WORKERS' FREE CHOICE—AN UNREALIZED PROMISE

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I. INTRODUCTION

The National Labor Relations Act (NLRA) no longer protects workers' rights to express free choice or to form a union despite its stated purpose and promise of protection for workers' organizational efforts.[1] For an increasing number of workers, the Act does not provide a process that will lead to union representation and a collectively bargained contract.[2] Instead, the National Labor Relations Board's (N.L.R.B.) election process sets off a drive by employers to intimidate workers, to misrepresent the potential results of having a union, and to thwart workers' organizational efforts.[3]

The law allows employers a choice to either request an election, or to recognize a union based on the results of workers' signed cards asking for union representation.[4] Traditional N.L.R.B. elections usually take place after unions collect signed cards from a majority of eligible workers in a unit, asking for union representation.[5] When presented with these cards by the union, the employer may request that the N.L.R.B. supervise a secret ballot election to verify the outcome of the signed card collection.[6] One of the biggest problems with a traditional N.L.R.B. election has been that employers then use the time between the presentation of the signed cards and the N.L.R.B. supervised election to engage in aggressive and possibly illegal anti-union behavior. Because many employers see this time before an election as an opportunity to scare and frighten workers who are considering voting for union

1. *See* National Labor Relations Act, 29 U.S.C. § 151 (1935).
2. *See* discussion, *infra* Parts II.A.-I.
3. *See id.*
4. 29 U.S.C. § 159(e) (1935).
5. *See* N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969) (describing a card-check procedure as a valid means of designating a union as the exclusive bargaining representative).
6. *See* 29 C.F.R. § 101.17-.21.

representation, few employers have followed the alternative legal route to union recognition.[7]

In response to employers' aggressive strategies to avoid unions, during the 1960s unions started to move away from traditional N.L.R.B.-supervised elections and to develop "card-check" organizing strategies.[8] The "card-check" recognition has been an attempt to overcome some of the problems with traditional N.L.R.B. elections. The most apparent advantage for unions of "card-check" recognition is that employers do not have the opportunity to meet with workers, to intimidate them, to make dire predictions and misrepresentations about the effects of unionization, or to illegally fire union organizers.[9] Recognizing this advantage, unions have developed strategies for pressuring employers to recognize the union at the time of the "card-check." The Employee Free Choice Act (EFCA) builds on this movement away from traditional N.L.R.B.-supervised elections to "card-check."[10]

II. EMPLOYEE FREE CHOICE ACT

The EFCA has three major goals. First, it provides for certification of a union as a bargaining representative if the N.L.R.B. finds that a majority of employees in an appropriate bargaining unit have signed valid authorizations designating the union as their bargaining representative.[11] Thus, employers would lose the opportunity to call for elections designed to frustrate workers' right to organize. The bill requires the N.L.R.B. to develop model authorization language and procedures for establishing the validity of signed authorizations.[12]

Second, the EFCA facilitates initial collective bargaining agreements by allowing interest arbitration of first contracts.[13] If the parties do not reach an agreement within 90 days, either party may request mediation, which if unsuccessful, is followed by arbitration.[14] Results of the arbitration are binding on the parties for two years.[15]

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7. *See* Linden Lumber Div. Summer & Co. v. N.L.R.B., 419 U.S. 301 (1974) (stating that an employer may reject a card majority and force the union to demonstrate majority support in a secret–ballot election).

8. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 827-28 (2005).

9. *See* discussion, *infra* Parts II.C.-F.

10. *See* Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2 (2007).

11. *Id.*

12. *Id.*

13. *Id.* § 3.

14. *Id.*

15. *Id.*

Third, the Act provides stronger penalties for violations that occur while employees are attempting to form a union or to attain a first contract.[16] An employer who violates employees' rights during an organizing campaign or when the parties are bargaining for a first contract may receive a civil penalty of up to $20,000.[17] If an employer discriminates against an employee during these same periods, the employer may be required to pay triple back pay.[18] And the N.L.R.B. must seek a federal court injunction against the employer if it has reasonable cause to believe that the employer has discharged or discriminated against employees.[19]

The essence of the EFCA is to reform a law that does not protect workers when exercising their fundamental human right of freedom of association. But more than just protecting freedom of association, the EFCA suggests that labor law needs to change to promote labor management relations that are more appropriate to the needs of workers, employers and the general economy. Before discussing the reasons why labor law reforms are necessary, this paper will address the current state of the law and the ossification of the NLRA through case law developed by the N.L.R.B. and the courts.

A. Although the Purpose of the NLRA was to Protect Freedom of Association, the Reality of Labor Relations is Quite Different

The purpose of the NLRA was set forth in the Act in 1935:

> It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[20]

The NLRA was designed to aid employees in forming associations, choosing representatives, and negotiating terms of employment and working conditions.[21] Despite the 1947 Taft-Hartley Amendments to the

16. H.R. 800 § 4.
17. *Id.*
18. *Id.*
19. *Id.*
20. 29 U.S.C. § 151.
21. *Id.*

Act, this purpose has remained the official goal of labor relations in the United States.[22]

Yet, the reality of labor relations is quite different. Instead of helping employees to associate openly, to choose freely, and to bargain collectively, the NLRA has been used by employers to prevent freedom of choice and to deny collective bargaining.[23] The N.L.R.B. election process—originally designed to ensure freedom of association—now foils attempts by employees to choose their representatives. Moreover, the law often turns a blind eye or approves the barriers that make freedom of association an unattainable goal.[24] There is almost no correlation between the rights guaranteed by the NLRA and the consequences experienced by employees when they try to organize and choose representatives.[25] In short, the N.L.R.B.'s election process is broken; little remains of the NLRA's original promise of freedom of association. The EFCA is an attempt to get the NLRA back on course.[26]

Comparisons of the N.L.R.B.'s election process with general political elections illustrate the extent to which union elections have deviated from the original democratic goals:

> If general political elections were run like N.L.R.B. elections, only the incumbent office holder, and not the challenger, would have access to a list of registered voters and their home addresses. The challenger would not get these until just before the election. Only the incumbent, and not the challenger, would be able to talk to voters, in person, every single day. The challenger, meanwhile, would have to remain outside the boundaries of the state or district involved and try to meet voters by flagging them down as they drive past. The election would always be conducted in the incumbent candidate's party offices, with voters escorted to the polls by the incumbent's staff. And finally, during the entire course of the campaign, the incumbent,

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22. *See generally* 29 U.S.C. §§ 141-187 (2000). The current National Labor Relations Act is the Wagner Act, as amended by ch. 120 of the Taft-Hartley Amendments of 1947, 61 Stat. 136 (1947), and the Landrum-Griffin amendments of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959). The official goal of labor relations remained the same, despite amendments to the original act by the Taft-Hartley Act, prohibiting union activities that are specified in § 8(b) such as secondary boycotts, or by the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act), containing a bill of rights for union members.

23. *See* discussion, *infra* Parts II.B.-I.

24. *See id.*

25. *See id.*

26. *See id.*

> but not the challenger, would have the sole authority and ability to electioneer among the voters at their place of employment, during the entire time they are working. Moreover, the incumbent could pull them off their jobs and make them attend one-sided electioneering meetings whenever it wanted. The challenger could never, ever make voters come to a meeting, anywhere or anyplace. And the incumbent could fire voters who refused to attend mandatory meetings, or if they tried to leave the meeting, or even if they objected to or questioned what was being said.[27]

Workers' experience of workplace governance bears little resemblance to the democratic vision that labor law initially expressed. In a report on the subversion of democracy under National Labor Relations Board Elections, Gordon Lafer describes the disturbing reality of workplace elections as follows:

> America's employees are subject to a regime of bribes, bullying, threats, terminations, delays, enforced propaganda, and political gag orders that we would not accept for the citizens of any foreign nation. The fact that this is happening in our own country makes the need for democratic reform all the more urgent.[28]

The lack of employee free choice is obvious from events that very commonly precede a secret ballot election, all of which are entirely legal: employers aggressively provide one-sided anti-union communication and information to workers, without allowing workers similar access to opposing views in support of organizing efforts;[29] employers ban union representatives from distributing information on company property, even in non-work areas during non-work time;[30] employers also threaten to hire permanent replacements of striking workers.[31] In addition, there is a

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27. *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing before the Subcommittee on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 64 (2007) (statement of Nancy Schiffer, Associate General Counsel, AFL-CIO) (hereinafter *Strengthening America's Middle Class*).

28. Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, AMERICAN RIGHTS AT WORK 40 (July 2007), *available at* http://www.americanrightsatwork.org/publications/general/neither-free-nor-fair.html (last visited Nov. 10, 2008).

29. *Id.* at 2.

30. *Id.*

31. *Id.* at 22.

high probability that a pro-union worker will be fired in the course of a union election campaign.[32] Even when employers engage in illegal tactics, the U.S. legal system tolerates long delays in enforcing labor laws.[33] This is supplemented by the fact that U.S. laws provide weak penalties for violations.[34] Moreover, the NLRB rarely petitions a federal district court for an injunction to stop illegal employer conduct.[35] In short, the law does not live up to its stated goal to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[36]

B. U.S. Laws Permit Employers to Refuse Workers' Demand for Union Recognition and to Force an N.L.R.B. Election, even when a Majority of Workers have Signed Union Authorization Cards

Since its inception, the NLRA allowed unions to secure representative status without an election, by showing a card majority.[37] From 1935 to 1947, the Board had authority to certify by secret ballot elections or "any other suitable method to ascertain" that the union had majority support.[38] The NLRA's recognition of workers' right to organize was curtailed when Congress passed the Taft-Hartley Act in 1947.[39] In the Taft-Hartley Act, Congress deleted from section 9 the phrase allowing certification via "any other suitable method."[40] Yet, the 1947 statute left some ambiguity about the methods by which unions can gain representative status, by retaining "designated or selected" language.[41] In *Gissel Packing Co.*,[42] the U.S. Supreme Court made clear that authorization card signatures may serve as an adequate reflection of employee sentiment, albeit "admittedly inferior to the election process"

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32. *Id.* at 32.
33. *Id.* at 33-34.
34. Lafer, *supra* note 28, at 33-37.
35. *See* discussion, *infra* Part II.A.
36. 29 U.S.C. § 151.
37. National Labor Relations Act, Pub. L. No. 74-198, § 9(c), 49 Stat. 449, 453 (1935) (hereinafter "N.L.R.A."). N.L.R.A. § 9(c) provides: "Representatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining . . . ." (emphasis added). *Id.*
38. *Id.*
39. Labor Management Relations Act, 29 U.S.C. 141 (1947).
40. *See generally* 29 U.S.C. § 141 amendments, *replacing* N.L.R.A. § 9(c).
41. 29 U.S.C. 141 § 9(a) (1947).
42. 395 U.S. 575 (1969).

as a means of showing employee choice.[43] But four years later in *Linden Lumber Div., Summer & Co. v. N.L.R.B.*,[44] the Court held that employers were not required to accede to a showing of a card majority; they could force a Board election.[45]

Thus, the law developed to allow an employer to file an election petition whenever a union demands recognition. Even where a majority of workers want union recognition, an employer may refuse their request and require that an N.L.R.B. election take place. During the period of time leading to the N.L.R.B. election, employers may legally fight the formation of a union in several ways.[46] For example, employers may order or strongly encourage workers to attend meetings at which the employers explain their opposition to a union and spell out the negative consequences of organizing.[47]

C. U.S. Laws Allow Employers to Aggressively Provide One-sided Anti-Union Communication and Information to Workers, without Allowing Workers Similar Access to Opposing Views in Support of Organizing Efforts

The Taft-Hartley Act includes an "employer free speech" clause that allows employers to campaign aggressively against union formation as long as the communications do not contain a "threat of reprisal or force or promise of benefit."[48] The Supreme Court explained that the employer "may even make a prediction as to the precise effects he [or she] believes unionization will have on his [or her] company."[49] The hazy distinction between illegal threats and legal predictions allows employers to present a dire picture of the consequences of organizing, such as workplace closures, firings, and cuts in wages and benefits. Employers may flood workers with anti-union information, stress the negative effects of organizing, and clearly and repeatedly state their opposition to having a union in the workplace. Short of making explicit threats of retaliation, an employer may create an atmosphere in which workers fear the consequences of flouting or defying a powerful employer's unmistakably hostile position to a union. Given the unequal power relationships in the employment relationship, an employer's strident opposition to union

43. *Id.* at 603.
44. 419 U.S. 301 (1974).
45. *Id.* at 309-10.
46. *See* discussion, *infra* Parts II.C-F.
47. *See* discussion, *infra* Part II.C.
48. 29 U.S.C. § 158(c) (1935).
49. *Gissel Packing Co.*, 395 U.S. at 618.

organizing efforts, without opportunities to hear from union organizers about the benefits of unionization, creates an atmosphere that is detrimental to freedom of choice.[50]

The Board has made it very simple for an employer to repudiate prior threats. In *Livingston Shirt Corp.*,[51] a partner as well as two supervisors of a company "each made statements to employees to the effect that the plant would close in the event of a union victory."[52] Yet, the Board held that "an employer may avoid liability in this type of situation by an appropriate repudiation or disavowal of the officer's or supervisor's statements."[53] In this case, the Board found that the company's president sufficiently repudiated all prior threats when he said: "I have not made the statement that if the union gets in here I will close this plant."[54] Thus, even if a partner or supervisor made threats, the employer can escape any violation of the Act by simply denying that he made the threat. This simple denial did not address the essence of the threat that the election of a union would lead to a plant closing. By simply saying he did not make this threat, without denying that the threat was credible or likely, the company's president appears to endorse the correctness of the threat.

The Board went further than accepting the employer's simple denial as a repudiation of the threat; it condoned the employer's delivery of anti-union speeches without providing a similar opportunity to the union to address employees. A majority of the Board found that "there [was] nothing improper in an employer refusing to grant to the union a right" to address employees equal to the right that an employer enjoyed in his own plant.[55] The Board's holding undermines rather than ensures the congressional intention that both parties to a labor dispute would have an equal right to disseminate their point of view.

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50. *See* JOSEPH ROSENFARB. THE NATIONAL LABOR POLICY AND HOW IT WORKS (Harper & Brothers 1940) ("An employer's 'opinion' about unionism expressed to his employees is not the same as his opinion on what doctor to use or about the international situation . . . When an employer addresses his antagonism toward unionism, however devoid his words may be of direct threats, there is always implicit the threat of economic compulsion if his wishes are not heeded. . . . Freedom of speech is possible only among those who approximate each other in equality of position."). *See also* International Ass'n of Machinists v. N.L.R.B., 311 U.S. 72, 78 (1940) ("Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.").

51. 107 N.L.R.B. 400 (1953).

52. *Id.* at 402.

53. *Id.*

54. *Id.*

55. *Id.* at 408-09.

Much more convincing is the minority opinion that by allowing an employer to "lawfully monopolize the most effective forum for persuading employees," the Board contravenes the congressional policy of neutrality.[56] Member Murdock, dissenting in part, said, "to the extent legally possible the Board should effectuate the congressional policy by seeing that the parties . . . have an equality of opportunity to have their arguments reach the employees in the same effective forum used by those who would defeat collective bargaining."[57] Member Murdock found support for his analysis in a study of the "psychological impact that accompanies the employer's solicitation" on company time and property.[58] "Field studies indicat[ing] how deeprooted . . . the feeling [is] among workers that their future welfare depends upon 'not crossing the boss'" would resonate with almost all workers.[59] But by completely ignoring the pressures inherent in employer speeches, the Board majority in effect abandoned the principle of equality of opportunity for both parties in labor-management relations.

Similarly, the U.S. Supreme Court neglected to recognize the inherent coerciveness of the situation when an employer pursues its own program of coercion on the premises and during working hours, while denying the union the same facilities and opportunity to solicit employees. In *N.L.R.B. v. United Steelworkers of America*,[60] the Court was confronted with the claim whether an employer commits an unfair labor practice when the employer engages in anti-union solicitation, which is coercive and accompanied by other unfair labor practices, while at the same time enforcing a no-solicitation rule against the employees.[61] The Supreme Court reversed a finding by the Board that the no-solicitation rule, while it might possibly be valid if fairly applied, was not fairly applied because of its link to the company's campaign of coercion.[62] In doing so, the Court accepted that employees could be hit hard in two ways: an employer may deliver coercive anti-union solicitation while enforcing a no-solicitation rule against employees.[63] Instead of "protect[ing] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing," the Court appeared willing to condone the denial of such

56. *Id.* at 410.
57. *Living Shirt Corp.*, 107 N.L.R.B. at 411 (Murdock, J., dissenting).
58. *Id.* at 423 (Murdock, J., dissenting).
59. *Id.* at 424 (Murdock, J., dissenting).
60. 357 U.S. 357 (1958).
61. *Id.* at 362.
62. *Id.* at 364-65.
63. *Id.*

rights, even where the employer's expressions of anti-union views were coercive in nature.[64]

The result of various decisions by the Board and the courts is that while employers may communicate with workers in the workplace, they do not have to provide union representatives the same opportunities. U.S. law does not give workers the right to receive information, oral or written, from union representatives at their workplace. To the contrary, U.S. law sanctions employers' right to prohibit union representatives from addressing worker meetings and from distributing literature on company property. While the employer may campaign aggressively against the union at the workplace, the law does not give union representatives the same opportunity to state their case. In short, employers and union representatives do not have equal opportunities to campaign before union elections; workers do not get a balanced view of unionization; and workplace elections are ultimately unfair.

D. U.S. Laws Allow Employers to Ban Union Representatives from Distributing Information on Company Property

The law restricts employees from distributing literature about the union in the workplace. Although employees may solicit during nonworking time, the U.S. Supreme Court held in *Republic Aviation Corp. v. N.L.R.B.*,[65] that an employer may usually ban employees from distributing literature, even during nonworking time and in nonworking areas, because of the employer's legitimate interest in keeping the plant free of litter.[66] Retail stores may also generally ban solicitation and distribution in the selling areas, even during employees' nonworking time.[67]

While employees are restricted in significant ways from distributing literature about unions in the workplace, the law makes it much harder for non-employees to either solicit or distribute literature at the workplace. Employer property rights have been held to trump a union's interest in communicating with employees where they can be most easily reached every day: the workplace.[68] Instead, non-employee union organizers have to communicate by mail, telephone, or by making home visits, even where such other ways of communication would be

64. *Id.*

65. 324 U.S. 793 (1945).

66. *See id.*; *see also* Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962) (sustaining a no-distribution rule, holding that union leaflets could create a littering hazard).

67. Marshall Field & Co. v. N.L.R.B., 200 F.2d 375 (7th Cir. 1952).

68. Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 533 (1992).

"cumbersome or less-than-ideally effective."[69] In *Lechmere*, the Court said, "[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."[70] Only in unique instances would a union be able to gain access to employees at the site of their employment, for example, in the case of logging and mining camps and other facilities that are "isolated from the ordinary flow of information that characterizes our society."[71] But the union's heavy burden of proving such "unique obstacles" results in most union organizers having no access to employers' premises to communicate their message to employees.[72] Due to the distinction that the law makes between employee solicitations and non-employee solicitations, it is often extremely hard for non-employee organizers to bring their message to employees.

In *N.L.R.B. v. Monsanto Chem. Co.*,[73] an employer refused to "permit the representatives of a labor union to distribute union literature to company employees on a parking lot which [the employer] provided for the use of its employees on company property adjacent to the company's chemical plant."[74] The court found that the employer's rule against solicitation or distribution of literature in the company parking lot did not constitute an unfair labor practice, even though organizers could not effectively distribute literature at an intersection of the highway and the road leading from the lot.[75]

Despite the legal expectation that employer rules discriminating against union solicitation and distribution would constitute an unfair labor practice, this prohibition against discrimination is not always evident from case law. For example, in *Cleveland Real Estate Partners v. N.L.R.B.*,[76] the court found there was no impermissible discrimination against union solicitation although the employer allowed Girl Scouts selling cookies, school kids selling candy, and other fraternal groups soliciting.[77]

Even when a majority of workers demand union recognition, the law allows an employer to challenge workers' demands, and to campaign aggressively against the formation of a union. For example, the employer can portray a disastrous picture of the effects a union would have such as

69. *Id.* at 539.
70. *Id.* at 532 (emphasis in original).
71. *Id.* at 539-40.
72. *Id.* at 535.
73. 225 F.2d 16 (9th Cir. 1955).
74. *Id.* at 16.
75. *Id.* at 17-21.
76. 95 F.3d 457 (6th Cir. 1996).
77. *Id.* at 465.

workplace closures, firings, and cuts in wages and benefits.[78] At the same time, an employer has the right to refuse union organizers an opportunity to reply to the employer's anti-union message, and to deny union organizers access to the employer's property, and even to prevent them from soliciting or distributing literature in areas outside the workplace.[79]

E. U.S. Laws Permit Employers to Threaten to Hire Permanent Replacements of Striking Workers

Employers typically campaign against the formation of a union by relying on employees' fear of losing their jobs and the legal consequences of strikes.[80] In particular, U.S. law allows employers to permanently replace workers who strike for economic reasons such as wages or benefits.[81] Workers terminated for this reason only have a right to reinstatement if the replacement worker leaves or a comparable position becomes available.[82]

F. There is a High Probability that a Pro-Union Worker will be Fired in the Course of a Union Election Campaign

In a study using published data from the N.L.R.B., John Schmitt and Ben Zipperer calculated that "about one-in-seven union organizers and activists are illegally fired while trying to organize unions at their place of work."[83] These researchers found that illegal firings increased steeply

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78. *See* discussion, *supra* Part II.C.

79. *See generally Republic Aviation*, 324 U.S. at 793; *Lechmere*, 502 U.S. at 533; *Monsanto Chem.*, 225 F.2d at 16; *Cleveland Real Estate*, 95 F.3d at 457.

80. *See* Be-Lo Stores v. N.L.R.B., 126 F.3d 268 (4th Cir. 1997) (holding that no violation occurred when employer handed out mock "pink slips" prior to Board election indicating that layoffs might be in employees' future if union won, since valid prediction about possible impact of unionization); Airporter Inn Hotel, 215 N.L.R.B. 824 (1974) (holding that a letter could lawfully conclude the following statement: "[A]void a lot of unnecessary turmoil. . . . [A] union . . . can't and won't do anything for you except jeopardize your jobs."); Pirelli Cable Corp. v. N.L.R.B., 141 F.3d 503 (4th Cir. 1998), (rejecting Board's finding that an employer illegally threatened employees when it gave them a pre-strike letter explaining its right to hire permanent replacements for striking employees).

81. *See* N.L.R.B. v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938) (holding that the hiring of permanent replacements for economic strikers is not an unfair labor practice).

82. *See* Laidlaw Corp., 171 N.L.R.B. 1366 (1968).

83. John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, CENTER FOR ECON. AND POL'Y RESEARCH (Jan. 2007), *available at*

during the years 2000-2005, as compared to the last half of the 1990s.[84] Schmitt and Zipperer concluded that the most likely explanation for union decline in the private sector was employers' systematic, aggressive, and sometimes even illegal, attacks on union efforts to organize new workers.[85] The fact that by 2005 only about one-in-twelve workers in the private sector were unionized appears to have little to do with the decline of manufacturing, union leaders' failure to adapt to structural changes in the economy, or with the preference of American workers, but much more to do with employers' behavior toward union supporters.[86] "Discriminatory discharges" of pro-union employees not only disrupt the unionizing effort, but also undoubtedly intimidate other workers from showing their support for a union-election campaign.[87] When a union supporter is fired, other workers immediately and inevitably fear that the same will happen to them if they show similar support.

The single greatest impediment to union organizing appears to be employer-generated fear.[88] Chilling statistics show the prevalence of retaliation against workers who exercise their labor rights. In her testimony before a House Subcommittee in favor of EFCA, AFL-CIO associate general counsel Nancy Shiffer pointed out that in 1969 the number of workers who suffered relation for exercising their rights to organizing was just over 6,000.[89] In 2005, that number increased to 31,358; "[o]ne worker every 17 minutes."[90]

In this kind of coercive environment, workers' fear of losing their jobs and their families' livelihood may make union membership appear too risky. Although one would expect workers to objectively weigh the potential benefits and risks of voting for a union, an objective assessment becomes impossible when a powerful employer with power over the workers' jobs and livelihood creates a subjective fear that it will terminate jobs of union supporters. Workers do not have a free choice when voting for a union means risking a job and a livelihood. This is a risk workers should not have to face.

Although polls have shown that a high percentage of workers are satisfied with their unions, private sector union density is down to about

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http://www.cepr.net/documents/publications/unions_2007_01.pdf (last visited Nov. 10, 2008).

84. *Id.*

85. *Id.* at 2.

86. *Id.*

87. *Id.* at 2-3

88. *See* discussion, *supra* note 27.

89. *Strengthening America's Middle Class*, *supra* note 27, at 3.

90. *Id.* at 9.

eight percent.[91] The most obvious explanation for this glaring discrepancy is the inadequacy of present law to protect employee rights against hostile employer actions.

The law as it stands allows employers opportunities to legally raise fear by making predictions about the consequences of organizing such as workplace closures, firings, and cuts in wages and benefits.[92] Even employers who retaliate illegally against the heroic workers who take on the task of organizing their fellow workers suffer no overly harsh consequences; long delays in enforcement and weak penalties create a tolerant atmosphere for those who overstep the boundary between legal and illegal hostility to unions.[93] The EFCA, when it is enacted, will give workers the right to have their free choice respected when they sign up with the union, deny employers the opportunity to call for elections designed to frustrate workers' right to organize, and allow workers to gain union recognition based on signed worker authorization, regain their voice, and become a force for progress.[94]

G. Even when Employers Engage in Illegal Tactics, the U.S. Legal System Tolerates Long Delays in Enforcing Labor Laws

Years often elapse between the filing of unfair labor practice charges against an employer and a N.L.R.B. decision. The N.L.R.B.'s annual report for the fiscal year 2005 mentions that the median number of days between the filing of a charge and a Board decision is 1,232, almost three and one-half years.[95] To this can be added many additional years if a party appeals the decision to a U.S. Circuit Court of Appeals or thereafter to the U.S. Supreme Court.

H. U.S. Laws Provide Weak Penalties for Violations

Even when an employer violates the Act, remedies are not effective. Not only do penalties come months or years after the violation, they are

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91. *See* Peter D. Hart Research Assocs., Labor Day 2005: The State of Working America 6 (2005), *available at* http://www.aflcio.org/aboutus/laborday/upload/ld2005_-report.pdf (last visited Nov. 10, 2008). Peter D. Hart Research Associates is one of the leading survey research firms in the United States.

92. *See* discussion, *supra* Part II.C.

93. *See* discussion, *infra* Part II.H.

94. *See* H.R. 800 § 2.

95. *See* N.L.R.B., SEVENTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2005, Table 23 (2006).

also too insignificant to serve as a deterrent.[96] The N.L.R.B. legal process generally involves investigation of a case, litigation in a hearing before an N.L.R.B. Administrative Law Judge, a possible appeal to the National Labor Relations Board, and possible enforcement in federal court.[97] Only after the completion of this lengthy process is an employer required to take remedial action.[98]

If an employer is found to have illegally threatened workers, illegally spied on workers who are supporting a union, illegally interrogated workers about their union support, or engaged in similarly illegal actions, the employer will be required to post a notice on a bulletin board saying that it will not commit the specific violations again.[99] The employer is also subject to a cease-and-desist order.[100] But if the employer commits a slightly different violation from the one that it has committed before, the whole legal process may start again.[101]

If the employer is found guilty of firing a worker in retaliation for union support, the employer may be ordered to pay the worker lost

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96. *See* N.L.R.B., SEVENTY-FIRST ANNUAL REPORT FOR THE FISCAL YEAR ENDED SEPTEMBER 2006, Table 23, *available at* http://www.docstoc.com/docs/863612/Seventy-First-Annual-Report-of-the-NLRB--Fiscal-Year-2006 (last visited Nov. 10, 2008). Legal proceedings in unfair labor practice cases take about three months for an investigation to take place and for a complaint to be issued. *Id.* It takes another 6 months to finish a trial before an administrative law judge and get a decision. *Id.* If the decision is appealed to the N.L.R.B., it takes over a year for the Board to issue a decision. *Id.* It thus takes more than two years from the filing of a charge to the issuance of a Board decision. *Id.* Appeals can then be made to federal court where more delays can be expected. *Id.* As discussed *infra*, penalties may consist of a requirement to post a notice, or an order to cease and desist. *See* discussion, *infra*.

97. 29 C.F.R. §101.2-.25.

98. 29 C.F.R. §101.15.

99. Courts regard the N.L.R.A. as non-punitive. *See* Consol. Edison v. N.L.R.B., 305 U.S. 197 (1938) (holding that punitive measures were not authorized by the NLRA); Republic Steel Corp. v. N.L.R.B., 311 U.S. 7 (1940) (holding that "[t]he Act is essentially remedial. . . . The Act does not prescribe penalties or fines in vindication of public rights").

100. *See, e.g.*, N.L.R.B. v. U.S.P.S., 486 F.3d 683 (10th Cir. 2007) (discussing broad versus narrow cease-and-desist orders and upholding a broad N.L.R.B. cease-and-desist order).

101. *See, e.g.*, ILO, United States Case No. 2227, The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Committee on Freedom of Association Report No. 332 (LXXXVI, 2003, Series B, No. 3), ¶ 564, *available at* http://webfusion.ilo.org/public/db/standards/-normes/libsynd/lsgetparasbycase.cfm?PARA=7281&FILE=2227&hdroff=1&DISPLAY=BACKGROUND (last visited Nov. 10, 2008) ("[R]emedial measures under the NLRA include an order to 'cease and desist' the unlawful conduct, and an order to post a written notice on the company bulletin board stating 'we will not' repeat the unlawful conduct. Experience has shown that these are not remedies taken seriously by employers and do not serve as any meaningful deterrent to prevent repeat violations.").

wages, minus any pay the worker earned in the mean time.[102] Thus, if a worker managed to find a job elsewhere at the same rate of pay, the employer pays nothing. There are no compensatory or punitive damages. A report by Human Rights Watch on workers' freedom of association in the United States mentions the "culture of near-impunity" due to a lack of remedies as one of the serious causes for undermining freedom of association:

> Many employers have come to view remedies like back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.[103]

I. The N.L.R.B. Rarely Petitions a Federal District Court for an Injunction to Stop Illegal Employer Conduct

Although the Board *may* petition a federal district court for a "10(j) injunction" after finding merit to charges of severe illegal employer conduct, the Board rarely files such injunction petitions.[104] According to the N.L.R.B.'s seventy-first annual report for the fiscal year ended September 30, 2006, "[t]he NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 25 petitions filed with the U.S. district courts, compared to 13 in fiscal year 2005."[105] "Injunctions were granted in 13, or 87 percent, of the 15 cases litigated to final order."[106] An injunction is designed to prevent the failure of an unfair labor practice charge because

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102. *See* St. George Warehouse, 351 N.L.R.B. 42 (2007) (holding that the General Counsel and unlawfully terminated workers will not have to come forward with evidence that the workers took appropriate steps to find other work in a hearing to determine back pay after a finding of illegal employer conduct); Grosvenor Resort, 350 N.L.R.B. 86 (2007) (holding that if an illegally fired worker waits more than two weeks before looking for interim work, back pay will be denied for that period so as not to "reward idleness").

103. Lance Compa, *Unfair Advantage: Worker's Freedom of Association in the United States Under International Human Rights Standards*, HUMAN RIGHTS WATCH 14 (2000).

104. *See* COX, ARCHIBALD, DEREK CURTIS BOK, ROBERT A. GORMAN, AND MATTHEW W. FINKIN, LABOR LAW 106 (Foundation Press 2001) ("When compared to the full range of unfair labor practice proceedings—some 30,000 charges filed each year and some 1,000 Board decisions—it is only rarely that Section 10(j) injunctions have been sought by the Board.").

105. N.L.R.B., SEVENTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2006, 26 (2007).

106. *Id.*

of long delays in the Board's investigation and adjudication of the charge.[107] For example, an injunction may seek the reinstatement of workers who were discharged for union activity. Without an injunction, such workers may not want to return to their old positions after years of litigation because they may have found other jobs. And the anti-union dismissal is likely to create fear and to deter other potential union supporters from expressing their support for a union. When workers only find out after years that an employer's conduct was illegal, the union organizing drive may have been irrevocably stopped.

J. The E.F.C.A. does not Require a Radical Departure from Existing Law as Written: It does Require a Dramatic Change in Practice

Present law allows an employer to recognize a union after a showing that a majority of employees signed authorization cards. Although the Supreme Court in *Gissel Packing Co.* regarded cards to be "inferior to the election process" as a showing of employee choice, the Court accepted that authorization card signatures may be adequate to reflect employees' preferences.[108] After all, when Congress enacted the Taft-Hartley amendments in 1947 after debating the issue, it decided to continue to allow the use of authorization cards.[109] Even in *Linden Lumber Div., Summer & Co. v. N.L.R.B.*,[110] despite its holding that employers could force a union to use the N.L.R.B.'s election procedure, the Court still allowed employers to recognize a union based on a majority of authorization cards.[111]

The NLRA allows a union to be certified as a majority representative based on signed cards from a majority of employees.[112] But courts have given employers power to force a union to use the Board's election procedure.[113] And it is during this election process that the reality of employee organizing encounters a range of legally sanctioned devastating practical and procedural difficulties.[114]

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107. *See* Miller v. California Pac. Med. Ctr., 19 F.3d 449, 455 (9th Cir. 1994).

108. *Gissel Packing Co.*, 395 U.S. at 603.

109. *See id.* at 598-600 (providing a history of the Taft-Hartley amendments, including Congress' decision to allow voluntary recognition based on card check).

110. 419 U.S. 301 (1974).

111. *Id.* at 310.

112. *Cf.* discussion, *supra* fn. 4.

113. *Cf.* discussion, *supra* notes 39-40.

114. *See* discussion, *supra* Part II.A.-I.

K. There are Principled and Economic Reasons Why Reforms are Necessary to Restore Worker's Ability to Organize and Gain a Voice at Work

Freedom of association is one of the most basic accepted tenets of a vibrant democracy. Along with freedom of speech, the First Amendment of the United States Constitution guarantees the right to peaceful assembly.[115] Yet, contrary to the publicly stated and widely accepted policy, American law is effectively denying workers a voice at work.

Fundamental principles aside, unionized workers benefit concretely from the presence of a union. Unions afford workers with distinct opportunities and advantages to raise earnings, to improve their standard of living, to secure health care coverage and retirement benefits, to achieve individual opportunity, and even to restore economic fairness.[116] For example, "[u]nion workers earn 30% more than non-union workers."[117] "Union workers are 63% more likely [than non-unionized workers] to have medical insurance through their employer."[118] Union workers are significantly more likely than other workers to have a guaranteed pension and short-term disability benefits.[119]

Ultimately, the EFCA makes economic sense. After the bill passed the U.S. House of Representatives by a wide margin on March 1, 2007, AFL-CIO President Sweeney explained that supporters in the House and the Senate embraced the Act, not as special interest legislation, but as "a momentous turning point in the growing movement to restore our nation's middle class."[120] The reestablishment of the middle class during a time of widening economic inequalities and rising corporate profits has wide appeal and a rational basis.

For both principled and economic reasons, the remedial reforms embodied in the EFCA are a necessary first step for reforming labor relations. Focusing on the most serious problems with current law, they are meant to eliminate employers' illegal conduct, the accompanying fear experienced by workers, and undue delays from the start of a union organizing process until the successful negotiation of an initial labor agreement.[121] While employers are likely to resist these reforms, the

115. U.S. CONST. amend. 1.

116. *See* discussion, *infra* Part II.K..

117. *Strengthening America's Middle Class*, *supra* note 27, at 2.

118. *Id.*

119. *Id.* at 2-3.

120. James Parks, *House Passes Employee Free Choice Act*, AFL-CIO BLOG (Mar 1, 2007), *available at* http://blog.aflcio.org/2007/03/01/house-passes-employee-free-choice-act/ (last visited Nov. 10, 2008).

121. *See* discussion, *supra* Part II.A.-I.

experience in some of the top performing and most competitive economies in Organisation for Economic Co-operation and Development (OECD) countries with high trust and more cooperative relations between labor and business would suggest that America needs more rather than less labor law reform.[122] For example, EFCA does not address new types of employee voice, participation or cooperation that are necessary for innovative and productive employment relationships built on trust.[123] By contrast, many European countries allow works councils, which are more cooperative in nature and allow employees to receive financial information, to take part in consultation on business adjustments and technological change, and to monitor human resource policies.[124] Such arrangements, allowing for more cooperative relations between workers and management and an audible voice for workers, are better suited to deal with changes in the world of work where businesses have to compete effectively, requiring "high performance work systems" and flexibility.[125] The EFCA appears to be an indispensable step to realize the NLRA's unfulfilled promise of allowing workers a voice. But at the same time, American unions, businesses and society in general, should ask themselves if the time has not arrived to replace or complement the traditional conflictual and adversarial relations between labor and management with other forms of labor-management relations that are better suited to the current and future workforce and economy.

122. *See* Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity*, 28 COMP. LAB. L. & POL'Y J. 101 (2007) (referring to the OECD, an organization with thirty members, including the United States, which brings together the governments of countries committed to democracy and the market economy from around the world).

123. *See* discussion, *supra* Part II.A.-I.

124. *See* Kochan, *supra* note 122, at 113.

125. *Id.* at 113-23.