru March 2007[20]	55.0	45.0
Oct, 2007 thru March 2008[21]	62.0	38.0
Oct, 2008 thru March 2009[22]	65.6	34.4

The cause of the recent rise in the percentage of union victories is unknown.

[17] Remarks of Senator Arlen Specter, R, Pa, Congressional Record – Senate, p S8378, June 26, 2007
[18] NLRB Election Report, Summary Table 7, *at* http://www.nlrb.gov/nlrb/shared_files/brochures/Election%20Reports/2005March.pdf .
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

The NLRB apparently does not track the number of days from filing of a Petition until final resolution of the case, and so does not post statistics concerning the effect of delay upon an organizing campaign. But one may draw the logical conclusion from the data. In each case in which a Petition for Representation is filed, more than half of the employees have expressed their wish to be represented by a union. A simple majority vote is all that is required to win union certification. Based on that majority vote, one would expect a win rate nearing 100%. But the actual win ratio is between 49 and 62%. Delay has a dilatory effect on union organizing.

2. Delay: Charges of Unfair Labor Practices

In our recounting of the procedure by which Petitions progress through the NLRB election process, we have not yet addressed another potential cause of delay. At any time during these proceedings, from the time before a Petition is filed and continuing through the time an appeal is pending before the National Labor Relations Board, the charge of an unfair labor practice may be filed by either party. During the time that such charges are pending, the final resolution of the case may be delayed while the charges are resolved.

The "laboratory conditions doctrine"[23] requires that employees be free to exercise their own wills through a fair election. If the election atmosphere has been tainted, laboratory conditions do not exist, and the election should not be held. If the unfair labor practice (ULP) has so tainted the atmosphere that the laboratory conditions doctrine cannot be met, then the election will be blocked.[24] If there is any doubt about whether the atmosphere has been sufficiently tainted so as to detrimentally affect the vote, the union may ask that the election be blocked, as it is better from the union's point of view to have no election than to have a vote resulting in a loss.

The NLRB records the types of unfair labor practices alleged, both against management and labor. The ULP charges filed during fiscal year 2008,[25] the latest year for which a report has been posted online, are expressed in Charts 3 and 4, which specify the ULPs filed against employers and against unions, respectively. In each case, the top 3 complaints have been charted, showing the number of cases out of the total of all cases, and the percentage each represents to the total number of cases.

Chart 3:

ULP vs. Employer (16,179 cases)	**Number of cases**	**Percent of cases**
Refused to bargain collectively with union; §8(a)(1)(5)	6,643	41.1
Discrimination vs union supporter; §8(a)(1)(3)	4,747	29.3
Interfered with Sec 7 rights; §8(a)(1)	2,643	16.3

Chart 4:

ULP vs. Union (6,349 cases)	**Number of cases**	**Percent of cases**

[23] See NLRB Procedures Guide *at* http://www.nlrb.gov/publications/Procedures_Guide.htm .
[24] NLRB, Jurisdictional Standards, Common to All Cases, *at* http://www.nlrb.gov/nlrb/legal/manuals/COMMON%20TO%20ALL%20CASES%2011700%2011886.pdf .
[25] NLRB Annual Report, 2008, Table 2, *at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2008Annual.pdf .

Interfered with Sec 7 rights; §8(b)(1)	4,864	78.3
Induced employee to strike §8(b)(4)	487	7.8
Refused to bargain collectively with employer; §8(b)(3)	268	4.3

Union charges of interference with Section 7 rights against employers allege that the employer is interfering with the employees' rights to organize. Employer charges of interference with Section 7 rights against unions allege that unions try to prevent employees from refraining from union activities or to force them to join. The time required for resolution of such charges varies greatly, and is another cause of delay. The investigation itself normally takes from 4 to 6 weeks. If the matter goes to trial, it may be several more months for the trial, and if an appeal is taken, a year or more for the appeal. Several unfair labor charges may be filed sequentially, each with its own concomitant delay.

3. Delay: First Contract

Finally, for some Petitions, all election objections and unfair labor practices resolved, the parties are to negotiate a first contract. They have, essentially, 12 months to agree to a contract. This is because the NLRB applies a certification bar, which prevents challenges to the newly certified union's majority status, for one year following the date the union is certified as the collective bargaining representative.[26] This means that the NLRB will not allow either an election by another union to unseat the certified union, or a decertification election called for by the employer who believes that a majority of the employees no longer wish to be represented by a union.[27] The practical effect of all of this is that it is in management's interest to delay the formation of a contract for as long as possible, so that support for the union will continue to erode, and a decertification election, removing the union as bargaining representative, may be held at the end of the year.

As we have seen in Chart 1, in practice, the average length of time required for a new unit to negotiate a first contract is 351.43 days,[28] just short of one year. One may surmise that if at this point there has not been sufficient erosion in support for the union, then management will enter into a first contract with the union. In cases where the parties were not able to agree to a first contract, the average time period of negotiation is 570.75 days.[29] At that point, efforts to unionize are often abandoned, and the union is decertified. The Federal Mediation and Conciliation Service, the federal agency that mediates labor negotiations reports that about 45% of newly formed unions fail to negotiate a first contract with an employer within two years.[30] These are all unions which have won their elections, and have been certified as the sole collective bargaining representative of the employees.

Of course, the parties are required to bargain in good faith, and charges and counter-charges of unfair labor practices, and of failure to bargain in good faith may be brought while the negotiation process is ongoing (adding further delays). If the employer engages in bad faith bargaining during the first year following the certification, the Board may extend the certification year for the additional

[26] *Brooks v NLRB*, 348 U.S. 96, 103 (1954).
[27] *Chelsea Industries*, 331 NLRB 1648 (1995).
[28] *Ibid*, n 2
[29] *Ibid*, n 2
[30] Kris Maher, *Unions Set Pacts at a Slower Pace as Clout Wanes, Employers Resist*, WALL STREET JOURNAL, Eastern edition, New York, NY, July 5, 2006. Pg A-2

period of time in which the Employer bargained in bad faith.[31] But an extension of time just adds to the delay.

INEFFECTIVE PENALTIES

The Bronfenbrenner study[32] was commissioned by the U.S. Trade Deficit Review Commission,[33] undertaken by Cornell University and conducted by Dr. Kate Bronfenbrenner. It is the most comprehensive study so far accomplished concerning union organization elections, illegal conduct by opposition management (especially the threat of plant closing), and the success or failure of formation of first contracts. Detailed data was taken of a random sampling of 400 NLRB proceedings during 1998 and 1999. The study concluded:

- More than half of all employers made threats to close all or part of the plant during an organizing drive. The threat rate was significantly higher (68%) in mobile industries such as manufacturing, communication and wholesale/distribution, compared to a 36% threat rate in relatively immobile industries such as construction, health care, education, retail and other service.
- Threats of plant closing were very effective. The union election win rate in cases where plant closing threats were made is 38%, while it is 51% in units where no threats were made. Win rates were lowest (32%) in mobile industries where such threats were more credible.
- Threats of plant closing were unrelated to the financial condition of the company. Such threats occurred no less frequently in companies in a stable financial condition than in those on the edge of bankruptcy.
- More than three quarters of the campaigns where threats occurred also involved aggressive legal and illegal employer behavior such as discharges for union activity, electronic surveillance, illegal unilateral changes in wages or benefits, bribes, threats to refer undocumented workers to INS, promises of improvement, and promotion of union activities out of the unit.
- Despite the high percentage of plant closing threats during organizing campaigns, after the election, employers actually shut down all or part of their facilities in fewer than 3 percent of the campaigns.

The findings of the Bronfenner study indicate that employer threats and promises are "shockingly routine"[34] in election campaigns. "The core problem is that the traditional National Labor Relations Board (NLRB) remedies are ineffective in deterring violations of the Act. If a person violates worker rights, the NLRB sanction is to require the wrongdoer to sign a written statement pledging not to do it again."[35] In other cases, the remedy is to post a notice for 60 days, advising employees that the

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[31] *Mar-Jac Poultry Co*., 136 NLRB 785, 787 (1962).
[32] Kate Bronfenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, *available at* http://digitalcommons.ilr.cornell.edu/reports/3/ .
[33] U.S. Trade Deficit Review Commission website (archive), *at* http://govinfo.library.unt.edu/tdrc/research/research.html .
[34] Leonard R. Page, *70th Anniversary Celebration of the Nat'l Labor Relations Act,* American Bar Association, Section of Labor and Employment Law, Practice & Procedure Under the NLRA, Committee Newsletter, May, 2005.
[35] Kate Bronfenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, *available at* http://digitalcommons.ilr.cornell.edu/reports/3/ .

employer has committed an unfair labor practice. Such remedies do not effectively operate to deter similar conduct. As a result, employers have little incentive to refrain from such conduct.

One of the most significant factors leading to the use of ineffective remedies is the ruling in *Republic Steel Corp vs. NLRB,*[36] a depression era decision which sharply curtailed the kinds of remedies the NLRB could impose. The U.S. Supreme Court held that board remedies could not be "punitive" in nature, and that deterrence was not a permissible rationale upon which to issue sanctions.[37] The result is the remedial scheme we have today, which does not provide "remedies" in any practical sense.

Leonard Page, former General Counsel of the NLRB stated:

> As if you didn't know, the essential problem is delay and ineffective remedies. *** The core problem is that the traditional NLRB remedies are ineffective in deterring violations of the Act. Section 10 of the Act gives the General Counsel the authority to seek remedies to restore the status quo and to prevent recidivist activity. The traditional 60 days notice posting remedy just does not do that. It is used to settle about 98% of all of the approximately 10,000 complaints issued each year. The notice posting remedy does not restore the status quo or prevent recidivism. Indeed, this high settlement rate, on which all NLRB General Counsels rely, is perhaps the best evidence that NLRB remedies are ineffective. When you add the ready availability of a non-admission clause to the traditional notice posting remedy, you have probably created the ultimate meaningless piece of wallpaper for employee bulletin boards. [38]

The Bronfenner study recommended that changes be made to the NLRA to provide for substantial financial penalties and injunctive relief for violations of the NLRA. The study also recommended revising the law to permit card check elections and first contract arbitration.

A DECLINE IN ENFORCEMENT

Many have observed the decline in enforcement under the current law. Using NLRB statistics, Senator Arlen Specter, R, Pa, reported that the number of cases handled by the NLRB declined from 40,861 in 1994 to 26,717 in 2006. But despite the decline in workload, the median age of unresolved unfair labor practice cases was 1232 days (3.4 years), and for representation cases, 802 days (2.2 years). The use of injunctions to compel enforcement declined from 104 applications in 1995 to 15 in 2005, and then to 25 in 2006. Intake of cases in the Washington office had declined from 1,155 in 1994 to 448 in 2006. [39] The Senator concluded, "The overwhelming evidence demonstrates that the NLRB is not doing its job and is dysfunctional." [40]

Garren Brent, a former General Counsel of the NLRB has stated,

> The empirical evidence clearly reveals the crisis in National Labor Relations Act (NLRA) enforcement. On the one hand, the number of employer violations and the volume of

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[36] Republic Steel v NLRB, 311 U.S. 7 (1940)

[37] Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, UCLA L. REV., 52 UCLA L. Rev. 1579**, (** 2005).

[38] Leonard R. Page, *70th Anniversary Celebration of the Nat'l Labor Relations Act,* American Bar Association, Section of Labor and Employment Law, Practice & Procedure Under the NLRA, Committee Newsletter, May, 2005.

[39] Remarks of Senator Arlen Specter, R, Pa, Congressional Record – Senate, p S8381, June 26, 2007, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S8381&dbname=2007_record .

[40] *Id.*, p S 8380, available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S8380&dbname=2007_record .

> discrimination charges against union supporters during election campaigns have soared. At the same time, union win rates in elections and unions' success in obtaining first contracts have plummeted. These related developments cry out for revamping the NLRB remedial scheme. [41]

POLITICAL POSSIBILITIES

In every Congress since 2003, the EFCA and the SBPA have been introduced in both the House and Senate, where they were referred to the appropriate committee and where they remained, unable to be called to the floor for a vote. Opponents of the bills would promise a filibuster, and neither Democrats nor Republicans had a filibuster-proof majority. In June, 2007, the House passed the EFCA, but the Senate was not able to call the bill for a vote because of the threat of a Republican filibuster. In the Spring of 2009, as before, both bills have been introduced, then referred to their respective committees, where they remain.

But now, the political realities have changed. Democrats might be able to forge a filibuster-proof majority which would enable them to call for a vote and pass the EFCA. Senate rules require a 3/5ths majority (60 Senators) in order to invoke cloture, the closing of debate (and the ending of filibusters) so that a vote can be taken on the matter in question.[42] The election of November, 2008, gave Democrats a majority in both the House (256 Democrats to 178 Republicans)[43] and the Senate (56 Democrats and 40 Republicans),[44] but not enough to stop a filibuster. However, events continued to unfold.

On April 28, 2009, Senator Arlen Specter, Republican of Pennsylvania, facing near-certain defeat in the Republican primary in his state in 2010, resigned from the Republican party, and joined the Democratic party, bringing the total number of Senate Democrats to 57. Specter had been targeted for defeat by far-right conservative interest groups, in part because of his previous support for the Employee Free Choice Act. [45]

Then, on June 30, 2009, the disputed Minnesota Senatorial race between Republican Norman Coleman and Democrat Al Franken, was finally resolved by the Minnesota Supreme Court[46], and Mr. Franken was sworn in as a U.S. Senator. That brought the total of Democratic Senators in the Senate to 58. With the addition of two independent senators who caucus with the Democrats (Bernie Sanders of Vermont, and Joe Lieberman of Connecticut),[47] a 60-vote majority was at least theoretically possible.

But on August 25, 2009, Democratic Senator Edward Kennedy died, leaving his Senate seat vacant, and reducing the Democrats most hopeful number of votes to only 59, 1 short of the 60 needed to stop a filibuster. A special election to fill Senator Kennedy's seat has been scheduled for January 19,

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[41] Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives* (2000). 51(2) LAB. L.J. 76 (2000).

[42] The Senate website contains an explanation of the rule, its history, and Senate action on cloture motions from 1919 to the present. *Available at* http://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm

[43] See the complete House election returns and graphic maps at NPR.org, *available at* http://www.npr.org/news/specials/election2008/2008-election-map.html#/house?view=race08

[44] See the complete Senate election results and graphic maps at NPR.org, *available at* http://www.npr.org/news/specials/election2008/2008-election-map.html#/senate?view=race08

[45] Brian Montopoli, *Sen. Arlen Specter to become a Democrat*, CBSNews.com, April, 2009, Blogs, Political Hotsheet, *at* http://www.cbsnews.com/blogs/2009/04/28/politics/politicalhotsheet/entry4974413.shtml .

[46] Todd Melby, *Franken Declared Senate Winner; Coleman Concedes*, Reuters.com, June 30, 2009, *available at* http://www.reuters.com/article/topNews/idUSTRE55T5Y420090630 .

[47] *What are our nation's independent Senators up to?*, Independent Political Report, March, 2009. Available at http://www.independentpoliticalreport.com/2009/03/what-are-our-nations-independent-senators-up-to/ .

2010. However, on September 24, 2009, Paul Kirk was appointed as by the governor of Massachusetts to serve as Senator until the special election.[48] Unless his appointment is challenged as illegitimate, his addition would bring the Democrats' numbers up to 60 again.

Nothing is certain, however. Senator Specter was one of the original sponsors of the bill (and the sole Republican supporter) when it was introduced into the Senate in 2003.xx Ironically, after becoming a Democrat, he opposed the EFCA,[49] reportedly because of the card-check provision. Most recently, Senator Specter has reported a compromise EFCA bill, but no amendments have been filed in the Senate.[50] However, it remains to be seen whether the compromise will be achieved, or if achieved, whether it will pass the Senate. If Senator Specter is unable to persuade others to his compromise bill, he may not vote for the bill in its final form.

In addition, although the two independent Senators caucus with the Democrats, there is no guarantee that they will vote in support of the EFCA. Moreover, the Democratic party contains several factions, some of which oppose the EFCA, and Democrats don't necessarily vote the same way. The "Blue Dog" Democrats generally do not support unions[51]. And events will continue to unfold. Senator Robert Byrd of West Virginia, now the longest-serving Senator in the history of the United States, is 91 and in ill health.[52] A change in his status or other events could continue to change the outlook for passage of the bill.

Finally, since every single one of the 60 votes is necessary to defeat a filibuster, one may anticipate that some Senators, seeing an opportunity, will ask for favors in return for their yea votes. Earlier in the year, it might have been anticipated that some Republican Senators, perhaps from industrial states, might be recruited to support the bill in exchange for something they wanted. But given the contentious health care debate, town hall routs and tea party demonstrations of the spring and summer of 2009, it seems highly unlikely that any Republican will vote for the bill, whatever its form. Still, it is possible that the Employee Fee Choice Act could become law in 2009.

REGULATORY REALITIES

Given the possibility that the Employee Free Choice Act could become law, we below review its terms to see what its effect would be on the NLRB regulatory scheme.

The Employee Free Choice Act

As we go to press, the proposed Employee Free Choice Act[53] would provide for the following changes to the current law:

- Require employers to recognize a union election made by card-check, or "signed authorization" elections, without the requirement of an NLRB election; authorize the NLRB to develop "guidelines and procedures" for such elections.

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[48] Chris Cillizza, *MA-Senate: Patrick names Kirk Interim Senator*, Washington Post, Politics, The Fix, September, 2009, *available at* http://voices.washingtonpost.com/thefix/senate/ma-senate-patrick-to-name-kirk.html .

[49] *Arlen Specter Opposes Employee Free Choice Act*, Washington Business Journal, March, 2009, *available at* http://www.bizjournals.com/washington/stories/2009/03/23/daily59.html .

[50] Alec McGillis, *Specter Unveils Revised EFCA Bill*, WASHINGTON POST, Capitol Briefing, *available at* http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html .

[51] Erick Becker, *Reid says EFCA on hold for Now*, examiner.com, August, 2009, *available at* http://www.examiner.com/x-14310-LA-Labor-Relations-Examiner~y2009m8d28-Reid-says-Employee-Free-Choice-Act-EFCA-on-holdfor-now .

[52] Paul J. Nyden, *Sen. Byrd About to Break record for longest time in Congress,* November,2009; *available at* http://wvgazette.com/News/200911140549

[53] The US Senate version of the law, which is identical to the House version, is S. 560, 111th Congress (2009).

- Provide that negotiations for a first contract must begin with 10 days of a written request for collective bargaining.
- Provide that if no agreement is reached on the terms of a first contract within 90 days, either party may request mediation by the Federal Mediation and Conciliation Service. (The FMCS now provides mediation and arbitration services in such disputes when the parties agree to submit their disputes.)
- Provide that if such mediation fails to reach agreement, the dispute go to arbitration before The Federal Mediation & Conciliation Service.
- Provide that the ruling of the arbitration board on the first contract shall be binding upon the parties for 2 years, unless amended by their agreement.
- During the time prior to initial organization, or after initial organization but before first contract formation, if a charge of unfair labor practices is made, such charge would receive priority over all other cases.
- For violations made during this same time period, in addition to any make-whole remedy ordered, the employer would be subject to a civil penalty not to exceed $20,000 for each violation.
- Provide that back pay for violations of the Act would be tripled.

At any time during the process, the parties may agree to continue their negotiations, without mediation or arbitration.

The Effect of the EFCA on the NLRB Process

3) Communications During an Organizing Campaign

Under the current law and NLRB regulations, both sides have a right to communicate their wishes regarding the benefits and/or drawbacks of unionization. They also may communicate facts about unionization and unions. Section 8c of the NLRA states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[54]

Thus, campaigning by both unions and management is permitted under the current law.

However, in practice, unions often attempt to keep their initial organizing efforts secret. This allows the union to be the sole source of communication and information about the benefits of unionization for the length of time they are able to keep their efforts from management's attention, and to avoid any anti-union steps management may take. Once management becomes aware of a union organizing effort, it can begin a counter campaign against unionization.

There is no requirement in the EFCA that a union attempting to organize a facility notify management of the campaign. Therefore, it would be possible for a union to mount an organizing campaign, get a majority of employees in the proposed bargaining unit to sign election cards[55], and present them to management requesting that management recognize and bargain with the union, *before management becomes aware of the organizing drive*, or at a very late stage in the process. As we noted earlier, in practice, this would deny management the right to make its case against unionization before a vote is taken. Although the playing field now may be tilted in favor of management under current

[54] 29 U.S.C. § 158(c)

[55] For purposes of this discussion we will refer to cards under the NLRB process as "authorization cards," and cards under the EFCA as "election cards."

law, this practice would swing it in favor of labor. The National Labor Relations Act requires a level playing field, or as near to one as it is politically possible to get.

The purpose of the National Labor Relations Act is to allow employees free choice in deciding whether they want union representation. Free choice requires informed choice. This requires that both sides be allowed to fully communicate with employees before they make a decision about union representation. One method of ensuring employee informed choice would be to require unions to notify management within a certain time period, perhaps through the NLRB, when they begin an organizing campaign, so that both the union and management have equal opportunity to communicate with employees.

The current NLRB election policy is that of the laboratory conditions doctrine, which requires "conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." [56] If under the EFCA employees are informed of only one side of the argument, laboratory conditions do not exist. But neither do laboratory conditions exist under current regulation and practice.

1. Requiring Mediation/Arbitration to Reach a First Contract

The EFCA would require that if no agreement is reached on a first contract within 90 days, either party may request the Federal Mediation and Conciliation Service to provide a mediator. If mediation fails to produce a contract, the dispute would be submitted to mandatory, binding arbitration. The ruling of the arbitration board would be binding upon the parties for two years, unless amended by their agreement.

The Federal Mediation and Conciliation Service provides mediation and arbitration services currently for labor disputes which the parties *agree* to submit for resolution. But the EFCA would make such submission mandatory after 90 days of negotiation, during which there is a failure to reach a first contract.

A practice much more common in the public sector than in the private sector, *interest arbitration* occurs when an outside third party listens to disputes about contract terms, and then *imposes* a settlement on both parties. The constitutionality of interest arbitration in the private sector has been questioned,[57] particularly with regard to the due process, equal protection considerations.

Moreover, Section 8d of the NLRA describes the obligation to bargain collectively and states in part that "such obligation does not compel either party to agree to a proposal or require the making of a concession." [58] Interest arbitration would *impose* a settlement on issues in dispute, thus requiring the parties to agree to a proposal and make concessions. In essence, when an arbitrator imposes contract terms on the parties it would precisely be requiring them to "agree to a proposal and make concessions." Mandatory interest arbitration would be a major change of law and policy, even if it withstands nearly certain constitutional challenges.

In practical terms, there is another difficulty with the proposed new regulatory scheme. Ninety days is simply not enough time to negotiate a contract. If the time period were extended to 6 months or a year, it would certainly be more reasonable, although ultimately, it might not solve the problem of extended delay. The question is whether the problem of extended delay should or can be solved without resorting to the major policy change of imposing interest arbitration.

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[56] *General Shoe Corp.*, 77 NLRB, 124, 127 (1948).

[57] *Constitutional Viability of the Employee Free Choice Act's Interest Arbitration Provision*., 26(1) HOFSTRA LAB. & EMP. L.J. 33 (2008).

[58] 29 U.S.C. § 158(d)

2. Election Delays

Supporters of the EFCA act cite election delays as one problem the proposed law would solve. However, one primary source of election delay is management contesting that the proposed bargaining unit is an appropriate one, consisting of members with a community of interest. Each side would obviously like employees included or excluded so as to affect the representation vote. Often, a challenge to the appropriateness of the proposed bargaining unit is filed by management as a delaying tactic to improve management's chances in the election.[59]

However, the NLRB is still legally responsible for determining whether a proposed group constitutes an appropriate bargaining unit. When management contests the proposed bargaining unit, the NLRB investigates and issues a ruling. The EFCA would not change this process.

The NLRB must still be responsible for determining "an appropriate bargaining unit," or the union could simply identify a pro-union group of employees and ask them to sign authorization cards guaranteeing the union would become the exclusive bargaining agent for those employees. Some other method of curtailing delays must be found.

One possible way of reducing delays due to contested bargaining units would be to require unions to notify the NLRB at the beginning of an organizing campaign and ask for a ruling on the appropriateness of the proposed bargaining unit, rather than waiting until filing a petition for a representation election. Thus, this issue could be resolved at least in some cases by the time of the filing for a representation petition and eliminate delays in holding the election. However, whether this procedure would avoid the delay or simply move it is unknown.

3. Duration of Incontestability of Certified Union

Currently, the NLRB does not allow more than one valid election in a 12 month period. This gives a newly elected union a year to negotiate a first contract before management or labor can file a decertification election. It also prevents other unions from attempting to organize the employees in the bargaining unit and petitioning for a representation election to unseat the certified union.

The EFCA does not speak to this issue. That being the case, it might be assumed that once a union was recognized as a result of a card check election, the same rules would apply, so that a decertification election could not be filed, nor could a different union attempt an organizing drive within the first 12 months. But there are unanswered questions. For example, if interest arbitration results in a contract, would the parties be prevented from requesting a decertification election or a change of unions for a period of two years, the length of the contract?

4. History of Authorization Cards

Under current NLRB law, the legal effect of signing an authorization card is a recognition that the employee wants a representation election, not that he is joining a union. The card-check election would change that. During an organization drive, management's campaign communications always made it clear to employees that even though they signed an authorization card, they were still free to vote against the union in the election if they so wished. In management's view, authorization cards really represent employees' wishes that an election will be held to determine their representation status, not that they wish to be represented by a union. In fact, opponents to the EFCA argue that the union often coerces and intimidates employees into signing authorization cards, and it is not until the secret ballot election that they can vote their true wishes. But in labor's view, why vote to have an election only to vote against union representation?

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[59] Clyde Scott and Nicholas Beadles, II, *Unit placement decisions in acute-care hospitals*, 44 LAB L.J., 143 (March 1993)

If card-check becomes a reality, the cards themselves must be fashioned in such a way that the signer is clear about what the effect of his signature would be. In addition, bilingual cards may be necessary in certain elections.

The current EFCA does not directly deal with the primary problems in the current union organizing process. Whatever form the final legislation takes, it should be based on the underlying philosophy of the NLRA; that is, to attempt to provide a balance of power between union and management so that employees are free to exercise their Section 7 rights.

The Secret Ballot Protection Act

In response to the original EFCA bill, Representative Charles Norwood, Republican of Georgia, proposed the Secret Ballot Protection Act (H.R. 874), introduced in February 2005. The identical bill was introduced on March 10, 2009. Its summary states that the Act was intended to "ensure the right of employees to a secret-ballot election conducted by the National Labor Relations Board. The bill was referred to the Subcommittee on Employer-Employee Relations in the House on March 24, 2005, where it remained until the Congressional term ended.

In each succeeding term that the Employee Free Choice Act has been introduced in Congress, the Secret Ballot Protection Act has also been introduced into Congress. Most recently, the bill was introduced in the House and Senate on April 22, 2009, and referred to the House Committee on Health, Employment, Labor & Pensions. In the Senate, the bill was placed on the Senate Legislative Calendar under General Orders.

The Secret Ballot Protection Act (SBPA) makes certain findings:

"1) that the right of employees under the National Labor Relations Act to choose whether to be represented by a labor organization by way of secret ballot election conducted by the National Labor Relations Board is among the most important protections afforded under Federal labor law;

2) the right of employees to choose by secret ballot is the only method that ensures a choice free or coercion, intimidation, irregularity, or illegality; and

3) the recognition of a labor organization by using a private agreement, rather than a secret ballot election overseen by the National Labor Relations Board, threatens the freedom of employees to choose whether to be represented by a labor organization, and severely limits the ability of the National Labor Relations Board to ensure the protection of workers."

In addition, The Secret Ballot Protection Act would make it illegal:"to recognize or bargain collectively with a labor organization that has not been selected by a majority of such employees in a secret ballot election conducted by the National Labor Relations Board." [60]

In other words, *the Secret Ballot Protection Act would prohibit even the current practice of an employer's voluntary recognition of a card-check election*, which would be a major step backwards for labor. Aside from some additional administrative provisions, there are no other provisions of the bill. No part of the bill addresses delay, ineffective remedies, or failure to reach a first contract.

While the Employee Free Choice Act would make card-check elections an option (*not* a requirement), the Secret Ballot Protection Act would enshrine in law the NLRB process as the only possible representation election, making any other methods illegal. Clearly, the Secret Ballot Protection Act would not address any of the problems with the current NLRB process.

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[60] S. 478, 111th Cong. §3 (2009).

THE HOPEFUL COMPROMISE BILL

Although no amendments have been made to the pending EFCA bill, nor an alternate bill offered as we go to press, Senator Specter's description of the proposed compromise amendments includes these points:

- The mandatory recognition of card-check elections would be removed from the bill. In its place the bill "would try to make union elections more fair by sharply limiting the time between organizers' declaration that they have enough support to call an election and the day of the vote, to reduce the potential for employer intimidation." [61]
- Organizers would also be guaranteed access to workers if employers held mandatory anti-union meetings on company time
- Penalties for violations of the law would be triple their current levels.
- The Mandatory arbitration provisions of the EFCA would be modified to require that employers and unions who fail to reach a contract within a few months would go to "last best offer arbitration," used in baseball arbitration. The mediator or arbitrator would have to choose one of the last offers, which is believed to encourage negotiators to offer reasonable contract terms.[62]

If these compromise provisions included in the pending bill, the chances of passage would certainly increase. By far, the two most contentious provisions have been the card-check and mandatory arbitration provisions, which will be modified.

As for their efficacy, the history of labor and management would indicate that shortening the time frame before the vote will intensify the lobbying efforts rather than curtail them. Access to workers will help level the playing field, and penalties will likely be taken more seriously. But it seems almost certain that even with the changes to the mandatory arbitration provisions, a legal challenge will be made, charging that the provision – even as modified - is unconstitutional. Given the current composition of the U.S. Supreme Court, it is entirely possible that the Employee Free Choice Act, or at least the mandatory arbitration portion of it, would be struck down as unconstitutional.

A CONTRARIAN RECOMMENDATION

If the NLRB is to effectively fulfill its mission of serving as a neutral party in disputes between management and labor, then something must change. The NLRA must be amended to address the lack of a level-playing field between management and labor. But we must ask whether either of the proposed laws, in their present form, do this.

The Secret Ballot Protection Act makes no effort to address the problems of the current system, and instead, seeks to enshrine them into law, while removing the voluntary recognition of card check elections. The Employee Free Choice Act would perhaps eliminate some delay, and would certainly make penalties more meaningful, but card-check elections would deny employers their right to present their cases before a union vote, and mandatory interest arbitration would represent a major change of law and policy. Even if the EFCA was successful in eliminating delay, if it meant that union organizers would be able to intimidate and coerce employees into signing authorization cards, then their Section 7 rights would not be protected. A better option is needed.

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[61] Alec McGillis, *Specter Unveils Revised EFCA Bill*, WASHINGTON POST, Capitol Briefing, *available at* http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html

[62] *Id.*

The one change in current law that would have the most significant impact on NLRB proceedings is not contained in either the EFCA or the SBPA, or even in the rumored amendments of the EFCA). If you were to ask practitioners who work for the NLRB, they would tell you that the change which would have the greatest impact on the significant problems of the current legislative system would be the simple remedy of making Board decisions self-enforcing. The Securities and Exchange Commission operates in this way, and its decisions are enforced without the delay and uncertainty to which NLRB decisions are subject.

Under the current legislative scheme, every Board decision is subject to review not only through the NLRB administrative procedure, by also by the courts. These multiple procedures add significant time, expense and delay to the resolution of disputes, all of which works in favor of management and against labor. Under current law and practice, the pendulum swings from one side to the other, each side striving for advantage, subject to the political winds. The current system does not create a level playing field, nor a fair and just process. But making NLRB orders self-enforcing would address delay and enforcement and give meaning to the provisions of the Act.

If the National Labor Relations Board were given the same self-enforcing power that the Securities and Exchange Commission exercises, delays would greatly diminish, and orders could be enforced with certainty and timeliness.