H.R. 4343, SECRET BALLOT PROTECTION ACT OF 2004

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

H.R. 4343, SECRET BALLOT PROTECTION ACT OF 2004

Thursday, September 30, 2004
U.S. House of Representatives
Subcommittee on Employee-Employer Relations
Committee on Education and the Workforce
Washington, DC

The Subcommittee met, pursuant to notice, at 10:38 a.m., in room 2175, Rayburn House Office Building, Hon. Sam Johnson [Chairman of the Subcommittee] presiding.

Present: Representatives Johnson, McKeon, Kline, Musgrave, Andrews, Kildee, Tierney, Holt, McCollum, Grijalva, and Norwood.

Staff present: Kevin Frank, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Richard Hoar, Staff Assistant; Jim Paretti, Workforce Policy Counsel; Deborah L. Samantar, Committee Clerk/Intern Coordinator; Loren Sweatt, Professional Staff Member; Jody Calemine, Minority Counsel, Employer-Employee Relations; Margo Hennigan, Minority Legislative Assistant/Labor; and Peter Rutledge, Minority Senior Legislative Associate/Labor.

Chairman JOHNSON. Good morning. A quorum being present, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce will come to order.

We are meeting today to hear testimony on H.R. 4343, the "Secret Ballot Protection Act of 2004." Under Committee Rule 12(b), opening statements are limited to the Chairman and the Ranking Minority Member of the Subcommittee. Therefore, if other members have statements, they may be included in the record.

Mr. Norwood, whose bill this is, will be with us shortly, and we'll give him some time, with your approval, later.

With that, I ask unanimous consent for the hearing record to remain open for 14 days to allow members' statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Without objection, so ordered.

STATEMENT OF HON. SAM JOHNSON, CHAIRMAN, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Good morning to all of you. Thank you for being here. I'm pleased to chair today's hearing on the Secret Ballot Protection Act, introduced by my good friend from Georgia, Charlie Norwood, the Chairman of the Workforce Protection Subcommittee.

Today's hearing continues our comprehensive review of our nation's labor laws, which in many instances have not been substantively changed in seven decades. Given that our labor market reflects a vastly different and modern era, these hearings will determine how our labor laws may be changed to better address the 21st century workforce.

As I noted at our hearing back in April, in the last 10 years we've seen an increased effort by big labor to circumvent current worker protection laws by abusing the secret ballot process. Indeed, the use of so-called card check agreements has become a critical component of big labor's organizing strategy. This can undermine the trust between workers and their employers, and it's just wrong that employers are often pressured into accepting card checks by unions.

We also heard expert testimony suggesting that secret ballot elections are more accurate indicators than authorization cards of whether or not employees actually wish to join a union. This bill responds to these concerns and would prohibit the use of card checks to ensure that all employees are allowed to cast their vote in a fair and secret ballot election.

I look forward to the hearing today and yield the balance of my time for an explanation of the bill to the Chairman of the Workforce Protection Subcommittee, Congressman Norwood. Thank you for being with us.

[The prepared statement of Chairman Johnson follows:]

Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer-employee Relations, Committee on Education and the Workforce

GOOD MORNING. I AM PLEASED TO CHAIR TODAY'S HEARING ON THE "SECRET BALLOT PROTECTION ACT OF 2004"—INTRODUCED BY MY GOOD FRIEND FROM GEORGIA, CHARLIE NORWOOD, THE CHAIRMAN OF THE WORKFORCE PROTECTIONS SUBCOMMITTEE.

TODAY'S HEARING CONTINUES OUR COMPREHENSIVE REVIEW OF OUR NATION'S LABOR LAWS, WHICH, FOR THE MOST PART, HAVE NOT BEEN SUBSTANTIVELY CHANGED IN 7 DECADES.

GIVEN THAT OUR LABOR MARKET REFLECTS A VASTLY DIFFERENT AND MODERN ERA, THESE HEARINGS WILL DETERMINE HOW OUR LABOR LAWS MAY BE CHANGED TO BETTER ADDRESS A 21ST CENTURY WORKFORCE.

AS I NOTED AT OUR HEARING BACK IN APRIL, IN THE LAST TEN YEARS WE HAVE SEEN AN INCREASED EFFORT BY BIG LABOR TO CIRCUMVENT CURRENT WORKER PROTECTION LAWS BY ABUSING THE SECRET–BALLOT PROCESS.

INDEED, THE USE OF SO–CALLED "CARD CHECK AGREEMENTS" HAS BECOME A CRITICAL COMPONENT OF BIG LABOR'S ORGANIZING STRATEGY. THIS CAN UNDERMINE THE TRUST BETWEEN WORKERS AND THEIR EMPLOYERS.

IT IS JUST WRONG THAT EMPLOYERS ARE OFTEN PRESSURED INTO ACCEPTING "CARD CHECKS" BY THE UNIONS.

WE ALSO HEARD EXPERT TESTIMONY SUGGESTING THAT SECRET BALLOT ELECTIONS ARE MORE ACCURATE INDICATORS THAN AUTHORIZATION CARDS OF WHETHER OR NOT EMPLOYEES ACTUALLY WISH TO JOIN A UNION.

H.R. 4343 RESPONDS TO THESE CONCERNS, AND WOULD PROHIBIT THE USE OF CARD–CHECKS TO ENSURE THAT ALL EMPLOYEES ARE ALLOWED TO CAST THEIR VOTE IN A FAIR AND SECRET BALLOT ELECTION.

I LOOK FORWARD TO HEARING THE TESTIMONY OF OUR WITNESSES TODAY, AND YIELD THE BALANCE OF MY TIME FOR AN EXPLANATION OF THE BILL TO THE CHAIRMAN OF THE WORKFORCE PROTECTIONS SUBCOMMITTEE, CONGRESSMAN NORWOOD.

STATEMENT OF HON. CHARLIE NORWOOD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. NORWOOD. Thank you very much, Mr. Chairman, and thank you for holding this hearing. I commend my colleague from Texas on his leadership on these important issues, and I appreciate more than you know your convening this hearing today, given the significance, in my mind, of the issues before us.

We have all heard far too many stories about big labor bosses mounting aggressive and coercive card check campaigns to organize a non-union workplace. Now these aren't just stories. These are real people with real problems coming in to talk to us about them. It seems that they coerce employees—or employers—into agreeing to card check agreements, then pressure employees into signing the so-called authorization cards, which do little more, frankly, than deny employees the right to a fair and secret ballot election where nobody knows how you vote, nobody knows what your position is on this, and that is the only fair way that this can be done.

These cards often force employees to declare their support for union representation in front of union operatives and fellow employees. That's just not right. If you vote on a secret ballot, nobody knows how you voted. If you have to sign a card, everybody knows how you voted. Workers are not offered a chance to vote in private. They are instead subjected to pressure tactics that rob them of a free choice. Those pressure tactics can come from many places, but they shouldn't come from anywhere if you're allowed a secret ballot.

Mr. Chairman, my legislation, the Secret Ballot Protection Act, is simply a matter of common sense. It puts an end to these coercive tactics by making clear in the National Labor Relations Act that a union must be elected by a majority, unhampered majority, in a free and fair secret ballot election.

Simply put, the Secret Ballot Protection Act does three things. First, it preserves the sanctity of workers' free choice and the right to a secret ballot election, meaning nobody knows how you vote.

Second, it protects workers from intimidation, threats, misinformation or coercion by a union to sign an authorization card.

Third, it eliminates the union's ability to pressure employees to agree to a card check recognition.

H.R. 4343 would amend the National Labor Relations Act to provide that the NLRB may only recognize a union selected in a board-administered secret ballot election. I fail to understand what's so wrong about that.

So many people in this Congress for years have urged that same thing on the rest of the world. Now it's not good enough in America. H.R. 4343 would make it an unfair labor practice for an employer to recognize a union which has not been selected by a majority of the employees in a secret ballot election, and would make it an unfair labor practice for a union to cause or attempt to cause an employer to bargain if the union was not selected in such an election.

My colleagues, this legislation is supported by all of the evidence that we have heard concerning abuse of the card check program, and that has been a lot of evidence. Though I'm sure we'll hear a

lot of political rhetoric today, as we have whenever we address these issues, the facts remain the facts.

But one thing I've never heard is a convincing answer to just one simple question: What can be more fair, what can be more democratic and more protective of employees' rights, than the right to vote in a secret ballot election where nobody knows how you vote?

I urge all of my colleagues to support this legislation. Again, I truly thank the Chairman. Mr. Chairman, I yield back the balance of my time.

Chairman JOHNSON. Thank you for being with us, Mr. Norwood. Thank you for your comments. Now I yield to my distinguished Ranking Minority Member from New Jersey, Mr. Andrews, for whatever comments you wish to make.

STATEMENT OF HON. ROBERT E. ANDREWS, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. ANDREWS. Thank you, Mr. Chairman. Good morning to the witnesses and our guests. The issue before the Committee this morning is how to assure that when a worker is confronted with a choice between choosing to join a union or not choosing to join a union, that that choice is made in a noncoercive, fair, free manner.

I think there is unanimity on the Committee that every man and woman faced with that choice should be able to make the choice freely, free of intimidation or coercion by anyone—by the union that's trying to organize them, by another union that might be competing to organize them, and certainly by the employer, as well.

My friend from Georgia indicated that we would hear a lot of political rhetoric today. We've already heard a lot of political rhetoric today from him. We hear caricatures of union bosses abusing the secret ballot process. We hear caricatures of coercion and intimidation. I have no doubt that there have been incidents of coercion and intimidation by workers in this process by union organizers. I have no doubt that that's true. I also have no doubt that it's true that there has been intimidation and coercion of employees by employers in captive meetings, in notices being put in people's paychecks, in promotion and hiring practices, as well. Our job is to look beyond the caricatures and look at the evidence, and I'm hopeful that this hearing will yield evidence as to several questions which I think need to be answered.

First, I do not think, as my friend, the Chairman, indicated, that the card check is an abuse of the secret ballot process per se. In fact, the card check process as a duly recognized route to employee unionization has been recognized by the National Labor Relations Board for a very long time. It is potentially the subject of abuse, but the mere existence of the card check process, in my view, is not evidence of abuse, which undercuts the principal argument for Mr. Norwood's bill.

The questions we ought to be asking here are how broad is the factual record of abuse of employees' free choice in the card check process? How often does it happen? How often are complaints filed? What is the resolution of those complaints? What remedies exist to

safeguard against that process under present law? Are those remedies being properly enforced?

Another set of questions we ought to look at is just how free and fair is the election process under a set of rules where the employer has virtually unfettered access to the voters, but where the organizers have virtually no access to the voters, particularly in the workplace? How often do people change their positions out of reasons of coercion during that process?

I do not bring to this hearing a prejudice with respect to the answer to those questions. As I said earlier, I am certain, and I'm sure we'll hear from some of the witnesses this morning, that there has been misconduct by union organizers in the process of pursuing card check registration. I'm also certain that there has been misconduct by employers in the process of trying to intimidate and influence the votes of employees in elections.

We should make law in this Congress based upon evidence, not instinct. We should look at the record that exists. We should not exaggerate anecdotal evidence. We should give it due weight. We should certainly understand, as Mr. Norwood said, that there are human beings attached to these problems. But the answer to every problem is not a new law. Very often, the answer to a problem is the proper enforcement of an existing law. And most certainly, the answer to a problem is not to overreact to a problem and extinguish a valid method of determining employee choice in the context of card check registration.

Mr. Norwood is my friend, and I'm particularly respectful of the incredible effort he is making to serve his constituents in the face of some very serious health issues. A lot of people here, Charlie, would not do what you're doing right now, and we admire you for it. But I disagree with my friend on this issue. I think that when he asks the simple question, what could be more fair than a secret ballot choice for an employee, I have an answer to his question. What could be more fair is an election that is conducted in a noncoercive environment where neither side has the ability to unduly influence the vote of the employee before it is taken.

That's the goal of the present law. I think that goal is contradicted by Mr. Norwood's proposal.

We look forward to hearing the testimony of the witnesses this morning and thank them for their participation.

Chairman JOHNSON. Thank you, Mr. Andrews. A profound statement, I think. You're getting better with age.

We'll begin with our panel of distinguished witnesses. Our first witness today is Mr. John Raudabaugh. Mr. Raudabaugh is a partner in the law firm of Butzel Long in Detroit, Michigan. From 1990 to 1993, he served as a member of the National Labor Relations Board. Mr. Raudabaugh is a nationally recognized expert in the fields of labor law and labor relations.

The next witness is Mr. Richard Hermanson. Mr. Hermanson is Vice President of the United Screeners Association Local Number 1 in San Francisco, California. Mr. Hermanson is an employee of Covenant Aviation Services at the San Francisco Airport. Thank you for being here.

Next on the panel is Mr. Brent Garren. Mr. Garren is a Senior Associate General Counsel with the international union, UNITE-

HERE, in New York, editor-in-chief of "How to Take a Case Before the NLRB," and is a former union co-chair of the ABA's Labor and Employment Section Committee on Practice and Procedure under the NLRA. Mr. Garren is testifying on behalf of UNITE-HERE.

Finally, we'll hear from Mr. Thomas Riley. Mr. Riley is a service sales representative with Cintas Corporation in Allentown, Pennsylvania.

Before our witnesses begin their testimony, I would like to remind the members, we will ask questions after the entire panel has testified. In addition, Committee Rule 2 imposes a 5-minute limit on all questions. And we also would ask that you adhere to a 5-minute rule, as well. And I don't know if you watched the lights when we were talking, but they're down there in front of you, and the green gives you four, and the yellow comes on when you've got a minute left, and the red, we'd like for you to tie it down if you would.

With that, I want to recognize Mr. Raudabaugh for an opening statement. Go ahead, sir.

STATEMENT OF JOHN N. RAUDABAUGH, ESQ., PARTNER, BUTZEL LONG, FORMER MEMBER OF THE NATIONAL LABOR RELATIONS BOARD (1990-1993), DETROIT, MI

Mr. RAUDABAUGH. Good morning. Chairman Johnson and members of the Subcommittee, I'm honored to be here today, and I thank you for your kind invitation.

The only right extended by the National Labor Relations Act is conferred on employees—the Section 7 right to choose an exclusive bargaining representative or to refrain from such activity. The Act protects this right to choose by prohibiting any employer and/or union encroachment on employee free choice. To be sure, the Act encourages the resolution of disputes and indeed values industrial stability. However, third party exclusive representation may not be achieved at the expense of employee rights.

So how is employee choice registered and majority status validated? Under current law, employee designation or selection may be by a Board supervised secret ballot election or by voluntary recognition based on polls, petitions, or union authorization cards. Of these various methods, the United States Supreme Court and the Board have long recognized what a Board-conducted secret ballot election is the most satisfactory, indeed preferred method of ascertaining employee support for a union.

As the Board announced in *General Shoe Corporation:* In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.

Over many years, the Board has developed specific rules and multi-factored tests to evaluate and rule on election objections. In contrast, recognition based on methods other than a Board-conducted secret ballot election, is without these laboratory conditions protections, and unless the interfering conduct rises to the level of

an unfair labor practice, there is no remedy for compromising employee free choice.

Today, organized labor embraces organizing tactics bypassing Board-conducted secret ballot elections. The AFL-CIO reports that more than 80 percent of newly organized employee in 2002 were organized through corporate campaigns and bargained-for neutrality and card check agreements. Indeed, organized labor finds the Board election procedures broken.

The issues of protecting free choice and validating employee majority preference has received periodic Congressional attention over the Act's 69-year history. During the first few years following the Act's passage, the Board determined majority choice by union cards and even strike votes. But as early as 1939, the Board became convinced by its experience that it is best to determine majority status by secret ballot.

The Taft-Hartley debates considered but rejected an amendment to require an employer to bargain only with a union certified following an election or already recognized. But with little debate, Congress did amend Section 9(c) limiting certification to the secret ballot election process.

In 1977, Congress again considered labor law reform, and in the early '90's witnessed renewed efforts for labor law modernization. Of concern is organized labor's latest effort to convince some legislators to deny employees access to information and to discard the secret ballot. Election systems are blamed for lower certification success rates because management has notice of the campaign period and can voice opposing views, whereas card check is viewed as successful because union organizers may be able to inflate the level of support through peer pressure for pro-union colleagues.

Well, yes, it is true that the Board's secret ballot election is highly regulated to ensure laboratory conditions. And it is also true that solicitation of authorization cards is virtually unregulated. Justice Douglas writing for the Supreme Court was clearly aware of the distinctions, and he said, "If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign toward their antagonists, whether they be non-union protagonists or the employer. The failure to sign a recognition slip may well seem ominous to non-unionists who fear that if they do not sign them they will face a wrathful union regime should the union win."

Interestingly, while organized labor and certain legislators advance card check and eschew the secret ballot election process for certifying union representation, they embrace the secret ballot process as a check on the employer's withdrawal of recognition. Apparently, organized labor wants the deliberative secret ballot election and attendant laboratory conditions on the back end when loss of majority status is at issue, but they reject it on the front end when soliciting signatures to demand recognition.

This Secret Ballot Protection Act of 2004 should be enacted. The manual election is the Board's crown jewel. To realize the sole right extended by the Act to choose whether to be represented for purposes of collective bargaining, the employee/voter should not be denied information or informed choice, a secret ballot to enhance se-

lection integrity and the validation of the exercise through maximum participation by the electorate.

In the final analysis, organized labor's push to abandon the secret ballot and necessarily compromise the employee's right to choose is nothing new. It is high time for Congress to bring congruity to its 1947 effort where it amended 9(c) by now amending Section 9(a) to make certain that choice will be free because it is secret.

Congressman Norwood and Senator Graham's bills seek a limited but critical repair to our nation's labor law. The long awaited chance to Section 9(a) will eliminate needless litigation. Representation rights will be determined by a single method, the secret ballot. These bills are not radically streamlining the Act by borrowing controversial interest arbitration from the public sector to force first contracts or devaluing the secret ballot and end running informed choice.

If Board procedures result in delay or Board administration is not consistent or Board unit determinations are outdated, or if Board laboratory conditions are too antiseptic, or if Board remedies for violations are——

Chairman JOHNSON. Sir, can you tie it down a little bit?

Mr. RAUDABAUGH. I'm sorry.

Chairman JOHNSON. That's all right. We've given you about 7 minutes already.

Mr. RAUDABAUGH. I will finish it immediately. Then gather these facts to address these others problems, and with my colleague from Cornell, where we disagree on this issue, those matters can be addressed separately, but the secret ballot is the essence of our democracy, and we extend that throughout the world.

Thank you.

[The prepared statement of Mr. Raudabaugh follows:]

Statement of John N. Raudabaugh, Esq., Partner, Butzel Long, Former Member of the National Labor Relations Board (1990–1993), Detroit, MI

Chairman Johnson and Members of the Subcommittee, I am honored to be here today and I thank you for your kind invitation.

I testify today in support of H.R. 4343/S.2637, The "Secret Ballot Protection Act of 2004." The Secret Ballot election is the foundation of America's industrial democracy established by the National Labor Relations Act of 1935. As President Reagan observed in November 1985 on the occasion of the National Labor Relations Board's 50th Anniversary: "Our system of peaceful industrial relations and the National Labor Policy that has evolved from the Act rests on this principle of free choice."

By way of introduction, I was nominated by President George H.W. Bush, confirmed by the Senate and served as a Member of the National Labor Relations Board ("Board" or "NLRB") from August 27, 1990 through November 26, 1993. Prior to my confirmation, I practiced labor relations law representing management from 1977 to 1990. Before entering law school, I served four years as a U.S. Navy Supply Corps officer and earned a graduate degree in labor economics. Since leaving the Board, I returned to private practice. I am a Shareholder in the law firm of Butzel Long now celebrating 150 years of client service. On July 15, 2004, I, along with former Board Members J. Robert Brame III and Dennis M. Devaney, authored and filed a brief on behalf of 21 Members of the U.S. House of Representatives led by Education and Workforce Committee Chairman Boehner and Employer–Employee Relations Subcommittee Chairman Johnson and Workforce Protections Subcommittee Chairman Norwood in the Dana/Metaldyne cases pending before the

Board concerning union card-check voluntary recognition. The brief is available at www.nlrb.gov for your convenience.

> "The free choice of the worker is the only thing I am interested in."
> Senator Robert F. Wagner, 1 Leg. History 440 (1935)

The only right extended by the National Labor Relations Act ("Act" or "NLRA") is conferred on employees—the Section 7 right to choose an exclusive bargaining representative or to refrain from such activity. 29 U.S.C. § 157 (2004); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) The Act protects this right to choose by prohibiting any employer and/or union encroachment on employee free choice. 29 U.S.C. §§ 158(a), (b) (2004) To be sure, the Act encourages the resolution of disputes and values "industrial stability." 29 U.S.C. § 151 (2004) However, third party exclusive representation may not be achieved at the expense of employee rights—"[i]ndividual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so." International Ladies' Garment Workers v. NLRB, 366 U.S. 731 (1961); see also Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998); Brooks v. NLRB, 348 U.S. 96 (1954).

So how is employee choice registered and majority status validated? Under current law, employee designation or selection may be by a Board supervised secret-ballot election or by voluntary recognition based on polls, petitions, or union authorization cards. 29 U.S.C. §§ 159 (a), (c) (2004). Of these various methods, the United States Supreme Court and the Board have long recognized that a Board conducted secret-ballot election is the most satisfactory, indeed preferred method of ascertaining employee support for a union. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) As the Board announced in General Shoe Corp., 77 NLRB 124 (1948):

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees...Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.

The Board's "laboratory conditions" doctrine sets a considerably more restrictive standard for monitoring election related misconduct impairing free choice than the unfair labor practice prohibitions of interference, restraint and/or coercion. Dal–Tex Optical, 137 NLRB 1782 (1962) Over many years, the Board has developed specific rules and multi-factored tests to evaluate and rule on election objections. Harsco Corp., 336 NLRB 157 (2001) In contrast, recognition based on methods other than a Board conducted secret-ballot election is without these "laboratory conditions" protections and unless the interfering conduct amounts to an unfair labor practice, there is no remedy for compromising employee free choice.

Notably, recognition of a majority representative affords certain privileges. Board certification of a bargaining representative elected by a majority precludes a challenge for one year, despite any interim loss of majority, to facilitate bargaining for an initial contract. Brooks v. NLRB, 348 U.S. 96 (1954) The Board created voluntary recognition bar attempts to do the same thing nurture the nascent bargaining relationship for a "reasonable period of time." But what is reasonable has grown from three weeks to just two days short of a year essentially the same as that obtainable only by a Board conducted secret ballot election and "laboratory conditions." MGM–Grand Hotel, 329 NLRB 464 (1999) Should a collective bargaining agreement be reached, the contract bar attaches effectively precluding employee choice for up to four years. General Cable Corp., 139 NLRB 1123 (1962)

Today, organized labor embraces organizing tactics bypassing Board conducted secret ballot elections. The AFL–CIO reports that more than 80 percent of newly organized employees in 2002 were organized through corporate campaigns and bargained-for neutrality and card-check agreements. Remarks of AFL–CIO President John T. Sweeney, Executive Council Meeting, March 20, 2004. Organized labor finds the Board election procedures broken. Id.

Apparently what's old is new again. The issues of protecting free choice and validating employee majority preference has received periodic Congressional attention over the Act's 69 year history. During the first few years following the Act's passage, the Board entertained many different means to record employee choice—authorization cards, union membership cards, strike votes, strike participation, and the acceptance of strike benefits. Sheila Murphy, "A Comparison of the Selection of Bargaining Representatives in the United States and Canada: Linden Lumber, Gissel and the Right to Challenge Majority Status," 10 Lab. L.J. 65, 69 (1988) (citing

McFarland & Bishop, Union Authorization Cards and the NLRB: A Study of Congressional Intent, Industrial Research Unit Univ. of Pa. Press (1969)). As early as 1939, the Board commented:

> Although in the past we have certified representatives without an election . . . we are persuaded by our experience that, under the circumstances of this case, any negotiations entered into pursuant to determination of representatives by the Board will be more satisfactory if all disagreements between the parties regarding the wishes of the employees have been, as far as possible, eliminated. We shall therefore direct that an election by secret ballot be held. Armour & Co., 13 NLRB 567 (1939)

The Taft–Hartley debates considered, but rejected, an amendment to require an employer to bargain only with a union certified following an election or already recognized. But with little debate, Congress did amend Section 9(c) limiting certification to the secret ballot election process. In 1977 Congress again considered labor law reform and in the early nineties witnessed renewed efforts for labor law modernization. And, throughout the Act's history, academicians have contributed to the debate. E.g., Craig Becker, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 Minn. L. Rev. 495 (1993)

Putting the philosophical debate aside—representative democracy as distinguished from industrial democracy—organized labor's complaints are several: election timing/delay, constituencies/unit gerrymandering, regulation of campaign tactics/laboratory conditions, remedies/penalties, and defining the employer's role, if any. Id.; Adrienne E. Eaton and Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," 55 ILR Rev. 42 (2001); Human Rights Watch, "Unfair Advantage: Workers" Freedom of Association in the United States under International Human Rights Standards," (2002); Brent Garren, "The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements," 54 Labor L.J. No. 4 (2003); Nancy Schiffer, Testimony before U.S. Senate Labor—HHS Subcommittee Hearing, (September 23, 2004) To be sure, labor's complaints, as well as critique from all affected constituencies, deserve hearing. But begin by considering Senator Wagner's observation:

> [A]s to . . . representation of the workers you cannot have anymore genuine democracy than this. We say under Government supervision let the workers themselves . . . go into a booth and secretly vote, as they do for the political representatives in a secret ballot, to select their choice. 1 Leg. Hist. 642 (1935)

And related to the secret ballot is the necessity of information to enable a choice. In Thomas v. Collins, 323 U.S. 516 (1945), Justice Jackson observed:

> Free speech on both sides and for every faction on any side of the labor relation is . . . useful . . . Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men.

Of concern is organized labor's latest effort to convince some legislators to deny employees access to information and to discard the secret ballot. Schiffer, Testimony, supra.; Chris Riddell, "Union Certification Success Under Voting Versus Card–Check Procedures: Evidence from British Columbia," 57 ILR Rev. 493 (2004); H.R. 3078, S. 1513 Election systems are blamed for lower certification success rates because management has notice of the campaign period and can voice opposing views, whereas card check is viewed as successful since union organizers may be able to inflate the level of support through peer pressure from pro-union colleagues. Id.

Yes, it is true that the Board's secret ballot election is highly regulated—to ensure "laboratory conditions." And, it is also true that solicitation of authorization cards is virtually unregulated. "Union Authorization Cards," 75 Yale L.J. 305 (1966). Justice Douglas, writing for the Court, was clearly aware of the distinctions:

> If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign towards their antagonists whether they be nonunion protagonists or the employer. The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win. NLRB v. Savair Mfg. Co., 414 U.S. 270, 280 (1973)

And the comments of the Fourth Circuit Court of Appeals cannot be ignored:

> The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited

> alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers weighs heavily in the balance. . . . Though the card be [sic] an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. . . . It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check," unless it were an employer's request for an open show of hands. NLRB v. S.S. Logan Packaging Co., 386 F.2d 562, 565 (1967) See also, HR Policy Assoc. Memoranda 02–88 (2002), 04–10 (2004); National Right to Work Legal Defense Foundation, Inc. News Releases 9/27/04, 9/8/04.

Interestingly, while organized labor and certain legislators advance card check and eschew the secret ballot election process for certifying union representation, they embrace the secret ballot process as a check on an employer's withdrawal of recognition. Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001) Organized labor wants the deliberative secret ballot election and attendant "laboratory conditions" on the "back end" when loss of majority status is at issue but rejects it on the "front end" when soliciting signatures to demand recognition.

Organized labor's objections with Board elections are directed at the procedural process, not the act of voting by secret ballot. Election delay, whether in time between petition filing and scheduled election or between vote tally and certification, has to do with Board procedures, not the act of voting by secret ballot. The issue of unit determination is a Board analytical procedure, not the act of voting by secret ballot. Ensuring "laboratory conditions" in the critical period and on election day has nothing to do with the act of voting by secret ballot. Whether the employer can or may speak has nothing to do with the act of voting by secret ballot (but much to do with informed choice).

H.R. 4343/S.2637, the "Secret Ballot Protection Act of 2004" should be enacted. The manual election is the Board's "crown jewel." San Diego Gas & Electric, 325 NLRB 1143, 1150 (1998) (Hurtgen, Brame dissenting). To realize the sole right extended by the Act—to choose whether to be represented for purposes of collective bargaining, the employee/voter should not be denied information for informed choice, a secret ballot to enhance selection integrity, and the validation of the exercise through maximum participation by the electorate.

> Nothing emphasizes the importance of the voter's choice more than the symbolism and the drama which accompanies a manual ballot. . . . The drama begins with the preelection hearing and formal announcement by conspicuously posted election notices. The next day the Board agent appears, surveys the facility, marks off the no-campaign areas, and instructs the observers. Usually with great solemnity and visibility, the agent seals the ballot box, opens the polls and superintends the campaign free area. Everything points to the solemnity and importance of the employee's choice, and more than any words, this process says to the employee, "This is important—so important that the United States Government has sent its agent to protect your right to vote is a free and unfiltered election." Id.

In the final analysis, organized labor's push to abandon the secret ballot and necessarily compromise the employee's right to choose is nothing new. It is time for Congress to bring congruity to its 1947 effort amending Section 9(c) by now amending Section 9(a) to make certain that choice will be free because it will be secret.

Congressman Norwood's and Senator Graham's bills seek a limited, but critical, repair to our nation's private sector labor relations law. The long awaited change to Section 9(a) will eliminate needless litigation—representation rights will be determined by a single method, the secret ballot. H.R. 4343 and S. 2637 are not radically "streamlining" the Act by borrowing interest arbitration from the public sector to force first contract settlements or devaluing the secret ballot and end-running informed choice while enshrining card-check recognition. If Board procedures result in "delay" or Board administration is not consistent or the lack of Board funds is the excuse for mail ballots or Board unit determinations are outdated or inappropriately rigid or Board "laboratory conditions" are too antiseptic or remedies for violations are too weak or non-existent or employers must be muzzled, then gather the facts, hold the hearings and let the debate air. But none of this has anything to do with the preservation and enabling of the right to vote, to choose intelligently, and in secret.

As to the neutrality component of this new-age organizing, again, what is old is new again. In 1981, neutrality agreements were reviewed as the "new frontier:

> Although it can be argued that neutrality agreements contain an element of protected expression and that such agreements reinforce the goal of reducing labor strife through peaceful cooperation, these considerations must be weighed against the interest of employees and, indeed, the interest of the public at large in "free, fair and informed representation elections." When these competing interests are considered, it seems that the interest of the individual employees in making an informed decision in a "free and fair election" and the interest of the public in maintaining the integrity of the electoral process should prevail. It follows from this that neutrality agreements violate the "laboratory conditions" required for holding representation elections pursuant to the National Labor Relations Act. Labor elections are not conducted under "laboratory conditions" when employees are legally restricted from receiving information from their employer—the only interested party who realistically is able to provide a point of view that differs from that of the union seeking to organize the employees. Neutrality agreements therefore impermissibly impair the right of employees to receive information during organizing campaigns and should be held to violate section 7 of the NLRA.
>
> Employers may agree to go along with such agreements to buy labor peace, particularly if they have only a limited number of unorganized facilities and do not foresee opening any new ones in the immediate future. However, the group that loses the most when neutrality agreements are entered into are the individual employees. They are the least powerful of the relevant groups and have no say in the decision to enter into such agreements. Neutrality agreements prevent such employees from getting the full story during an election campaign. Ultimately, under neutrality agreements, the choice to be represented by a union is not really a free and informed one as envisioned by the drafters of the NLRA.
>
> An employer is and should be completely free to decide to remain neutral in any given campaign. It is one thing, however, for an employer to decide to remain neutral in a given campaign, but it is entirely different matter to agree to remain neutral in all future campaigns involving a certain union. . . . [I]t would seem that neutrality agreements threaten the very assumption upon which the selection of a representative under NLRA depend.
>
> Even an employer who has a constructive working relationship with a union could be expected to balk at entering into an agreement which will cast doubt on the integrity of the electoral process and which will jeopardize individual employee rights. However, regardless of an individual employer's willingness to enter into a neutrality agreement, the NLRB and the courts have the ultimate responsibility for insuring the rights of individual employees to a free and fair representation election under the National Labor Relations Act. In keeping with the responsibility, the National Labor Relations Board and the courts should hold that neutrality agreements fall outside the proper bounds of the National Labor Relations Act. Andrew M. Kramer, Lee E. Miller, Leonard Bierman, "Neutrality Agreements: The New Frontier in Labor Relations," 23 Boston College L. Rev. 39 (1981)

The card check—neutrality–"bargaining to organize"–union corporate campaign debate is critical. Organized labor's objections to the procedures for Board representation casehandling deserve airing. But to reverse declining membership by circumventing the secret ballot is unacceptable. Yellow-dog contracts were considered despicable by the unions in the 1920's. Inducing employees into de-facto pre-hire agreements is much the same. Bargaining for employer silence and its impact on informed choice gives new meaning to the old adage—"Silence is Golden."

Conclusion

This concludes my prepared oral testimony. I look forward to further discussion during the question/answer period. I thank each of you for your service to our country, to considering the ever important evolution of U.S. labor relations law, and for inviting me here today.

Chairman JOHNSON. Thank you, sir.

Mr. Hermanson. Did you have any trouble getting out of the airport this morning?

Mr. HERMANSON. Pardon me?

Chairman JOHNSON. Did you have any trouble getting out of the airport?

Mr. HERMANSON. No problem whatsoever.

Chairman JOHNSON. Thank you. Go ahead.

STATEMENT OF RICHARD HERMANSON, VICE PRESIDENT, UNITED SCREENERS ASSOCIATION LOCAL 1, SAN FRANCISCO, CA

Mr. HERMANSON. My name is Richard Hermanson. I am employed as a transportation security screener at San Francisco International Airport. It is a privilege to speak before the Subcommittee today.

When Covenant Aviation Security hired me in November 2002, I attended a new hire orientation where company officials introduced themselves and gave an overview of company goals as a contractor to the Transportation Security Administration. Midway in the orientation, a union representative from Service Employees International Local 790 was also given a turn at the podium. He spoke briefly, explained what a union security clause is, and that we had 30 days to comply with the security clause. To this day, I do not know why the company recognized the union, but it did for a time until a charge was filed with the NLRB Region 20 and the company and union agreed to no longer enforce the existing collective bargaining agreement.

United Screeners Association Local 1 was then started by a number of my co-workers, who, like myself, were extremely displeased with SEIU representation. A petition was passed, and once it was signed by 30 percent of the workforce, we met to discuss filing the petition. 790 was also passing representation cards at this time. As we discussed filing the petition, we were stuck on one critical issue—a proper filing would exclude SEIU 790 from the ballot. We did what we felt was the right thing. We fled the petition as a "guard" unit, and Region 20 ultimately approved the filing.

Undeterred, SEIU 790 immediately switched gears, telling screeners that an NLRB election was not the only way to achieve union recognition. They said that they could use signature cards for recognition if a majority of the workforce voted no and signed a petition for SEIU 790. They said that they could use political pressure to gain recognition. They also said that they could use the San Francisco Airport Labor Peace Card Check Ordinance to force recognition that is meant to be voluntary under the NLRA. Although SEIU 790 was initially successful in their attempt to divide the loyalties of the screeners by suggesting that a federally supervised secret ballot election was merely a prerequisite to their card count demand for recognition, the ultimate resolution of the campaign is still in doubt.

SEIU 790 has been giving away a lot of food during the campaign—pizza, chocolate, chicken, and burritos are among the items given out. Our organizers on more than one occasion observed screeners ask SEIU organizers for a bite to eat and saw them directed to a representation petition as a prerequisite to receiving the good. On one occasion, an organizing dangling a lunch cooler in front of me to capture my attention approached me. I looked at him. He then asked me if I've signed the petition. I was on the

clock, but I lost my cool anyway. It was an insult to have merchandise used as an enticement for a representation petition.

One co-worker of mine has relayed the SEIU organizers showed up at his house unannounced and that he had difficulty getting them to leave after he let them in the house. The organizers finally left after he threatened to call the police. Organizers have been known to call the same person four times late in one evening in the hope that they would give in and commit to support SEIU. Sometimes these tactics work. We've had co-workers tell us that they just signed to get the organizer or co-worker off their back, that they were made uncomfortable by the peer pressure to sign a card, that they signed a fake name to get a free lunch cooler, or even that they believed signing was for the meal.

The decision on whether to be represented by a labor organization is to me the most important decision an employee can make in the workplace. This decision should be determined by a secret ballot election. The campaign has a scheduled election date, and the campaign has the privacy of a secret ballot. Employees are not faced with the pressure of fielding the same questions over and over, questions such as are you ready to sign the card? and the myriad of other coercive tactics that I've seen employed over the past year at San Francisco International.

My experience over this period suggests to me that card count campaigns carry the risk of a union being granted recognition while it does not carry true majority support; that there is a big difference between a majority of signatures and majority support.

As an officer of United Screeners Association Local 1, I am not interested in our union being extended recognition where privacy is compromised and support is inherently tainted. These concerns led me to advocate for a secret ballot election at the workplace well before the introduction of H.R. 4343. I'm very fortunate to have fellow officers that are also committed to a secret ballot, and it follows that I support the passage of H.R. 4343.

I look forward to the day where we will no longer be disadvantaged by filing for a secret ballot election because a rival, uncertifiable union has an incentive to divide the loyalties of the workers merely for the opportunity to conduct an inherently coercive card-count campaign.

Thank you.

[The prepared statement of Mr. Hermanson follows:]

Statement of Richard Hermanson, Vice President, United Screeners Association Local 1, San Francisco, CA

My name is Richard Hermanson. I am employed as a transportation security screener at San Francisco International Airport. It is a privilege to speak before the subcommittee today.

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Undeterred, SEIU 790 immediately switched gears, telling screeners that an NLRB election was not the only way to achieve union recognition. They said that they could use signature cards for recognition if a majority of the workforce voted "No" and signed a petition for SEIU 790. They said that they could use political pressure to gain recognition. They also said that they could use the San Francisco Airport Labor Peace Card Check Ordinance to force recognition that is meant to be voluntary under the National Labor Relations Act. Although SEIU 790 was initially successful in their attempt to divide the loyalties of the screeners by suggesting that a federally supervised secret-ballot election was merely a prerequisite to their card count demand for recognition, the ultimate resolution of the campaign is still in doubt.

SEIU 790 has been giving away a lot of food during the campaign. Pizza, chocolate, chicken and burritos are among the items given out. Our organizers on more than one occasion observed screeners ask SEIU organizers for a bite to eat, and saw them directed to a representation petition as a prerequisite to receiving the food. On one occasion, an organizer dangling a lunch cooler in front of me to capture my attention approached me. I looked at him and he asked me if I've signed the petition. I was on the clock but I lost my cool anyway. It was an insult to have merchandise used as an enticement for a representation petition.

The SEIU organizers clearly keep a database on who has not signed a card. They wait after work for the unsigned to clock out and pressure them to "make a commitment" and sign cards. This one-on-one targeting is not merely attempts to convey information about the benefits of unionization–they are attempts to get signatures for recognition without the privacy of a secret ballot.

One coworker of mine has relayed that SEIU organizers showed up at his house unannounced, and that he had difficulty getting them to leave after he let them in the house. The organizers finally left after he threatened to call the police. Organizers have been known to call the same person four times late one evening in the hope that they would give in and commit to support SEIU.

Sometimes these tactics work. We've had coworkers tell us that they just signed to get the organizer or coworker off their back, that they were made uncomfortable by the peer pressure to sign a card, that they signed a fake name to get a free lunch cooler, or even that they believed signing was for the meal.

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As an officer of United Screeners Association Local 1, I am not interested in our union being extended recognition where privacy is compromised and support is inherently tainted. These concerns led me to advocate for a secret-ballot election at the workplace well before the introduction of H.R. 4343. I am very fortunate to have fellow officers that are also committed to a secret ballot, and it follows that I support the passage of H.R. 4343. I look forward to the day where we will no longer be disadvantaged by filing for a secret-ballot election because a rival, uncertifiable union has an incentive to divide the loyalties of the workers merely for the opportunity to conduct an inherently coercive card-count campaign.

Thank you.

Chairman JOHNSON. Thank you, sir. I appreciate your comments. Mr. Garren, you may begin your testimony.

STATEMENT OF BRENT GARREN, ESQ., SENIOR ASSOCIATE GENERAL COUNSEL, UNITE-HERE, NEW YORK, NY

Mr. GARREN. Thank you, Mr. Chairman, and thank you, Congresspeople, for giving me this opportunity to speak to you on a subject which I think we can all agree is of enormous importance to millions of working people in this country and enormous importance to our society. And I thank you for holding a hearing on the subject of defending employees' freedom of choice whether to unionize or not, because you are 100 percent right in your sense that that right is under attack.

Where we disagree is the source of that attack. It is employers' fierce, unrelenting, and often unlawful opposition to unionization that has been strangling employees' freedom to choose whether to organize or not; and H.R. 4343 would make this problem far worse, not better.

The National Labor Relations Board election process that is being held up as the instrument through which employees can exercise their free choice is extraordinarily flawed and ineffective in at least four ways. One, there's enormous delay built into the election process, not just delay prior to the election, but delay of up to three or 4 years is routine between an election and certification if an employer chooses to pursue even the most frivolous sort of objections. And there are hundreds of such cases. Our courts of appeals and the NLRB have hundreds of such cases.

Delay in obtaining the right to bargain means effectively denying that right to bargain. Workers get discouraged, and the impulse to unionization is effectively destroyed.

Second, the current election system allows employers to engage in massive, unrelenting Vote No campaigning, the sheer volume and intensity of which is extraordinarily coercive, and it is even more so in contrast to the extraordinarily limited access that union organizers have to employees.

Employers regularly have multiple captive audience meetings where employees are required on paid time to listen to anti-union message and can be discharged if they either refuse to listen to that message or choose to stand up and express their viewpoint when they have been instructed to remain silent.

I don't believe that's democracy. I don't believe that's how we run political elections. I don't believe that any of you would find it fair when you were running for Congress if your opponents could require the voters to attend meetings, and if they didn't attend, your opponent could fire them. That does not strike me as American elections. Maybe it's the way they run elections in some dictatorships around the world, but not in America.

There was recently a case where the NLRB approved the right of employers to send ride-alongs with truck drivers so that for 10 to 12 hours a day, a management official rode with a truck driver to tell them why the company opposed the union, and this averaged three times for each driver during the election campaign.

What is the access the union gets to voters in an election campaign? They have the right to go to their home and try to talk to them if the worker has the time and the interest. What does this mean for deciding the election, for swing voters, for undecided and uninterested voters? It means the company can force them to hear

their message endlessly, and the union has no meaningful opportunity to speak to them. That is not American elections as I understand them.

Third, there are enormous unfair labor practices committed by employers. And I remind you of the old saying, data is not the plural of anecdote. There are facts that the NLRB has compiled in terms of unfair labor practices. The number of firings of union supporters in organizing drives has skyrocketed. Every single study that has examined NLRB statistics has shown an enormous increase in such firings. Depending on the timeframe, from the '50's to the '80's, the '60's to the '90's, you're looking at increases of 800 or 1,400 percent.

Finally, with the NLRB election procedure, once workers have run the gauntlet of an NLRB election, they still do not have a contract. And approximately half the time that workers vote for unionization, they never get a contract. That is a massive denial for tens of thousands of workers of their right to freedom to choose, and that's what I would urge you to consider solving.

Thank you very much.

[The prepared statement of Mr. Garren follows:]

Statement of Brent Garren, Esq., Senior Associate General Counsel, UNITE–HERE, New York, NY

Thank you for inviting me to testify before this Sub-committee today. My name is Brent Garren, and I am the Senior Associate General Counsel of the international labor union, UNITE-HERE, AFL–CIO, CLC, on whose behalf I am testifying. The subject of today's hearing is H.R. 4343, the "Secret Ballot Protection Act of 2004." We oppose H.R. 4343 because it would inflict great harm on the twin goals of our federal labor policy protecting employees" free choice to organize a union or not and promoting industrial stability. In addition, H.R. 4343 would displace private agreements among parties with a major expansion of government prohibitions and regulations, a serious blow to the uniquely American system of industrial relations, which relies so heavily on private party agreements to determine terms and conditions of employment.

Voluntary recognition agreements ("VRAs"), also known as "neutrality agreements" or "card check agreements" depending on their features, are an increasingly widespread and important aspect of America's labor relations landscape. Unions are turning to VRAs with increasing frequency because of their enormous frustration at the weakness of the NLRB machinery to realize the promise of employees' right to organize. The great majority of newly-organized members of my union, UNITE-HERE, which organizes very aggressively, come in through VRAs. Both opponents and proponents of VRAs agree that they produce a far higher rate of union success than the NLRB's election process.[1] VRAs are critical to the realization of employees" right to organize in the 21st century.

As we argue below, VRAs are a good thing, because they further the twin goals of our national labor policy: employee freedom of choice and industrial stability. Moreover, VRAs further another cornerstone of our labor policy: the principle that voluntary agreements developed in the give and take between private parties best tailor solutions for their specific circumstances. Part I of this discussion looks at the range of provisions available in creating VRAs. Part II demonstrates that VRAs further federal labor policy and, therefore, should be viewed favorably by our national labor policy. Part III examines H.R. 4343 specifically.

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[1] One study found that the rates of success across organizing campaigns governed by card check recognition and card check recognition with so-called "neutrality" provisions were 62.5% and 78.2%, respectively, as compared with the NLRB election win rate for 1983–98 of 45.64%. Adrienne E. Eaton and Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Ind. & Lab. Rel. Rev. 42, 51–52. See also David E. Weisblatt, Neutrality Agreements are Neither Neutral Nor Very Good for Employers, McDonald Hopkins, at http://www.mhbh.com/topics/business/neutrality.html (citing percentages of union victories in card check recognition campaigns [78%] and secret ballot elections [53%]).

I. What Are Voluntary Recognition Agreements?

The general term "VRA" refers to a broad range of agreements between an employer and a union that affect the representation process for the employer's employees. We use the term "VRA" rather than "neutrality/card check agreement" because VRAs contain a very wide range of provisions. Many require neither employer neutrality nor card check recognition.

VRAs can occur when a union represents some of the employees and seeks to represent others, or when a union seeks representation for the first time with an employer's employees. Most VRAs address some or all of the following subjects:

(1) Recognition procedures. Most agreements call for recognition based on a certification of the union's majority status demonstrated by a review of signed authorization cards by a third party. However, VRAs may instead provide for private, non–Board elections or NLRB-conducted elections. Some agreements have a hybrid, in which the nature of the recognition process depends on the strength of union support manifested by authorization cards.[2]

(2) Definition of the bargaining unit. Most agreements provide for a stipulated group of employees for which the VRA will operate and whom the union seeks to organize.

(3) Access provisions. Some VRAs provide for limited union access to the employer's facilities and/or the provision of employee rosters.

(4) Dispute resolution procedures. The vast majority of VRAs outline dispute resolution procedures to address violations of the VRA, unfair labor practices, or other disputes.

(5) Limits on campaigning. The variety of campaigning provisions is especially great. Some VRAs require that the employer be "neutral," by not supporting or opposing the union's organizing efforts. Many others limit the employer's campaign by prohibiting the fear-mongering attacks on unions and the dire predictions of disaster following unionization that have become commonplace in NLRB election campaigns. These provisions permit the employer to stress the positives of its employment record, or to conduct "fact-based" campaigns to present the company's position. In one such clause, the employer committed itself to "communicat[ing] with [its] employees, not in an anti-[union] manner, but in a positive pro-[company] manner."[3] In another agreement, the employer pledged "to communicate fairly and factually to employees in the unit sought concerning the terms and conditions of their employment with the company and concerning legitimate issues in the campaign."[4] Yet another variant is to limit the methods in the employer's campaign, rather than its content. In one UNITE VRA, we agreed that the employer would address all the employees at the onset of a short campaign period (in a debate format in which the union also spoke). It was free to argue against unionization in any manner it wished. It was, however, thereafter prohibited from campaigning, including holding captive-audience speeches or conducting one-on-one meetings. Finally, in some such clauses the employer merely pledges to "strive to create a climate free of fear, hostility, or coercion."[5]

Many VRAs also include restrictions on the union's campaigning. More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[6] Unions often commit to notifying the employer of the union's intention to initiate a union organizing campaign.[7] Commonly, they also prohibit the union from picketing or striking during the recognition process. They may also limit the length of the union's campaign period,[8] ban the union from denigrating or disparaging the employer,[9] or allow the employer special rights to respond to misstatements of fact by the union.[10] As noted above, they may require the union to obtain a supermajority of employee support to obtain card check recognition.[11]

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[2] Eaton and Kriesky, supra note 2, at 48. In one common variation, over 65% cards signed leads to card check recognition, 50–65% triggers a non–NLRB election, and between 33%–50% leads to a Board election.

[3] International Union v. Dana Corp., 278 F.3d 548, 551 (6th Cir. 2002) (quoting Joint Agreement at 92).

[4] Roger C. Hartley, Non–Legislative Labor Law Reform and Pre–Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, 22 Berkeley J. Emp. & Lab. L. 369, 380 n.59 (2001) (quoting Kerri J. Selland, AK Propaganda War Erupts, Am. Mtl. Mkt., May 18, 1995, at 2, available in 1995 WL 8070195).

[5] Eaton and Kriesky, supra note 2, at 47.

[6] Id. at 48.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

Finally, if disputes occur, unions (as well as employers) are typically committed to participate in dispute resolution processes.[12]

II. The Policy Rationale for VRAs

The primary goals of national labor policy, as implemented by the Act, are twofold: to assure employee free choice to engage in or refrain from organizing and collective bargaining, and to maintain industrial peace.[13] In furthering these principles, federal labor policy highly values "freedom to contract" between employers and unions.[14] All three of these aims are promoted by giving deference to VRAs, and each will be examined in turn.

A. VRAs Promote Employee Free Choice

The differential in organizing success between VRAs and NLRB elections is undisputed. Are NLRB elections distorted by employer coercion, or is recognition under VRAs instead distorted by union coercion, as the critics of VRAs charge?[15] In today's labor relations landscape, scarred by massive employer interference with employee Section 7 rights, the answer is crystal-clear: VRAs are an antidote to venomous employer "vote no" campaigns which routinely poison the NLRB election process.

1. NLRB Elections Do Not Protect Employee Free Choice

The current framework of NLRB representation procedures and unfair labor practice doctrines, including remedies, was established in the decades following the passage of Taft–Hartley. The law developed at a time when employer hostility to unions was much less vehement. In the 1950s and 60s, employers did not routinely engage in the massive legal and illegal sabotage of employee Section 7 rights that are commonplace today. Despite these changes, the NLRB has taken no serious measures to ensure that its representation and unfair labor practice procedures effectively protect employee free choice in today's context.

The representation process is flawed in four fundamental respects. First, an employer can delay the representation process so that it can either dissipate the union's majority before the election or destroy the union's bargaining power before it is required to bargain.[16] My union, for example, endured a delay while an employer litigated a single issue whether UNITE (a predecessor union) was a labor organization under the Act. Many other hearings have little more merit than this. Moreover, even after a union has won an election, no enforceable court order will issue requiring bargaining until three or four years have passed.[17] The effects on employees are well-documented and disastrous. One study found that the unionization rate drops by 2.5% for each additional month between petition and election,[18] while another found a drop of 0.29% for each day of delay.[19]

Second, even if the employer limits its campaign to lawful activity, the volume and vehemence of the employer's campaign can terrorize workers. Employers often drown workers in a tidal wave of predictions about the calamities that will befall any workplace so unwise as to unionize. The incessant pounding of captive audience meetings and one-on-one meetings has nothing to do with a rational exchange of

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[12] Id.

[13] See Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 38 (1987); National Labor Relations Board, The NLRB: What It Is, What It Does, available at http://www.nlrb.gov/publications/whatitis.html.

[14] See N.L.R.B. v. American National Ins. Co., 343 U.S. 395 (1952); Stanley D. Henderson, Labor Law: Cases and Comment 90 (Foundation Press 2001).

[15] "I wonder why the Unions were unwilling to go to elections to avoid this result. Was it because they doubted that the employees who signed cards would vote the same way in secret elections?" Jonathan Kane and James P. Thomas, Pall Corp. v. NLRB What About Section 7? 7 (2003) (unpublished paper presented to ABA Labor and Employment Law Section Sub—Committee on Practice and Procedure under the NLRA, Pepper Hamilton LLP). (quoting Houston Div. of the Kroger Co. (Kroger II), 219 N.L.R.B. 388, 391 (1975) (Kennedy, M., dissenting)). See also Weisblatt, supra note 2.

[16] See Hartley, supra note 6, at 381–82; Andrew Strom, Rethinking the NLRB's Approach to Union Recognition Agreements, 15 Berkeley J. Emp. & Lab. L. 50, 53–55 n.59 (1994)

[17] See Parts Depot, Inc., 332 N.L.R.B. No. 64, slip. op. at 7 (2000) (citing Garvey Marine, 328 N.L.R.B. No. 147, slip. op. at 7 (1999)).

[18] Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self Organization under the NLRA, 96 Harv. L. Rev. 1769, 1777 (1983) (citing Prosten, The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 240, 243 (1978)).

[19] Id. (citing Roomkin & Juris, Unions in the Traditional Sectors: The Mid—Life Passage of the Labor Movement, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 212, 217—18 (1978)).

opinions in the free marketplace of ideas, but is intended to intimidate. The ALJ in Parts Depot, Inc.,[20] which upheld UNITE's claim of several employer unfair labor practices, discussed the employer's captive audience meetings, which he found completely lawful:

> If phrased in terms of war, [the company's] response was equivalent to America's B–52 carpet bombing of the Iraqi front line forces at the 1991 opening of "Desert Storm" in the Persian Gulf War. As the Iraqis stumbled from their trenches begging the advancing United States soldiers to accept their surrender, so too, figuratively, the [company's] employees, shell shocked from the long series of verbal "carpet bombing" speeches and videos, would have stumbled toward the voting booths, begging for the chance to vote against the Union. . . This is not to say that the speeches and videotapes . . . constitute a threat . . .[21]

The great disparity in access to the voters makes NLRB elections unfair. Employers can and routinely do, require employees to listen to multiple anti-union speeches and watch anti-union videos. An employee may be disciplined for refusing to attend anti-union meetings or for speaking out in favor of the union when instructed to be silent

In a recent NLRB case, Frito–Lay, Inc.,[22] the employer sent "ride-alongs" to ride 10–12 hours a day with truck driver-voters, explaining the employer's opposition to the union. These ride-alongs, including high level management officials, accompanied the voters on a average of 3 times each during the election campaign. An employee had to specifically tell management that he did not want a ride-along to avoid them. The Board found this perfectly acceptable. In contrast, the union has no access to voters during work time and cannot compel voters to hear its message. An undecided or uninterested voter can completely avoid the union's message if he prefers, but can be forced to listen to the employer's anti-union message virtually without limit.

Third, employer unfair labor practices during NLRB election campaigns have become routine.[23] All available statistics tell the same story: employer unfair labor practices have soared since the 1950s and 1960s, devastating Section 7 rights. One study showed that, in 1969–1976, the number of workers receiving back pay under Section 8(a)(3) of the Act totaled approximately 1.2% of voters in representation elections. In 1984–1997, that figure increased by almost 800%, to a level of 9.5%.[24] LaBlonde and Meltzer, who criticized figures in earlier studies as being exaggerated, nevertheless found a 600% increase in the relative incidence of discriminatory discharges from the late 1960s to late 1980s,[25] while another study revealed a 14-fold increase in employer discrimination against union activists during organizing drives between the 1950s and the late 1980s.[26] Yet another report found that 31% of all employers illegally fire at least one worker for union activity during organizing campaigns.[27] The former president of the National Academy of Arbitrators, the nation's leading organization of labor—management neutrals, stated in 1996 that "[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world."[28]

The rising tide of employer unfair labor practices, and particularly discriminatory discharges, against union supporters has contributed directly to the erosion of union win rates in elections.[29]

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[20] Parts Depot, Inc., 332 N.L.R.B. No. 64 (2000).

[21] Id., slip op. at 14.

[22] 341 NLRB No. 65 (March 31, 2004)

[23] See Brent Garren, When the Solution is the Problem: NLRB Remedies and Organizing Drives, 51 Lab. L.J. 76, 76–8 (2000) (surveying numerous studies).

[24] Id. at 77 (citing Charles J. Morris, A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA, 2 Emp. Rts. Emp. Pol. J. 317, 329–30 (1998)).

[25] Id. (citing Robert J. LaBlonde & Bernard D. Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegalities, 58 U. Chi. L. Rev. 953 (1991)).

[26] Garren, supra note 21, at 77 (citing Commission on the Future of Worker–Management Relations, Fact Finding Report, issued by the Commission on the Future of Worker–Management Relations, June 2, 1994, as reprinted in the Daily Labor Report, June 3, 1994 at WL * 191).

[27] Kate Bronfenbrenner, The Effects of Plant Closings or Threats of Plant Closing on the Rights of Workers to Organize, Labor Secretariat of the North American Commission for Labor Cooperation (1996).

[28] Human Rights Watch, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards (2000) (quoting Theodore St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 Chi.–Kent L. Rev. 631, 639 (1985).

[29] See Garren, supra note 21, at 77–78 (citing Paul C. Weiler, Hard Times for Unions: Challenging Time for Scholars, 58 U. Chi. L. Rev. 1015, 1029–30 (1991); William Dickens, The Effect

The remedies available to workers coerced in exercising their Section 7 rights (including postings and reinstatement with back pay) are insufficient both to deter such abuses or to erase their undermining of employee free choice. Postings are not likely to dissipate the effect of employer threats.[30] Reinstated workers often are "so scarred by the discharge experience that they do not resume union activities," and studies show most reinstated workers are gone within a year, many reporting bad company treatment.[31] More than two-thirds of rerun elections produce the same result as the election overturned due to objectionable conduct.[32]

Fourth, winning an NLRB election, with all its delay and emotional drain on employees, is, by itself, insignificant. If employees cannot obtain a collective bargaining agreement, then their freedom to choose unionization has been denied. Continuing employer hostility results in only a narrow majority of election victories leading to the achievement of collective bargaining agreements. From 1975 to 1993, the success rate for obtaining first contracts fell from 78% to 55.7%.[33]

The result of these factors is that the usual NLRB election is poisoned by employer coercion. A 1991 poll showed that 59% of workers believed they would lose favor with their employer for supporting a union and 79% agreed that workers are "very" or "somewhat" likely to be fired for trying to organize a union, with 41% of non-union workers believing "it is very likely that I will lose my job if I tried to forma union."[34] This widespread and (unfortunately) reasonable fear means that in most NLRB elections employer coercion has "the tendency to undermine [the union's] majority strength and impede the election process."[35] For the same reasons that the Supreme Court found that requiring recognition based on a card majority appropriate in Gissel, so too is voluntary recognition appropriate and necessary to protect employees' right to organize.

2. VRAs Further Employee Free Choice

VRAs protect employee free choice by eliminating crippling delay and employer coercion. Typically, representation issues are definitively resolved through VRAs in weeks or months rather than years. VRAs severely restrict delay prior to determining the union's majority support. The parties agree to a definition of the bargaining unit, eliminating the lengthy NLRB process of a hearing and appeal to Washington. Disagreements are typically resolved through arbitration, often with expedited procedures. Because the elimination of delay at the "front end" of the process is of great important to defending employee free choice, VRAs often limit the campaign period to further produce a speedy result.[36]

For example, one SEIU agreement stated that the parties would jointly choose an election officer, who would both direct an election within five working days following the union's presentation of cards from at least 30% of the employees and oversee the election within 35 days in accordance with NLRB guidelines for assessing the validity of election results.[37] Other VRAs may provide for NLRB elections, but contain commitments by the employer not to cause delay.[38]

VRAs may also minimize the delay between recognition, if attained, and the completion of a first contract. Many VRAs allow for decision by an arbitrator or similar neutral in the event that a party to the agreement fails in its duty to bargain. As discussed below, unions may obtain court orders under Section 301 enforcing arbitration decisions. Such a process is far quicker than an unfair labor practice proceeding through the Board to the Court of Appeals. An intransigent employer may,

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of Company Campaigns On Certification Elections: Law and Reality Once Again, 36 Ind. and Lab. R. 560, 574 (1983)); Eaton and Kriesky, supra note 2, at 43.

[30] In light of the findings of a 1991 poll (that 59% of workers believed they would lose favor with their employer for supporting a union and 79 % agreed that workers and "very" or "somewhat" likely to be fired for trying to organize a union), "the idea that a piece of paper on the wall dissipates the effect of employer threats borders on the absurd." Id. at 78.

[31] See id. at 80 (citing Les Aspin, Legal Remedies under the NLRA Under 8(a)(3), (1970), as reprinted in Julius G. Getman & Jerry R. Andersen, 6 Labor Relations and Social Problems 133, 134 (1972)).

[32] Id. at 81 (citing Daniel Pollitt, NLRB Re-run Elections: A Study, 41 N.C. L. Rev. 209, 212 (1963)).

[33] Id. at 78 (citing Benjamin W. Wolkinson, et. al., The Remedial Efficacy of Gissel Bargaining Orders, 10 Ind. Rel. L.J. 509–10 n.3 (1989); Dunlop Commission Report, supra note 24, at WL * 197–98).

[34] Commission on the Future of Worker–Management Relations, Fact Finding Report (Dunlop Commission), p. 40.

[35] Gissel at 614.

[36] For example, UNITE has entered into agreements limiting the campaign period to 15 days.

[37] Agreement, [Employer] and Service Emp. Int'l Union (1991) (on file with author).

[38] Hartley, supra note 6, at 382.

of course, appeal the district court's enforcement of an arbitration award, but this is unlikely to be successful.

VRAs also can help curb employer intimidation, through the variety of campaign limitations discussed above. Not only are coercive employer actions less likely in such an environment, but arbitration or other dispute resolution processes in VRAs can resolve potential violations much more expeditiously, and impose a wider array of remedies, than NLRB proceedings.[39] For example, one UNITE agreement provided for one of a panel of arbitrators to hold a hearing on complaints of campaign misconduct within 24 hours of the complaint and for a bench decision to issue.

3. VRAs Do Not Interfere With Employee Free Choice

Employer advocates claim that VRAs hamper employee free choice by limiting the ability of employees to hear the employer's "vote no" campaign and because card check recognition as a mechanism for assessing employee desires is less reliable than an NLRB secret-ballot election.

However, VRAs must be based on employee free choice. Enforcement of VRAs by the federal courts hinges upon the union's demonstration of a "fair opportunity" for employees to freely decide whether to accept it as a representative.[40] The Second Circuit summarized the requirement in no uncertain terms: "[c]ritical to the validity of such a private contract is—whether the employees were given an opportunity to decide whether to have a labor organization represent them."[41]

Employer advocates claim that campaign limitation clauses undemocratically limit the ability of employees to hear both sides.[42] The Yale University Office of Public Affairs' statement on the issue is typical: "[E]mployees lose the benefit of a full and open debate that would occur prior to a union election."[43] Similarly, the employer in Dana[44] argued that the VRA it signed should not be enforced because limits on employer campaigning violate public policy; it "effectively silence[d]" the company, and thereby violated the statutory rights of its employees.[45] Rejecting the employer's argument, the court stressed two pertinent themes.

First, the court stressed that Section 8(c)[46] merely limits what employer speech may constitute evidence of an unfair labor practice, but does not require an employer to express its views.[47] "In fact, far from recognizing § 8(c) as codifying "an absolute right" of an employer to convey its view regarding unionization to its employees . . . we have stated that an expression of an employer's views or opinion under § 8(c) is merely "permissible."[48] Thus, Dana's "voluntary agreement to silence itself during union organizing campaigns does not violate federal labor policy."[49]

Second, the court held that limits on the employer's campaign could not interfere with the employees' Section 7 rights. "As Section 7 grants employees the right to

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[39] Despite this flexibility, however, "arbitrators arguably have been quite conservative in the remedies they have, in practice, ordered." Eaton and Kriesky, supra note 2, at 54 (citing Adrienne Eaton and Debra Casey, Bargaining to Organize: Disputes and Their Resolution, unpublished manuscript, Rutgers University (2001)). But see George N. Davies, Neutrality Agreements: Basic Principles of Enforcement and Available Remedies, 16 Lab. Law. 215, 220–221 (2000) (highlighting the strong remedies awarded by arbitrators and subsequently challenged unsuccessfully in United Steelworkers of American v. AK Steel Corp., 163 F.3d 403 (6th Cir. 1998) and International Union v. Dana Corp., 278 F.3d 548 (6th Cir. 2002)).

[40] See, e.g. Pall Biomedical Products Corp., 331 N.L.R.B. 1674, 1676 (2000); Hotel Emp., Local 2 v. Marriott Corp., 961 F.2d 1464, 1468–69 (9th Cir. 1992); Hotel & Restaurant Emp. Union v. J.P. Morgan, 996 F.2d 561, 566 (2nd Cir. 1993); Local 3–193 Int'l Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295, 1299–1301 (9th Cir. 1980); Strom, supra note 18, at 62 (citing Advice Memorandum of the NLRB General Counsel, General Motors Corp., Saturn Corp., and UAW, 122 L.R.R.M. 1187, 1190–91 (1986)). Even if VRAs do not explicitly condition recognition on the showing of majority support, the Board will read the requirement into such contracts. Houston Div. of the Kroger Co. (Kroger II), 219 N.L.R.B. 388, 389 (1975).

[41] J.P. Morgan, 996 F.2d at 566.

[42] See Eaton and Kriesky, supra note 2, at 59 n.1 (citing two articles arguing that VRAs prevent employees from "getting the full story"); Kane and Thomas, supra note 17, at 6–7.

[43] Yale University Office of Public Affairs, Labor Negotiations at Yale University: Frequently Asked Questions about Union Neutrality, at http://www.yale.edu/opa/labor/faq—neutrality.html.

[44] 278 F.3d 548 (6th Cir. 2002).

[45] Id. at 558.

[46] Section 8(c) of the NLRA states: "The expression of any views, arguments or opinions 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 provision of this. . .[law], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[47] Dana, 275 F.3d at 558 (citing Hotel Emp., Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992)).

[48] Id. at 559–60 (citing N.L.R.B. v. St. Francis Healthcare Ctr., 212 F.3d 945, 954 (6th Cir. 2002).

[49] Id.

organize or to refrain from organizing...it is unclear how any limitation on Dana's behavior during a UAW organizational campaign could affect Dana's employees' Section 7 rights."[50]

This understanding of the limited relevance of Section 8(c) to Section 7 rights is consistent with Linn v. United Plant Guard Workers of America, Local 114,[51] in which the Court protected union members' speech against state law defamation claims absent actual malice. While stating that Section 8(c) reflected an "intent to encourage free debate on issues dividing labor and management, [52] the Court also stated that

> [i]t is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements. . .. Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers . . . strengthens this interpretation of congressional intent.[53]

Additionally, most VRAs do not "silence" employers, but rather limit their campaigning, often with restrictions on the unions' campaigns as well. The arbitrator's decision reviewed in the Dana decision concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[54] In today's climate, it is hard to imagine that employees in any case will not get an opportunity to hear and fairly evaluate anti-union arguments.

Employers also claim that card check recognition is less reliable than an NLRB election because they are susceptible to fraud and coercion.[55] These arguments are unavailing for two reasons. VRAs provide mechanisms for preventing these problems, and the possibility of coercion in obtaining cards is in actuality far less of a threat to employee self-determination than employer coercion.

Card check procedures remain the primary mechanism for recognition within VRAs,[56] and labor law as well as the terms of most VRAs themselves—require that any recognition following a VRA be free from coercion. If a union is accused of obtaining card support through fraud or coercion, an employer could refuse to recognize a union's claim of majority support. Such a refusal would trigger arbitration procedures, if provided by the VRA, or direct recourse under Section 301 to federal court. As noted above, the federal courts will not enforce VRAs if the union cannot demonstrate that employees had a "fair opportunity" to freely decide whether to accept it as a representative. If an arbitrator ever failed to require majority support, such failure would give the employer recourse at the Board.[57]

J.P Morgan, however, demonstrates that arbitration is fully capable of taking irregularities into account in determining majority status. The employer alleged that the union had coerced employees into signing authorization cards. In response, the arbitrator ordered a delay in the card count "until coercion charges were resolved because authorization cards obtained through coercion were invalid." After the arbitrator found no union coercion, the employer continued to fight recognition unsuccessfully in the Second Circuit, which upheld the arbitrator's decision.

Thus, the Board's existing case law governing card check irregularities will stand as a safeguard whether enforced through arbitration, the courts, or the Board against recognition of a union who has engaged in unfair labor practices.

4. VRA's Facilitate First Contracts

As discussed above, almost half the time employees run the gauntlet of an NLRB election, they are still denied the benefits of collective bargaining because they cannot obtain a contract. It is in the first contract area that VRA's unarguably demonstrate their value. Research shows that in 96.5% of the occasions studies, card

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[50] Id. at 559.
[51] 383 U.S. 53 (1966).
[52] Id. at 62.
[53] Id. at 62 n.5.
[54] Dana, 275 F.3d at 552.
[55] See Eaton and Kriesky, supra note 2, at n.1; Kane and Thomas, supra note 17, at 6–7; Yale University Office of Public Affairs, supra note 38.
[56] Eaton and Kriesky found that 73% of the sample of 118 agreements they collected from a wide variety of sources called for card check arrangements. Eaton and Kriesky, supra note 2, at 48.
[57] Central Parking System, Inc., 335 N.L.R.B. No. 34, slip op. at 2 n.5 (2001). As Strom notes, adopting a policy of deference to arbitration awards resulting from disputes in voluntary recognition situations would not preclude the Board from stepping in to curb genuine Section 8(a)(2) violations. Strom, supra note 18, at 81.

check recognitions led to first contracts.[58] As discussed below, this is because VRA's stem from and help deepen a cooperative labor-management relationship which is the bedrock of industrial stability.

B. VRAs Promote Industrial Peace and Stability

VRAs also curtail the industrial strife common in organizing drives. Indeed, one prerequisite for the enforcement of such contracts through Section 301 suits is that they "forward labor peace."[59] The receptivity of federal courts to enforcing such agreement indicates that those agreement have generally met this test.

That organizing campaigns often produce bitterness and divisiveness is uncontested. J.P. Morgan refers to "those tensions inevitably flowing from a union organizing effort."[60] Similarly, "intensive workplace discussions and arguments are common. After several weeks of such campaigning, the final days before an election usually reach a high level of tension."[61] In a typical campaign, the employer bombards employees with the message that, if the facility unionizes, the employees "may" lose their jobs, suffer reductions in wages and benefits due to collective bargaining, or face strikes and violence, and the union counters with greater promises in addressing the last attack and in anticipation of the next. Not surprisingly, such a campaign spirals into enormous division and bitterness among employees. The hostility in the workplace generated by a hard-fought and prolonged organizing campaign hurts employers, employees, and the general public.

VRAs dramatically ameliorate the strife and tension of organizing drives by changing their character. Most VRAs commit the employer (and typically also the union) to what the arbitrator in the Dana dispute called a "high-minded" campaign, in which the parties agree not to disparage each other but rather to promote themselves. Most often, campaign limitation clauses do not "silence" the employer, but rather require of the parties "a civil atmosphere for the discussion of the issues surrounding the question of union representation."[62] Indeed, the clause to which Dana agreed permitted the corporation to "communicate with employees, not in an anti–UAW manner, but in a positive pro–Dana manner."[63] In interpreting the clause, the parties' arbitrator concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[64] The agreement reached between AK Steel Corporation and United Steelworkers of America provides another example.[65] Eliminating the fear-mongering common in "vote no" campaigns is a huge step toward furthering labor peace and stability.

SEIU's agreement with one health care employer committed the parties "to a process that resolves issues between [them] in a manner that not only reduces conflict, but also fosters a growing appreciation for [their] respective missions "[66] In a situation involving UNITE, the employer and union were locked in a bitter dispute for many months, with many NLRB charges and accusations flying back and forth. The parties entered into a VRA which provided for an expedited arbitration process to resolve complaints of campaign misconduct. Significantly, neither side invoked the process. Instead, the level of tension decreased dramatically after the VRA, and the communication between the parties improved so that disputes were settled without the need for arbitration.

Moreover, VRAs provide for expedited campaigns and dispute resolution, if and when charges arise. In addition to committing the employer not to engage in delay-

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[58] Eaton & Kriesky, supra, note 1, p. 53.

[59] Id. at 566.

[60] 996 F.2d at 566 (citing N..L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274 (1960)).

[61] Commission for Labor Cooperation, Union Organizing Systems in the Three NAALC Countries, available at http://www.naalc.org/english/publications/nalmcp—7.htm.

[62] Hartley, supra note 6, at 380. For a discussion of the content of various VRAs, see supra Part I.

[63] International Union v. Dana Corp., 278 F.3d 548, 551 (6th Cir. 2002) at 551–52.

[64] Id. at 552.

[65] "Neutrality means that the Company shall neither help nor hinder the Union's conduct of an organizing campaign, nor shall it demean the Union as an organization or its representatives as individuals". [T]he Company reserves the right—[t]o communicate fairly and factually to employees—concerning the terms and conditions of their employment with the Company and concerning legitimate issues in the campaign. For its part, the Union agrees that all facets of its organizing campaign will be conducted in a constructive and positive manner which does not misrepresent their employment and in a manner which neither demeans the Company as an organization nor its representatives as individuals." AK Steel Corp. v. United Steelworkers of America, 163 F.3d 403, 410–11 (6th Cir. 1998) (Appendix A).

[66] Agreement (on file with author).

ing tactics, many agreements impose time limits on the union for organizing.[67] Shortening the campaign process helps minimize tension. Moreover, arbitration provisions[68] allow for quick resolution of charges of coercion, which also minimize tension. As noted above, a UNITE agreement permitted arbitration of alleged campaign conduct violations within 24 hours with a bench decision. More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[69] Analyzing one such agreement, in which the union agreed to refrain from picketing and the employer agreed to card-check recognition, the Sixth Circuit concluded that "each gave up rights under the Act—in an effort to make the union recognition process less burdensome for both."[70] VRAs leave the representation process itself far freer from strife and tension than the usual NLRB election.

C. Promoting VRAs Advances Party Resolution in Labor Relations

Encouraging private party solutions to labor disputes is a cornerstone of federal labor policy. American National Insurance Company stated that "[t]he [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreement governing relations between unions and employers."[71] Specifically, "voluntary recognition is a favored element of national labor policy."[72]

Arms-length bargaining will create better, more specifically tailored solutions to particular disputes than standard Board processes. "[I]t is incumbent upon the Board," the Board held in a recent case, "to recognize and encourage the efforts expended by [the parties] in attempting innovative bargaining structures and processes and novel contractual provisions."[73]

VRAs can solve problems in ways in which the Board cannot. Clearly, constitutional and statutory concerns of free speech and due process affect the Board's ability to limit campaigning and to provide expedited representation processes. VRAs are not so limited. As discussed below, H.R. 4343 would be a major step away from private party resolution and towards government regulation depriving parties of their freedom to solve specific problems.

III. H.R. 4343 Is Dangerous and Ill–Conceived

We oppose H.R. 4343 because voluntary recognition is essential to vindicating employee choice in the coming decades, just as it has been an essential and favored element of our national labor policy since the passage of the Wagner Act. Passage of H.R. 4343 would inflict serious harm on the right to organize and should be opposed for that overarching reason. In addition, particular consequences of H.R. 4343 should be examined.

Voluntary recognition is essential for the Board to process the existing level of representation cases. The NLRB's staffing and funding levels are already woefully inadequate. The Board does not have the resources to conduct secret ballot elections in every organizing campaign. As NLRB General Counsel Rosenfeld testified to the Senate Subcommittee on Labor, Health and Human Services and Education: "We could not continue day-to-day operations if there weren't voluntary recognitions."[74] Prohibiting voluntary recognitions would create horrendous backlog at the Board, thereby denying employees' any meaningful freedom to choose representation.

By prohibiting voluntary recognition, H.R. 4343 displaces the private party agreements by government regulation. Our labor relations policy relies heavily on private agreements. Unlike other industrialized countries, our labor law does not specify holidays, vacations, health insurance or virtually any other terms and conditions of employment, save minimum wage and overtime. We favor private party arbitration of contract disputes rather than judicial resolutions. Even within the Board processes, we give great latitude to private party agreements. For example, the parties can agree on the definition of a bargaining unit, even if the Board would not have ordered such a unit following a hearing. In all areas, American labor law is uniquely and heavily reliant on private parties devising specific solutions to particular problems. Outlawing private agreements in the recognition area is out of synch with the structure of our labor law and prevents innovative problem-solving.

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[67] Eaton and Kriesky, supra note 2, at 48.
[68] Id. (reporting that more than 90% of the agreements they studied called for dispute resolution, and that the process most frequently outlined was arbitration).
[69] Supra note 2, at 48.
[70] 996 F.2d at 566.
[71] N.L.R.B. v. American National Ins. Co., 343 U.S. 395, 401 (1952).
[72] N.L.R.B. v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978).
[73] MGM Grand Hotel, 329 N.L.R.B. 464, 467 (1999).
[74] Cited in the Daily Labor Reporter, 9/24/04, p. AA–1.

H.R. 4343 would ban any recognition if it did not result from a Board election, no matter what the circumstances. A consequence of H.R. 4343, which I hope is unintended, would be to eliminate Gissel[75] bargaining orders. No matter how egregious an employer's unfair labor practices and no matter how overwhelming the union's support prior to the commission of those illegal practices, an employer would be forever immunized against having to recognize the union, so long as it successfully tainted the atmosphere preventing a fair election.

As discussed above, some VRA's call for private elections. No matter how impeccably run and how free from even allegations of coercion, H.R. 4343 would ban them. Other VRA's require a super-majority of card signers, a demonstration of employee support far beyond that required by the NLRA. Yet, this too would be prohibited.

The impact of H.R. 4343 on wide areas of labor law is unclear, but extremely dangerous. Would H.R. 4343 prohibit unit clarification petitions, which might add newly created or changed job classifications to a bargaining unit? Would it prohibit labor and management from reaching an agreement on including groups of employees in a bargaining unit? What about an arbitrator's resolution of a dispute over new or changed job titles? Even if unit clarifications were permitted, banning private resolution of these issues would send the backlog problem at the Board to Himalayan heights. Would H.R. 4343 prohibit a judicial or Board order requiring an alter ego company that unlawfully ran away from its unionized employees to recognize the union? Would it affect successorship doctrine, thereby allowing employers to deprive employees' of their unions by shuffling corporate forms?

H.R. 4343's banning any "attempt to cause" voluntary recognition is particularly pernicious. I am not aware of any other aspect of our labor law that outlaws "attempted" behavior. For example, while a union may not obtain a "hot cargo" agreement within the meaning of Sec. 8(e) of the Act, it is not unlawful to propose (without insisting to impasse) such an agreement. By adding the vague and elusive concept of "attempt" to our labor law, H.R. 4343 opens a Pandora's Box. If a union filed a unit clarification petition which sought to add employees to an existing unit and lost the case, would that constitute "attempting" to gain recognition without an election? What if the union sought the same result through an arbitration, which it lost? What if a union engaged in pure speech, without any promise or threat, advocating that employers in general or a specific employer grant voluntary recognition? The "attempt" provision is unwise and unconstitutional. Indeed, the current representation petition form requires petitioners to state whether they have asked the employer for recognition. Is checking that box to become an unfair labor practice?

IV. CONCLUSION

The sponsors of H.R. 4343 are correct in identifying the assault on employees' rights to choose unionization or not as a critically important issue, requiring a legislative solution. However, the source of the attack is employers' fierce, coercive and often illegal opposition to unionization. Increasingly, employers resist providing affordable health insurance, pensions or wages that allow working families to enjoy the American Dream. Voluntary recognition is a keystone of a labor policy that protects the right to organize and opens the door to a middle class future for millions of working families. We urge you to oppose H.R. 4343.

Chairman JOHNSON. Thank you, sir. I understood you perfectly. You talk at my speed.

Mr. Riley, you may begin your testimony.

STATEMENT OF THOMAS RILEY, SERVICE SALES REPRESENTATIVE, CINTAS CORPORATION, EMMAUS, PA

Mr. RILEY. Mr. Chairman and Honorable Members of the Subcommittee, my name is Tom Riley, and I am an employee of Cintas Corporation out of Allentown, Pennsylvania.

It is my pleasure to share with you my experience in the union card check campaign so that you can see this from an employee's perspective.

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[75] NLRB v. Gissel, 395 U.S. 575 (1969).

As background, I have served my country by enlisting for 6 years in the U.S. Army with tours in Kuwait and Korea. I was honorably discharged at the rank of Sergeant E–5 and proud to have defended my country, particularly in today's troubled times.

I believe our democratic freedoms are the foundations of our great country, which is why I'm personally troubled by the recent union tactics against me, my family, and my co-workers.

I've worked for Cintas for 2 years, starting as a sales service representative. My job is to take care of my customers, keep them happy and meet their needs. We provide our customers with uniforms for their employees and doormats, restroom supplies and other products for their business. We visit every one of our customers on a weekly basis, and we take great personal pride in the work.

After I started working for Cintas, the union campaign started. The union distributed notices to the union, to other unions telling them to find ways to quit doing business with Cintas. I had one union, one unionized customer who 1 day was very happy with our products and my service and the next day gone. No more—we weren't in business anymore.

Mr. Chairman, I was paid on commissions, as are all other SSRs. This union campaign hurt me and my family directly by taking money out of my paycheck, and it hurts a lot of other people, too. And this is the same union on the one hand that says that it wants to represent me, and on the other, at the other time, he's taking food off my table.

I draw the line, Mr. Chairman, when the union organizers come to my house on a Sunday afternoon telling my wife that they're with the company and they need to talk to me. When I came to the door, they admitted that they were really with the union, and they started trying to tell me all sorts of bad things about Cintas. I told them to leave, and they eventually did.

I called a friend of mine from work, and he said that they had been to his house already. What is disturbing is that I have an unlisted telephone number and address, on purpose. I have a wife and two small children. Our privacy is very, very important, and I don't like the fact that union organizers are now coming to my door, lying to my wife about who they are and what they want. My wife is now scared whenever the doorbell rings or one knocks on the door, you know, and she shouldn't have to be, at least not in America.

I have since learned that the union had gotten my personal information illegally by copying down my license plate number and getting the information from the state's vehicle registration files, which we understand is a violation of the Federal Driver's Privacy Protection Act. In one case, there was a co-worker who doesn't live with his parents but his car that he drives was still registered at his parents' address. His parents got a visit from the union organizer. That's why several of my fellow employees and me, along with a number of our family members, have filed a lawsuit against the union for what we believe they've done in violation of Federal law.

There have been other situations at our facility that are also troubling. One woman who works on late shift was followed home

one night. She purposely drove past her house and the car still followed her. She then pulled into her driveway, and before the car drove off, she got the license plate number and called the police. They told her that the rental car was rented by a union employee using the union's corporate account.

We have a process supervised by the government so that individuals like me can go into a voting booth and check yes or no as to whether I want to be in a union. Nobody, either my employer or the union, would know how I vote. I would rather—I would vote, or I'd be free to vote with my heart, not based on whether or not I was concerned about my wife and my family or whether union organizers might continue to bother them at home, or not concerned about whether anyone might follow me home at night or because I felt pressured to signing a union card just because I wanted to be left alone.

Mr. Chairman and Honorable Members of the Subcommittee, I enlisted to serve in our military because I believe in the democratic freedoms that are the foundation of our company. I fought for and was willing to die for these beliefs. And now when I get home and into civilian life, I find the unions are trying to take away that same democratic freedoms that my brothers and sisters in uniform are dying for around the world.

We have a democratic election process. I say we use it, I say we protect it. Mr. Chairman, I and many other employees like me are in favor of legislation that protects our democratic rights, and we support the Secret Ballot Protection Act. Thank you very much for the invitation to talk to you today.

[The prepared statement of Mr. Riley follows:]

Statement of Tom Riley, Service Sales Representative, CINTAS Corporation, Emmaus, PA

Mr. Chairman and honorable members of the Subcommittee, my name is Tom Riley and I am an employee of Cintas Corporation in Allentown, Pennsylvania. It is my privilege to share with you my experience in a union card-check campaign, so that you can see this from an employee's perspective.

As background, I served my country by enlisting for six years in the U.S. Army, with tours in Kuwait and Korea. I was honorably discharged at the rank of Sergeant E–5 and am proud to have defended my country, particularly in today's troubled times. I believe our democratic freedoms are the foundation of our great country, which is why I am personally troubled by recent union tactics against me, my family and my co-workers.

After serving our country in the military, I went to work for a small family-based grocery store chain in Lansdale, Pennsylvania that was facing a union organizing campaign. The family owners were very clear that the decision of whether or not to be in a union was our choice, and I thought they were a very good employer.

I then got the opportunity to work for Cintas, which has a reputation as a great company. After talking with a number of people and interviewing with the company, I was attracted by their culture and "can-do" attitude that is very much like family. I love my job and the people I work with.

I've worked for Cintas for two years, starting as a Sales and Service Representative. My job is to take care of my customers, keep them happy and meet their needs. We provide our customers with uniforms for their employees, and door mats, restroom supplies and other products for their business. We visit with every one of our customers on a weekly basis, and we all take great personal pride in our work. I was recently promoted to Service Training Coordinator, which means that I help train other SSRs in managing their routes and taking care of customers—in addition to filling in and helping SSRs on their routes from time to time.

After I started to work for Cintas, the union campaign started and union people began showing up, and there have been all kinds of bad things said about my company. The union started sending information to my customers, making all kinds of

allegations about the company—and about the products and services that we provide. Like I said, I take great pride in what I do and I was personally offended by what the union was saying to my customers.

The union distributed notices to other unions, telling them to find ways to quit doing business with us. I had one unionized customer who one day was very happy with our products and my service, and the next day stopped doing business with us. Mr. Chairman, I was paid on commission—as are all other SSRs. This union campaign hurt me and family directly, by taking money out of my paycheck. And it's hurt a lot of other people, too. And this is the same union that, on one hand, says it wants to represent me, while at the same time is taking food off my family's table. We shouldn't overlook the fact that it's the workers who are harmed many times by these union campaigns.

But I draw the line, Mr. Chairman, when union organizers come to my house on a Sunday afternoon, telling my wife that they were with the company and needed to talk with me. When I came to the door they admitted that they were really with the union, and started trying to tell me all sorts of bad things about Cintas. I told them to leave and they eventually did. I called a friend of mine from work, and he said that they had been to his house, too.

What is disturbing is that I have an unlisted telephone number and address—on purpose. I have a wife and two small children, and our privacy is very, very important to me. And I don't like the fact that union organizers are now coming to my door, lying to my wife about who they are and what they want. My wife is now scared whenever anyone knocks at the door, and she shouldn't be—at least, not in America.

I have since learned that the union may have gotten my personal information illegally, by copying down my license plate number and getting information from the state's vehicle-registration files—which we understand is violation of the federal "Driver's Privacy Protection Act." In one case, there is a co-worker who doesn't live with his parents, but the car he drives was registered at his parents' address—and his parents got visits by union organizers. That's why several of my fellow employees and me, along with a number of our family members, have filed a lawsuit against the unions for what we believe they've done in violation of federal law.

And, it appears that the unions have been doing this to other employees in other parts of the country, too. So our lawsuit has been expanded into a nationwide class-action lawsuit on behalf of all Cintas employees so that we can perhaps protect the privacy of other employees and their families.

There have been other situations at our facility that are also troubling. One woman, who works on the late shift, was followed home one night. She purposefully drove past her house, and the car still followed her. She then pulled into her driveway and, before the car drove away, she got the license plate number and called the police. They told her it was a rental car, rented by a union employee using the union's corporate account. It this what union organizing today is all about—following women home at night?

We have a process supervised by the government, so that individuals like me can go into a voting booth and check "yes" or "no" as to whether I want to be in a union. Nobody—either my employer or the union—would know how I vote. And I would be free to vote my heart, not based on whether or not I was concerned about my wife and family, or whether union organizers might continue to bother them at home. Or, not concerned about whether anyone might follow me home at night. Or, because I felt pressured into signing a union card just because I wanted to be left alone.

Mr. Chairman and honorable members of the subcommittee, I enlisted and served in our military because I believe in the democratic freedoms that are the foundation of our country. I fought for, and was willing to die for, these beliefs.

And now, when I get home and into civilian life, I find that unions are trying to take away the same democratic freedoms that my brothers and sisters in uniform are dying for around the world. We have a democratic election process. I say we use it. And I say we protect it. Mr. Chairman, I and many other employees like me, are in favor of legislation that protects our democratic rights, and we support the "Secret Ballot Protection Act."

Thank you for your invitation to talk with you today.

Chairman JOHNSON. Thank you for being here. What branch of the service were you in?

Mr. RILEY. I was in the Army, sir.

Chairman JOHNSON. Good for you. Thanks for your service. We appreciate it. Mr. Raudabaugh, you know, we've heard some conflicting testimony this morning already. I'd like to ask you kind of point blank, in your experience both in practice and on the Board, is it your conclusion that even in this day and age, union organization often relies on intimidation of workers, and could you cite any examples, or do you know of any?

Mr. RAUDABAUGH. To answer that specific question, yes, there are examples. I refer to it in my paper. The H.R. Policy Association brief that I reference gives a long list of cases. Most recently, there are cases pending before the Board that raise this question brought by the courtesy of the representation of the National Right to Work Foundation, which monitors and assists employees in championing their rights to be left alone. And there are cases now coming before the Board yet again raising issues of overreaching, intimidation, threats, coercion.

Chairman JOHNSON. Well, you know, some of the others—Mr. Garren, I think—indicated that employers are not clean all the time, either. Is there something that we need to do to rectify those kind of problems that exist on both sides, I guess?

Mr. RAUDABAUGH. I think that it's absolutely the case. If you look at Board case law, employers violate the law, as do unions. The question here in the free choice act is whether or not we have a secret ballot process to put a piece of paper in a box supervised by a member of the Board regional office.

Just like the gentleman at the end of the table just said, it's not public knowledge how I choose to vote. But your question goes to other issues that the unions have raised and the labor law reformers looked at. I think that calls into question whether the remedies are adequate under the statute. It calls into other issues unrelated, though, to the secret ballot.

Chairman JOHNSON. OK.

Mr. GARREN. May I comment on that, Mr. Chairman?

Chairman JOHNSON. Yes, sir. Please do. Any of you who would like to make a comment on the questions, please do. Go ahead.

Mr. GARREN. Again, I think some of the answers are there in numbers. The number of employer unfair labor practices, including discharges during organizing drives, has gone up enormously, a thousand percent, 1,400 percent, again, depending on the timeframe. There's absolutely nothing comparable, and no one has pointed to anything comparable, in terms of union unfair labor practices. In fact, the number of union unfair labor practices has declined.

Compared to 10, 20, 30 years ago, any point you wish to compare it to, the relative incidence of employer unfair labor practices, destroying employees' right to organize, is growing, and the incidence of union unfair labor practices is shrinking. I think it suggests which problem needs most immediate attention.

Chairman JOHNSON. Well, that's possible, but, you know, those two guys made cases for—against the unions in particular, and I'm sure that he's right. We don't want our guys protecting the freedoms that we enjoy here in this country to have to worry about some union guy coming up and knocking on your door at night. That's not right. You would agree on that, I think.

Mr. GARREN. Well, I would agree very much, Mr. Chairman, and I think it goes directly to the point that unions have no right to campaign in the workplace; that under the statute and its interpretation as we have it now, unions are only permitted to campaign outside the workplace, which means the only real choice we have to give employees any message about the union is their homes. And that is a very bad situation, I agree with you thoroughly that that is bad, and the solution for it is to give unions access to workplaces so we can have a fair campaign process, which we don't.

Chairman JOHNSON. I presume that's been discussed before, hasn't it?

Mr. RAUDABAUGH. Indeed. Indeed. And of course, my good colleague chooses to ignore—we've had the campaign process for 69 years under the Wagner Act. We have pro-union advocates in the workplace. They talk to each other at breaks. They talk before and after work. They go to union organizational meetings. Mr. Garren's own union has been the subject of the Board's case law. I won't go into it, but the fact of the matter, this has gone on for a long time.

The issue before the committee as I understand is, are we going to correct what has troubled the Board and the courts since the discussion in 1947 where this Congress amended Section 9(c) to attach certification to secret ballot election and attempted to parallel and correct Section 9(a), and they did not. And so the courts have been troubled for years over the Section 9(a) reference to selection or designation with the Section 9(c) process.

So what we have right now and what I'm hearing is we have this very antiseptic and very careful election process to ensure that my fellow citizens at this table do not get intimidated and pushed around and everyone else in the workplace knows how they voted. That's the secret ballot process and laboratory conditions.

And then we have, because we haven't addressed Section 9(a), which this bill would do, we allow voluntary recognition, we allow people to go to their homes. We allow all of this. This bill is focusing on one simple, necessary reform. When I and you choose to decide yes or no, why is it your business how I'm voting? Why is it my business how you're voting? The secret ballot is nothing more than an act of supervision.

Chairman JOHNSON. Thank you very much. My time has expired. Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman. I'd like to thank the witnesses for their preparation and their time this morning.

I don't think anybody who listens to Mr. Riley's comments can't be disturbed about the fact that a knock on the door when you're not home and your spouse and children are is disturbing. I've been there. It happens to people in public life a lot, where some constituent knocks on your door and you don't want it.

I did want to ask a question of my fellow alumnus, Mr. Raudabaugh. If a union approached an employer and said ""We don't want to do home visits; what we'd like is to be able to set up shop in the lunch room and make a presentation in the lunch room for the employees, and that's what we're going to do," does the employer under present law have the right to say no, they don't want that?

Mr. RAUDABAUGH. The employer has the right to say no, and no access to third parties, yes.

Mr. ANDREWS. OK. So I think one of the areas of reform we ought to look at as a solution to the very real problem Mr. Riley talked about is modifying that so there is a reasonable right of access to the workplace in a non-coercive way so that we can address that problem.

And you, Mr. Raudabaugh, used the word "antiseptic" to describe the election process a few minutes ago. I read and listened to Mr. Hermanson's testimony very closely, and I took a look at a filing that Mr. Hermanson's union made before the NLRB about some concerns they had about the conduct of the competing union that's trying to organize them, as well as the employer. And I wanted to ask Mr. Hermanson about how antiseptic the process has been in the election that he's going through. And I fully understand that Mr. Hermanson's comments are directed at the competing union as well as the employer. But I wanted to look at these.

Mr. Hermanson, is it correct that organizers from your union were monitored by the employer during the campaign period?

Mr. HERMANSON. I believe we made the charge, but it was dismissed.

Mr. ANDREWS. But do you believe it happened?

Mr. HERMANSON. Well, yeah, because we were denied access to our work area off hours by name.

Mr. ANDREWS. Is it correct that during the campaign period that all formal discipline was rolled back? And I assume that means favoritism, that somebody who's seeing things the way the company wants to see it gets preferential treatment?

Mr. HERMANSON. Well, it was across the board. So that they changed terms and conditions of employment drastically prior to the election.

Mr. ANDREWS. Why do you think the company did that?

Mr. HERMANSON. Probably out of fear that we would win the election.

Mr. ANDREWS. Because they had a desire to see a certain outcome. They wanted you to lose and the no votes to win, for whatever reason?

Mr. HERMANSON. Correct.

Mr. ANDREWS. All right. The filing also says that vacations, sick leave and the quality service program were consolidated to create a new leave policy. Is that pretty much the same problem? Do you think that was done to try to influence the outcome of the vote?

Mr. HERMANSON. Right. Certain people are going to react to certain incentives different ways, so they, you know, rather scientifically, addressed different outlooks, and they addressed it in order to influence the votes, yes.

Mr. ANDREWS. And the pleading also says that employee councils were created that were designated to deal directly with the management. Several employees on the company council were members of the competing union here. What's the point there? Is it that you think that the company tried to show there was a better route to getting what you want than voting yes on your union?

Mr. HERMANSON. Yes. I mean, in my terminology, I would say they tried to create a sham union.

Mr. ANDREWS. You see, this—I don't know the facts of your specific case and the Board's going to rule on that, but I think this at least points out the fact that the antiseptic that we hear that's used to describe this process is not quite as clean as one would think.

And the record as I understand it does show that in at least 25 percent of all organizing efforts, employers are found to have illegally fired employees when those actions are grieved. The record shows that in one recent year, 1998, approximately 24,000 employees won compensation for being unlawfully discriminated against or fired for union activity during an election process.

Now, Mr. Raudabaugh, I don't claim that the case in Mr. Hermanson's case is representative of all cases. But how many cases do you think it's representative of?

Mr. RAUDABAUGH. I'm glad you asked me that question. The antisepsis to which I refer goes to the process of the Board being extremely concerned with putting a stop to the very kinds of things you're talking about, and which an election——

Mr. ANDREWS. Which happened during election process, not a card check process.

Mr. RAUDABAUGH. Yes. But the antisepsis, sir, is allowed by filing objections and bringing it before the Board for the Board to put a stop to it, whereas in a non-election, a nonsupervised election, we go to something much more akin to what we see in the citizenship sector, which is interest groups, blogs and all of the screaming talk shows that we have this season with no regulation of any kind. So in the workplace, the Board's process that this institution put into place in 1935 through Board case law and the development of the conditions for supervising the election, if they want to object to those behaviors, the Board will resolve it.

Mr. ANDREWS. Well, my time is up, but I would just comment that the relevant issue in this bill is the secret ballot. I don't think the secret ballot cures any of those ills that we just talked about right here.

Mr. RAUDABAUGH. No, but it sure protects all of us from knowing how you vote.

Mr. ANDREWS. But it doesn't cure the ills that we just talked about.

Mr. RAUDABAUGH. That's a different issue, unrelated to the secret ballot.

Mr. ANDREWS. It's a very important issue.

Mr. RAUDABAUGH. Absolutely. But it's not the secret ballot.

Mr. ANDREWS. Mr. Hermanson, I'm sure, thinks it's a very important issue.

Mr. HERMANSON. They're not repeat offenders, except for the case of the sham union, because they recognized the service employees union without an uncoerced majority. So in my opinion, they are encroaching upon some very dangerous territory, you know, the strongest remedy available, which is a 10(J) injunction.

Mr. ANDREWS. Has an election been scheduled yet, Mr. Hermanson, in your case?

Mr. HERMANSON. The second election? Not yet.

Mr. ANDREWS. How long have you been waiting?

Mr. HERMANSON. Since February.

Chairman JOHNSON. Mr. McKeon, do you care to question?

Mr. MCKEON. Yes, thank you.

Chairman JOHNSON. You're recognized for 5 minutes.

Mr. MCKEON. Thank you. Mr. Raudabaugh, we've heard a lot about the card check recognition and corporate campaigns to pressure an employee or an employer to agree to them. Now unlike the traditional bargaining process, corporate campaigns center on making the employer look bad in the public eye and often include intensively negative media campaigns, frivolous litigation and picketing???????

Now I understand that the National Labor Relations Act prohibits a union from engaging in certain secondary activity, such as unlawful picketing of employers. But other activities are allowed. This is a pretty thorny area of the law. However, can you explain to us, perhaps in layman's terms, exactly what prohibited secondary activity is and what's permissible? And if we pass legislation prohibiting card checks, do you think we'd see an end to these sort of corporate campaigns?

Mr. RAUDABAUGH. Yes, sir. What we've seen is the development of the neutrality agreement that goes along with the vehicle of card checks as the method for soliciting signatures. If a majority is obtained, then the agreement would be that we will now recognize the union as the representative.

In that neutrality agreement goes along sometimes with issues of agreeing to access or agreeing not to say anything negative. What also goes along with it is a very subtle issue that is only this week going to be now entertained before the Board in the beginning of litigation, which is the violation of Section 8(e) of the statute and the hot cargo agreement where an employer agrees with the union with the wink and the nod that in its dealings with other third party suppliers, for example, that it will only do business with, wink, wink, good corporate citizens. We will only do business with other people who are also agreeing to neutrality, to agreeing to card check recognition. And this issue, this inherent boycott, is an issue that comes up in the secondary process of avoiding doing business with anyone that's not going to agree in advance to the union being allowed to go through and get cards signed and avoid the Board process.

A secondary corollary to that issue is the issue before—that should be before agencies soon, as I understand it, which is whether or not it's a criminal violation for those parties, i.e., the employer and the union, to agree in advance to bypass these procedures because it constitutes a thing of value, which in Section 302 is specifically carved out as being illegal, criminal.

Now what is it that's of value? Well, it's significantly of value if you're going to be able to bypass what apparently is being frustrated here, which is why does it take so long to go through an election? Why does it take so long for the Board to resolve if there's overreaching? If you want to circumvent the due process, that saves money and time. If you want to save the electioneering process and just go up and push people around and get signatures, that saves time. So that's a thing of value. That's also criminal.

Those two issues are very much at the core of the neutrality card check effort to save the time and money, avoid the opportunity for

employers to know that there is a campaign going on, circumvent the opportunity of—the most critical aspect short of the secret ballot is informed choice. How on earth could anyone make a decision to vote Republican or Democrat this fall if you didn't hear, like tonight, the views of the candidates? How could you possibly select one candidate or the other if you didn't hear from them and what their positions are? And this is exactly what's at stake, is trying to get a one-sided presentation, get a guaranteed first contract through the Kennedy-Miller bill of doing something that's unheard of in Federal labor law. Even in national emergency disputes under the Railway Labor Act involving railroads and airlines, we don't cram down third party interest negotiated—or third party arbitrated agreements.

And all of this is going on simply because we have issues of the inability to communicate a message, apparently, unsuccessful organizing efforts. And I would submit all of these issues that Congressman Andrews quite appropriately highlighted should be addressed. But the process exists. It's taken several years to prosecute Enron. Now are we going to get rid of that and just hang them?

The process is there. The process works. And, surely, the United States of America is not going to walk away from the secret ballot.

Mr. GARREN. May I comment on that?

Mr. MCKEON. Thank you very much.

Mr. GARREN. May I comment on that?

Mr. MCKEON. It's up to the Chairman. My time is up.

Chairman JOHNSON. Please do.

Mr. GARREN. Yes. Just to answer your question very briefly, you asked what secondary conduct is and what isn't in terms of corporate campaigns. Unions are not permitted, it's unlawful to coerce or picket or disrupt the business of a secondary. What is permitted is conduct protected by the First Amendment.

And it is scary to me to hear attacks that there's something wrong with unions publicizing what in their opinion are bad labor conditions, such as companies that don't pay a living wage and violate living wage ordinances, or don't provide health insurance, or don't provide pensions. And that's what the core of corporate campaigns are is explaining and exposing bad labor conditions. And in America, that's protected by the First Amendment.

Mr. MCKEON. Would you agree then that in the instance of Mr. Riley that it's OK to go to other companies and discourage them from doing business with his company and taking food off his——

Mr. GARREN. Yes. I think it is absolutely right for UNITE-HERE to go to customers of Cintas and tell them that Cintas does not pay a living wage, even though it's required to by the city of Haywood, California and the city of Los Angeles; that Cintas violates the National Labor Relations Act——

Mr. MCKEON. We have a real difference of opinion on that. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. Mr. Grijalva, do you care to question? And I want to thank you for joining us for a hearing down in Texas. Did you have a good time down there?

Mr. GRIJALVA. Yes, it was a good time. Thank you, Mr. Chairman.

Chairman JOHNSON. You bet. You bet. Go ahead.

Mr. GRIJALVA. Let me, if I may, just a couple of short questions to Mr. Riley, if I may. Just to get more information on your testimony. In your complaint about the union organizers calling you up and coming to your house, as you described, inappropriately and frightening your family, let me ask you about your employer, Cintas. Has the company and the management guys urged you and other employees not to sign cards? Have they called you into meetings to explain to you the pros and cons of unionization?

Mr. RILEY. I just want to let you know, it is in the full statement, that since I've been out of the military, this is my second job. This is my second encounter with union organizations. Both employers have educated us that it is our choice. Not one time did they tell us do not vote union. If anything, I proposed the question, am I allowed to speak out if I oppose it? But at no time did they have any meetings encouraging us not to vote union. They educated us what the union is, what the purpose of a union is, and it's our choice whether or not we want to be unionized or not.

Mr. GRIJALVA. And that same work site, workplace, were union organizers or union representatives had the freedom to come and approach you directly and give you literature and talk to you about their union?

Mr. RILEY. The only issue I have with them coming up freely is, you know, it started out standing in the parking lot as all employees of Cintas enters the facility. And then they start showing up at my house. Again, I have an unlisted address and an unlisted phone number for reasons. How did the union find out where I lived? I'm a very approachable person, but if, you know——

Mr. GRIJALVA. My question was in the workplace.

Mr. RILEY. In the workplace. No, at no time was the union granted permission to come talk to any of us freely.

Mr. GRIJALVA. Granted that you questioned the process by which access to the address, but if a union organizer or a person trying to convince you or give you information about the union is essentially prohibited from making that contact with you at the workplace, a phone call, what other avenue do they have, other than to try to approach you away from the workplace?

Mr. RILEY. Well, if they accidentally bumped into me at the shopping market.

Mr. GRIJALVA. Let's talk about that.

Mr. RILEY. Well, the reason why I say that is because I have proof that there was an unlawful tactic on how to get my address. You know, had they come to my house and I was in the phone book, I would have just assumed that they got a list of employees, maybe, you know, however they would have done that, and then they looked us all up in the phone book and they show up at my house.

Mr. GRIJALVA. Let me—given that, and it's a valid point, given that, let me follow up with another question. Let's say that a local candidate or someone running for Congress is out campaigning and comes and knocks on your door to ask you for you and your wife's vote. Has that happened?

Mr. RILEY. That has happened. That was the intent of them showing up to my house.

Mr. GRIJALVA. OK. And so they asked you for your support. I'm not going to ask you whether you backed them or not, but the fact that they came and knocked on your door, did that—that eliminated your free choice when you went to the ballot box?

Mr. RILEY. No.

Mr. GRIJALVA. Or the support that you gave one candidate or another?

Mr. RILEY. You know, with them showing up to my door, you know, really has no effect on my decision on how I would vote.

Mr. GRIJALVA. Isn't that equivalent to what the union is doing when they came to your door? You've still got the choice to make.

Mr. RILEY. Sure.

Mr. GRIJALVA. OK. And just one thing about the company, and I'm very aware of Cintas. Our caucus is on record dealing with this particular corporation, the Hispanic Caucus, but beyond that, you're aware that there is a class action suit filed on behalf of customer sales representatives such as yourself for nonpayment of overtime of nearly $100 million? They've already settled one on the same—a similar lawsuit in California for $10 million.

I mention that because sometimes that legal avenue is available to the union or to representatives of employees because you can't get redress of these kinds of issues through the process as it's set up by the company. And I mention that.

I yield back, sir. I have no further questions.

Chairman JOHNSON. Thank you, Mr. Grijalva.

Mr. GARREN. Can I make one brief comment on that, Mr. Chairman? It will be very brief.

Chairman JOHNSON. Go ahead.

Mr. GARREN. On the question of union organizers being at the parking lots, we did a lot of that. There were 26 different locations in which the NLRB investigated our charges that Cintas illegally interfered with our attempts to communicate with employees at those parking lots. They found merit in the 26 locations, and Cintas had to enter into a settlement agreement concerning interfering with our communications with employees at their parking lots.

Chairman JOHNSON. Were they trying to use card checks in those?

Mr. GARREN. Yes. Yes, we were.

Chairman JOHNSON. OK. Mr. Norwood?

Mr. NORWOOD. Thank you very much, Mr. Chairman. And I'm going to try to get us focused back on what this hearing is about. And it isn't about whether employers have more time with employees than unions do. It is not about who intimidates who. It is about one simple all- American thing: Do people have the right to join a union and vote secretly so employers and unions don't know how they voted, regardless of who coerces who? If you don't know how an employee voted, you can't fire them. If you don't know how an employee voted, you can't coerce them if you're a union. Now what is wrong with this Congress saying clearly that in America you have the right to vote privately? And it is nobody else's business whether you spend your adult employment life as a union member or not.

My question is for Mr. Garren. In your testimony, we heard a lot about how employers allegedly coerce or intimidate employees during an election campaign. Perhaps someday we'll have a hearing on that subject, or whether employers have greater access to employees than the union does. Maybe we can have a hearing on that.

Now I would probably take a lot of exception, Mr. Garren, to some of your conclusions, and I suspect you and I could probably spend the rest of the day arguing these points. But that's not the point of this hearing. Let's set that aside. My question to you is very basic. Even if everything you've said today is completely true and accurate, why does that mean then an employee should have to give up their right to a secret ballot vote? Employers have so-called, quote, "greater access" to employees when there's a secret ballot election. But they have the same access to employees with a card check. None of that changes. The only difference I see in the card check is that the employee is forced to publicly declare how they're voting.

Why in the world would they have to do that? Why would they have to do that in front of management? Why would they have to do that in front of the union? Why would they have to do that with their co-workers rather than privately casting their ballot for their intention? A man ought to be able to vote his own conscience without interference from me or you. How do you respond to that?

Mr. GARREN. Well, in two ways. One, the Supreme Court in *Gissell Packing* explained very, I think, clearly and cogently that when the election process, when employer opposition to unionization impedes the election process and makes a fair election improbable—not impossible, just improbable—then the best—and these are the words of the Supreme Court—in those cases, the best indicator of majority support of the employees' free choice is authorization cards.

If you look at our industrial landscape today, the overwhelming majority of employees——

Mr. NORWOOD. Just put a comma there just for a second. Are you familiar with that Supreme Court ruling that says that? I'm not a lawyer, so maybe somebody else can help me.

Mr. RAUDABAUGH. Well, it's interesting. Obviously people see things differently. What *Gissell* said was in those instances where you have hallmark violations so serious that a rerun election would not bring about a fair result because of the intimidation being so toxic and so long- standing, then in those very rare circumstances, then we will proceed to order bargaining if there has been at some point an indication of majority.

Now my quick answer—I've watched too many talk shows.

Mr. NORWOOD. I got the time, baby. You just keep talking.

Mr. RAUDABAUGH. My quick answer to Mr. Garren is to raise this *Gissell* issue is—I'm sorry. That's just beside the point. If he wants to focus on the very few cases where appellate courts approve and endorse a Board *Gissell* bargaining order, then we can. But the overwhelming number of cases have nothing to do with that at all, and I would like to come back to your very fair point, which I think summarizes it all, because it's—it would be—this is what was said in *Logan Packing*. It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a

card check unless it were an employer's request for an open show of hands.

I mean, the fact of the matter is, all we're talking about with this bill is we're not talking about overreaching. We're not talking about whether employers or unions are evil or worse than the other. We're only talking about why is it that Congressman Norwood's choice to join a union or not is public knowledge to everyone in the room. I can't conceive why that should be.

Mr. GARREN. May I answer the question, since it was asked of me?

Mr. NORWOOD. Mr. Chairman, I ask unanimous consent for one last minute if no one objects on the other side.

Chairman JOHNSON. You've already gone over, but we'll give you another half. Go ahead.

Mr. NORWOOD. All I really wanted to end up by saying is that I would think that as many Members of this Congress has done in the last—well, in 2001, and in particular many of my friends on the other side of the aisle—have encouraged foreign nations to at least allow their unions to have a secret ballot election because it's fair. The very people who are opposing this, my good friend Mr. Miller, is the one who led the fight to encourage the rest of the world to go to secret ballot elections. Now what's going on here? Thank you, Mr. Chairman.

Mr. GARREN. Mr. Chairman, may I have just a moment to answer the question? Because Mr. Raudabaugh answered it, not me.

Chairman JOHNSON. I'd prefer not to, because we're about to run out of time. We're about to get a vote on the floor of the House, and I'd like to allow some further questioning. Mr. Kildee, you're recognized for 5 minutes.

Mr. KILDEE. Thank you very much, Mr. Chairman. This has been a good cross-section. An attorney from Detroit, my state. Very familiar with Ford Motor Company back in the early days, probably before you were born, though. But I was.

We have a smaller union represented here. We have a large union represented here, and we have someone working for a non-union company who served in the military. By the way, I have two sons who served in the military. One was an airborne ranger. He's still in. I pinned his ranger tag on him when he finished ranger school. It's a pretty tough school.

So this has been a good cross-section, and I think we find those who represent all America, including those who have very recently defended our country.

All of us bring into Congress our own background or our own perspective. Mr. Norwood, who is a very good friend of mine, and he knows that, and I'm a very good friend of his. He brings his perspective in. I bring my perspective in.

When I was growing up, you know, there was certain companies that had certain receptivity to unions and certain companies that had hostility and intimidation, including the Ford Motor Car Company, which now has a great labor record.

But we all bring that background in. I can recall that back in the days my dad was joining the United Auto Workers, albeit in Flint, not in Dearborn, but in Flint, that the method of intimidation then was generally the blackjack. And, you know, Walter Reuther got

pretty well beaten up by blackjacks in the battle of the overpass. Now it's more sophisticated, we know. And I don't mean to—we have generally black briefcases, right? Labor consultants. You go through the telephone book and, you know, you can find your labor consultants who will help you keep a union out, and it's certainly more sophisticated and more humane, I guess, to use the black briefcase rather than the blackjack.

But we do know that there are companies out there that work assiduously to keep unions out. I was born in 1929. I can remember the sit down strike in Flint in 1936, '37. I can remember 1940, the battle of the overpass. So we're always going to have that, some companies being receptive, some being very hostile and using whatever means they can find, fair or foul, to keep the union out.

Having said that, let me address a question here to Mr. Garren. As I understand Mr. Norwood's bill, it would take away the freedom of contract between a union and an employer—specifically, the freedom to agree to a process whereby the employer might recognize a union that represents a majority of its workers. I can understand why unions might want a card check procedure. Are there reasons why employers would want a card check procedure instead of the NLRB elective process?

Mr. GARREN. Yes. I think there are many reasons. One of the things that's very common and virtually inevitable in NLRB election campaigns is an enormous amount of hostility and tension. The Supreme Court talks about that in *Linn* v. *Plantguard,* talks about the vituperation and tension that you have. It's a very disruptive and divisive event. And many employers prefer to avoid that, prefer to have a much more amicable and less painful process. There was a decision I believe out of the Second Circuit enforcing a card check agreement in which both the union and the company had agreed to campaign only in a high-minded manner, and the court commented that it was enforcing it in the interests—because it was part of labor peace, and that both sides had given up things in order to make the recognition process less painful.

So, yes, I think there are plenty of good reasons why employers make sound business decisions to enter into card check agreements, voluntary recognition agreements.

Mr. KILDEE. All right. Thank you, Mr. Chairman. I'll let you move on to the next member.

Chairman JOHNSON. Yeah. Did you want to comment? You acted like you did.

Mr. RAUDABAUGH. Indeed. I appreciate those remarks. I've carried this around since undergraduate days at Penn. This is the National Labor Relations Act. In 1935 in Section 7 it talks about free choice. There's only one right in the statute. It's lovely that unions and it's lovely that management would like to avoid debate and discord. That's wonderful. The point is, the statute only confers a right, and it's not to unions or to management. It's to employees, the people who live in the houses next to us. You and me. It is our right, not the employer's right and not the union's right. And it is the employee's right to choose and freely. And what Mr. Norwood's bill is attempting to do, thank you very much, is to allow me to decide whether I want to vote for this or for that.

Chairman JOHNSON. Mr. Kline.

Mr. KLINE. I want to thank you for your testimony and your answers. Mr.Riley, you're from Allentown, Pennsylvania, at least in some—temporarily. I was born in Allentown. Always nice to see somebody from the old home town. And I want to thank you also for your military service. It means a lot to all of us and to me personally. Like Mr. Kildee, my son is serving in the Army today, and I just want to thank you for that service.

We've had some testimony today about what American democracy is and voting. We have some experience, those of us here at this dais, about American democracy and voting. And it seems to me that at the core of that American democracy is the secret ballot, and it's the reason I'm a co-sponsor of this bill. We've had testimony about coercion and bad tactics and terrible stories, Mr. Riley, from you and from Mr. Hermanson. And I know that there are instances of coercion by management and about unfair practices and ride time for employers and managers.

But I go back to Mr. Norwood's point, and I thank Mr. Raudabaugh for emphasizing this himself, is that this bill, and I just reread it again during the course of this, only addresses how the vote is cast. And it does seem to me that the secret ballot is at the core of our democracy, and it's the least that we can do for those employees, as pointed out, the basic act addresses the rights of employees, and we want to guarantee those rights.

But I'd like to—a question was asked by my colleague, Mr. Kildee, of Mr. Garren. He had some reasons why employers would want to move to a card check system. I appreciate that answer, and Mr. Raudabaugh, I'd like to hear from you of any reasons that you might know of that employers would want such a system that would move away from the secret ballot.

Mr. RAUDABAUGH. I will put my hat on as a management side labor lawyer. I'm not sure I'm aware of any. What comes down to this issue of neutrality is beguiling to me. We assume that debate has to be acrimonious and disruptive and conducted with coercion and intimidation. I don't think that is how we should view this. I know modern day campaigns and talk shows are pretty aggressive, but we can exchange difference of views without beating up on each other.

But what is bothering me here on the whole issue of neutrality is going back to the single right in this statute to employees is to make a choice freely—which goes to Mr. Norwood's secrecy—to make a choice necessarily suggests that I have some information to choose either this or that. And I don't know how you learn with a one-sided presentation from one side or the other. Employees should have the right to hear all views.

Mr. KLINE. Thank you. I'm going to run out of time here in just a moment. It seems to me, though, just another comment, because I can't stop myself, that regardless of whatever coercion there might be on the part of union or employer or fellow workers, the secret ballot defends the employee from the effects of that. Because at the end of the day, neither the employer nor the union nor fellow co-workers know how you voted.

Let's just sort of put this in the scale of the—get an idea of the scale of this. I've got some figures here that show between 1999 and 2003, there were roughly 14,000 elections held by the NLRB.

And of those, there were objections filed in about 3 percent, and about half of those came from employers which would indicate that less than 2 percent came from the unions. Mr. Raudabaugh, can you address that and tell us what you think that says about the process?

Mr. RAUDABAUGH. Yes. I think it's like all things. Most people abide by the law. Most people try to do right. Most people don't run into making violations of the law, and your statistics—those are similar to the ones I've obtained. I presume they come from annual reports from the Board—point out that isn't it a wonderful thing that most people can conduct themselves, abide by the rules, and that these problems are the absolute infinitesimal portion of all cases and all elections, and we have procedures to deal with it.

Mr. KLINE. Thank you, sir. I see my time has expired, Mr. Chairman.

Chairman JOHNSON. Thank you. Mr. Tierney, you're recognized.

Mr. TIERNEY. Thank you. It's interesting to note that Communist Russia used to have secret ballots, too, but they didn't always work out so well. You know, I think that everybody here would say that they're not opposed to the concept of a well-run election with secret ballots, but they also favor allowing the option of having a company and having employees decide if they want to go with the card check or some other way of resolving it voluntarily, and the law absolutely allows for that. And there's good reason for that.

You know, there are good reasons all the way down here. I mean, if you just look at Cintas's conduct, it rivals Wal-Mart in some of these things here. I mean, a hundred violations of labor law in the United States and Canada. People getting $10 million settlements for back pay that was owed them for overtime that they didn't get. Violations of OSHA regulations. A hundred times they've been cited by OSHA for violating Federal health and safety laws, not paying a living wage in violation, being sued by a city for that. We can see why people organize and why there's a need for them to get out there.

But if we look at elections as they're run right now, once you petition for an election, you have on average 43 days to get to that election, but the problem is, there are many ways to continue that period of time, which then opens it up for manipulation and delay. If you go to a regional director's decision, that can be appealed. Those take up to 265 days. The median number of days for representative cases before the Board is 473 days. If the employer then contests that, it could be years.

And so I think that there are many reasons why an employer and employee would want to have another way to go on this situation. Two studies, one in 1998, one in 1999, both said that 36 percent of workers who voted against unions said that they did that because they were pressured by the employer to vote against them.

So, Mr. Garren, I just want to ask you some questions. Are you aware of the 25 percent of employees who have been found to have been illegally fired or disciplined, at least one worker for union activity during organizing campaigns?

Mr. GARREN. Yes. It's certainly our experience that unfair labor practices are the norm. They're the standard.

Mr. TIERNEY. And that's usually in that period when you're waiting for your election, right?

Mr. GARREN. Yes. When people are organizing either to get support to file a petition or after the petition has been filed.

Mr. TIERNEY. And you're aware that 75 percent of employers hired consultants or union busters to help them fight those organizing drives?

Mr. GARREN. I would have guessed more, but if it's 75 percent, I'll accept that figure.

Mr. TIERNEY. Are you aware that 78 percent of employers force employees to attend one-on-one meetings with their own supervisors against the union?

Mr. GARREN. Yes. Certainly the overwhelming majority, in our experience.

Mr. TIERNEY. I think the most egregious case I heard is you saying they're putting people right in the truck and make them drive around with them all day. I think I'd rather have them come visit my wife as long as they weren't threatening her, you know, than be sitting in the truck with them all day and badgering them.

Are you aware that 92 percent of the employers force employees to attend mandatory closed door meetings against the union?

Mr. GARREN. Yes, very well aware of that. And I don't believe those statistics were at all true when the basic structure of the Act and the remedies and election procedures were adopted. And the volume and viciousness of the Vote No campaigning that you've just alluded to is exactly what makes the norm in NLRB elections today an unfair election.

Mr. TIERNEY. And are you aware that there's findings that 51 percent of the companies threaten to close the plant if the union wins the election?

Mr. GARREN. Yes.

Mr. TIERNEY. I mean, that recalls to me the Wal-Mart case where they had the meat packers in their plant decide they wanted to unionize, so they just closed down all those divisions in their entire chain of stores, right?

Mr. GARREN. That's correct.

Mr. TIERNEY. And you're also aware that there's a high finding, 52 percent of the employers threaten to call immigration officials during organizing drives that include undocumented employees?

Mr. GARREN. I have seen many organizing drives smashed to smithereens by that threat—people terrified, and that was the end of any thought of a union.

Mr. TIERNEY. The last figures I have was that in 1998, there were 24,000 cases won by workers who had illegally been discriminated against for engaging in legally protected union activities. Do you have any more recent numbers than that?

Mr. GARREN. No, I don't. But, again, every study I've seen has shown dramatic increases in these numbers. Even studies that set out to show that no, that wasn't the problem, ended up concluding that yes, it was.

Mr. TIERNEY. All right. And I guess I'm going to close with this. In my district the problem is that even after elections are supposedly held and we go through all of this delay, you go through all of these tactics in that situation, 32 percent of the time, elec-

tions by workers to have a union still haven't had their union 2 years later.

Mr. GARREN. Yes, that's correct.

Mr. TIERNEY. Does that figure bear out through the whole country?

Mr. GARREN. I believe the figure is more like 50 percent, the studies I've seen, do not have a union, do not have a contract. And I think it is extremely important to note that in card check voluntary recognition arrangements, the studies show about 96 percent of the time, unions get contracts, workers get contracts. So it is in fact card check that proves to actually deliver the benefits of collective bargaining that workers sought. And the election system does not deliver that benefit.

Mr. TIERNEY. I guess to some of us it's fairly obvious as to why both companies and employees might opt to go some route other than the elective process. And with respect to the elections, I think we have a lot of work to do to make sure that in fact the employees are protected, do get both sides of the story, have fair access to all the information, and then have a fair vote that happens to give them results quickly.

Chairman JOHNSON. The gentleman's time has expired. Ms. Musgrave.

Ms. MUSGRAVE. Thank you, Mr. Chairman. I have some written material that I'd like to submit for the record, if I may.

Chairman JOHNSON. I understand Mr. Norwood has some, also. Without objection, they'll all be entered.

Ms. MUSGRAVE. Mr. Chairman, I'd like to yield Mr. Norwood the remainder of my time.

Chairman JOHNSON. OK. I'm going to yield you 1 minute, because we've got a vote going.

Mr. NORWOOD. I'm going to go fast. Everybody's got studies, and I have one, too. Are you guys aware that 63 percent of the workers agree that stronger laws are needed to protect the existing secret ballot election process and to make sure workers can make the decision about union membership in private without the unions, their employers, or anyone else knowing how they vote? That's a study, too.

I've got another study that says 78 percent of the workers believe Congress should keep the existing secret ballot election union membership.

Everybody's got studies. Mine's going in the record just along with Mr. Tierney. Mr. Tierney says everybody wants to keep the secret ballot election, but my friends, and they are over there, are all on a bill that totally eliminates the secret ballot election. You can't have it both ways.

Last, let's make it clear. This bill does not tell employers how to think. If they want to be unionized, they can say so. They can say so under card check and they can say so under secret ballot. It's not their business nor is it the union bosses' business. This is about the workers deciding do they want to be unionized, Mr. Chairman. That's all this bill is about.

Thank you.

Chairman JOHNSON. Thank you. Ms. McCollum, you're recognized.

Ms. MCCOLLUM. Thank you, Mr. Chair. When Mr. Riley was talking about how he felt intimidated, his right to privacy, I respected that. But I also think, Mr. Riley, that you would be outraged to know that businesses can photograph employees without them knowing it while they're at work while union organizations are going on. That businesses hire people to photograph employees who come out of union meetings that are held in a VFW meeting after hours. And that businesses—and I know this from first-hand experience—businesses do intimidate and threaten employees in one-on-one meetings, and they do ask their supervisors to do that, because I was asked to do that.

So two wrongs don't make a right. But when you feel that your job is threatened, especially with the way the economy is right now, I think employers quite often have the upper hand on the issue. And that's why we need to find a way in which unions in open sunshine can come in and have access without employees feeling that their job might be threatened, the hours that they work might be threatened.

I scheduled commission employees. I had people come in and tell me "make sure that they don't work weekends at big sales." I know exactly what you're talking about from your experience and how you were saying. But it also happens in the reverse.

And Mr.—I'm afraid I'm mispronouncing——

Mr. RAUDABAUGH. Raudabaugh, yes.

Ms. MCCOLLUM. Have you in your legal practice ever worked with an employer and suggested that an employer work with a union in an open fashion to have the union come into a business and have equal access?

Mr. RAUDABAUGH. In very unique settings, in faculty situations or something like that. But I go back to the first year I was on the National Labor Relations Board, and this whole issue of access and so forth had been roundly debated. And Clarence Thomas's first authored opinion was in Lechmere, and talking about property rights and accommodation of rights. And that is what is so interesting about our democracy is the balancing and what is fair. It's a very complex, difficult question.

Ms. MCCOLLUM. Thank you. I understand. Thank you. So the employers' rights—I have a very limited amount of time. So the employers' rights come over the employees' rights to have equal access to information in the same setting. Because they own the property. And that's just the way it is, right?

Mr. RAUDABAUGH. But the public sidewalks, the public airways, the local media, billboards. This case law has been around a very long time in balancing those opportunities.

Ms. MCCOLLUM. Reclaiming my time. I understand that. But I also know from talking to employees going through union organizations—and some of my employees supported the unions and some of them didn't, and I felt very respected that they felt I as in management was a person that they could come to and get an honest answer—felt extraordinarily intimidated that while at work, they knew two things were going on. One, their supervisor, the manager could call them into the office and speak with them for an hour at a time if they wished. And two, that they were being photographed, watched and scrutinized by the same employer if they were seen

talking to someone who was actively trying to get a union organized in the store.

Thank you very much for the time, Mr. Chair.

Chairman JOHNSON. Thank you. I appreciate your patience and your shortness. We've got votes on the floor. I want to thank the witnesses for their valuable time and testimony and thank you for coming here, some of you from a long way.

If there's no further business, the committee stands adjourned.

[Whereupon, at 12:10 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Letter to Junta De Conciliscion, Submitted for the Record by Hon. Charlie Norwood

August 29, 2001

Junta Local de Conciliacion y Arbitraje del Estado de Puebla
Lic. Armando Poxqui Quintero
7 Norte, Numero 1006 Altos
Colonia Centro
Puebla, Mexico C.P. 72000

Dear members of the Junta Local de Conciliacion y Arbitraje of the state of Puebla:

As members of Congress of the United States who are deeply concerned with international labor standards and the role of labor rights in international trade agreements, we are writing to encourage you to use the secret ballot in all union recognition elections.

We understand that the secret ballot is allowed for, but not required, by Mexican labor law. However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.

We respect Mexico as an important neighbor and trading partner, and we feel that the increased use of the secret ballot in union recognition elections will help bring real democracy to the Mexican workplace.

Sincerely, (16 Members of Congress)

GEORGE MILLER, MARCY KAPTUR,
BERNARD SANDERS, WILLIAM J. COYNE,
LANE EVANS, BOB FILNER,
MARTIN OLAV SABO, BARNEY FRANK,
JOE BACA, ZOE LOFGREN,
DENNIS J. KUCINICH, CALVIN M. DOOLEY,
FORTNEY PETE STARK, BARBARA LEE,
JAMES P. MCGOVERN, LLOYD DOGGETT.

http://www.house.gov/georgemiller/

Checking the Premises of "Card Check", Submitted for the Record by Hon. Charlie Norwood

Posted: 7/20/2004

Checking the Premises of "Card Check":

A Nationwide Survey of Union Members and Their Views on Labor Unions

By Zogby International
for the
Mackinac Center for Public Policy

Methodology: Zogby International conducted interviews of 703 union members chosen at random from a Zogby database of self-identified union households nationwide. All calls were made from Zogby International headquarters in Utica, N.Y., from June 25 through June 28, 2004. The margin of error is ± 3.8 percentage points. Slight weights were applied to age, race and gender to more accurately reflect the sample population.

----------**Results**----------

1. For how long have you been a member of a labor union?

Less than 5 years	17%
5 – 9 years	24
10 – 14 years	15
15 – 19 years	11
20 years or more	33

2. In what industry do you work?

Education	32%
Government	21
Manufacturing	11
Construction	11
Services	7
Transportation	6
Energy	3
Wholesale and/or retail trade	2
Telecommunications	2
Mining	1
Janitorial/Custodial Services	1
Textile/Laundry	--
*Other	3

***Other responses:** Arts/Entertainment (19); Newspaper/Publishing (7); Attorney; Horse racing; Office manager *(number in parentheses denotes frequency of similar response)*.

3. Was the union to which you belong organized before or after your current employer first hired you?

The union I belong to was organized before I was hired	93%
The union I belong to was organized after I was hired	7

4. Compared to when you first joined the union, how have your opinions changed towards your union and its leaders in general – are you now much more favorable, somewhat more favorable, somewhat less favorable, or much less favorable toward the union, or have your opinions remained about the same?

Much more favorable	20%	
Somewhat more favorable	12	(More favorable 32%)
Somewhat less favorable	10	
Much less favorable	15	(Less favorable 25%)
About the same	42	

5 – 7. As a union member, which of the following responsibilities do you consider to be …

- *the most important for a labor union?*
- *second-most important for labor unions?*
- *third-most important for labor unions?*

Table 1. Responsibilities of a Labor Union (ranked by % most important)

	% Most important	% Second-most important	% Third-most important
Bargaining for better wages, benefits and working conditions for its members	**73**	15	5
Improving job security	10	**34**	**18**
Protecting against internal union corruption	3	8	**19**
Helping companies be more competitive	3	5	8
Improving the public image of labor unions	2	9	**16**
Engaging in political activities	2	11	10
Protecting the secret-ballot election process for all workers in union membership decisions	1	4	7
Increasing union membership	1	9	11
*Other	2	2	2
Not sure	2	2	6

***Other (Most):** Retirement benefits (2); Supporting its members (2); Collective bargaining; Company safety; Get more people to vote; Going back to representation we had before; Health benefits; Helping to obtain more employment; Protecting us from being sued; Serving as an advocate for the union member; Educating younger members (number in parentheses denotes frequency of similar response).

***Other (Second-most):** Benefits (2); Job security (2); Representation (2); Retirement benefits (2), Being honest with the members; Disability insurance; Health care; Improving education of children; Making more power for the workers; Organized labor; Protecting peoples' rights; Timely contracts (number in parentheses denotes frequency of similar response).

***Other (Third-most):** Fight for union member rights (2); Better health care; Explanation of rights; How the board works with their union members to improve their situation in life; Job security; Keeping educated and informed and strong membership; Making sure elections are clean; Organized labor; Outsourcing our companies to other countries; Policing their own members; Protecting members from discrimination; Providing mutual aid and comfort; Staying out of politics; Wages; Working conditions (number in parentheses denotes frequency of similar response).

8. When you think of how your union dues are spent by your union, which of the following best describes how those dollars are spent?

My dues are mostly spent on helping workers get better pay, benefits, and working conditions	42%
My dues are mostly spent to pay big salaries and perks to people in the union bureaucracy	22
My dues are mostly spent to support political parties or candidates	12
My dues are mostly spent on something else	10
I don't know how my union spends my dues	10
Not sure	4

9 – 10. Do you think your union spends too much, too little, or about the right amount of your dues money …

- *on direct benefits to you and your family, like efforts to secure better wages, benefits, and working conditions?*
- *on things like supporting political candidates and helping them get elected?*

Table 2. Spending Dues on Benefits and Politics

	Too much	Too little	Right amount	Not sure
On direct benefits to				

you and your family, like efforts to secure better wages, benefits, and working conditions	4	43	47	6
On things like supporting political candidates and helping them get elected	34	11	42	14

11. Do you feel your union is doing the things it needs to do to make sure the union is strong and healthy for many more years, or do you feel your union is on the decline?

Doing what it needs to make sure it is strong and healthy	51%
On the decline	44
Neither/Not sure	6

12. Do you believe workers should have the right or should not have the right to vote on whether they wish to belong to a union?

Should have the right	84%
Should not have the right	11
Not sure	5

13. I'm going to describe two ways that workers might be asked to decide if they want to become part of a union, and ask you which of the two ways is most fair. In the first way, a union organizer would ask workers to sign their name on a card if they wanted to be part of a union. The worker would sign his or her name on the card if he or she wanted a union, or the worker would tell the union organizer he or she would not sign the card if he or she did not want a union. In the second way, the government would hold an election in the workplace where every worker would get to vote by secret ballot whether he or she wanted a union. Which way is more fair?

Table 3. Choosing the Fairest Way to Decide on a Union

	%
*The **first** way, which has union organizers ask workers to sign their name on a card if they want a union, or refuse to sign the card if they don't want a union*	41
*The **second** way, which has the government hold a secret-ballot election and keep the workers' decisions private*	53
Neither/Not sure	5

14. Currently, the government is responsible for holding secret-ballot elections for workers who are deciding whether to form a union, and for making sure workers can cast their votes in a fair and impartial manner. Do you agree or disagree that the current secret-ballot process is fair?

Agree	71%
Disagree	13
Not sure	16

15. Do you agree or disagree that stronger laws are needed to protect the existing secret-ballot election process and to make sure workers can make their decisions about union membership in private, without the union, their employer, or anyone else knowing how they vote?

Agree	63%
Disagree	24
Not sure	14

16. Which of the following do you feel should oversee secret-ballot elections for union membership? (The options were rotated in the interview and appear in rank order below.)

Oversight should be given to other outside parties	35%
Oversight should be given to individual unions	27
Oversight should stay with the government	24
Oversight should be given to individual companies	6
Neither/Not sure	8

17. Should Congress keep the existing secret-ballot election process for union membership, or should Congress replace it with another process that is less private?

Keep the existing process	78%
Replace it with one less private	11
Not sure	11

18. Which of the following percentages of workers do you feel should have to vote for a union before that union represents all the workers?

At least one-third of the workers	9%
At least half the workers	27
At least two-thirds of the workers	51
All of the workers	11
Not sure	2

19. Some companies and union organizers want to make a special agreement to unionize the workers if at least half of the workers sign their names on cards saying they want a union, rather than letting all the workers vote in a secret-ballot election overseen by the government. Do you agree or disagree that it should be legal for a company and union organizers to make this special agreement to bypass the normal secret-ballot process to determine whether to unionize the workers?

Agree	26%
Disagree	66
Not sure	8

20. Do think it is fair or unfair for a worker to lose their job if he or she refuses to pay dues to, or support, a union?

Fair	32%
Unfair	63
Not sure	5

# # #

National Right to Work Committee, Memorandum with Fact Sheet, Submitted for the Record by Hon. Marilyn N. Musgrave

National Right to Work Committee

A COALITION OF EMPLOYEES AND EMPLOYERS

MARK MIX, *President*

MEMORANDUM

TO: Employer-Employee Relations Subcommittee
FROM: Mark Mix, President
RE: Written Testimony for Hearing on H.R. 4343
DATE: September 30, 2004

The National Right to Work Committee firmly supports Congressman Norwood's Secret Ballot Protection Act, H.R. 4343.

Big Labor's coercive "card check" organization scheme is corrupt to its core, as we have outlined for the record in the attached fact sheet.

The simple truth is that Big Labor is pushing this "card check" scheme because they consistently lose secret ballot elections that are fairly conducted.

The Secret Ballot Protection Act would do away with this attempt by Big Labor to forcibly organize workers that would otherwise reject their so-called "representation."

National Right to Work Committee
Fact Sheet

The National Right to Work Committee, 8001 Braddock Rd., Springfield, Virginia 22160, (703) 321-9820, (800) 325-7892, www.nrtwc.org

A COALITION OF EMPLOYEES AND EMPLOYERS

July 28, 2004

Big Labor 'Card Check' Schemes Rife With Abuses

Union Bosses' Mistrust of Workers Causes Tactic to Spread

To most Americans, the term "**card check**" means nothing.

But to union bosses, this term potentially means billions of extra dollars collected in forced union dues, above and beyond the $7 billion in forced dues and "fees" that unions already report collecting each year on forms filed with the U.S. Labor Department.

To understand what "card checks" and "card-check organizing" are, one must first understand what Big Labor seeks to achieve through the acquisition of so-called "union authorization cards." Union officials virtually never intend to obtain the power to negotiate pay, benefits, and working conditions merely for those employees who sign such cards.

Under current law, Big Labor bosses may obtain bargaining power over workers who don't sign cards as well as those who do, over union nonmembers as well as union members. That's because federal labor law authorizes union "**exclusive representation**" over private and federal-government employees in all 50 states. So-called "exclusive representation" is more accurately labeled as monopoly bargaining.

- Under Section 9(a) of the 1947 Taft-Hartley Act, a union that has been certified or recognized as the representative of the workers in a bargaining unit has the right of "exclusive representation" for all workers in that unit:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit [that the federal government deems] appropriate for such purposes . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

- The concept of exclusive representation means that the union is the sole bargaining agent for the unit. The employer is prevented from dealing with any other organization in the determination of wages, hours and working conditions for that unit. The employer is also prevented, under most circumstances, from implementing changes in the conditions of work without prior negotiations with the union. Moreover, the individual employee within the bargaining unit, whether a union member or not, is unable to bargain with the employer on his or her own behalf unless union bosses grant their permission.

Card checks empower union bosses to force a business's employees to accept a union as their exclusive bargaining agent solely through the acquisition of signed union authorization cards from employees in a particular bargaining unit. Since union officials themselves keep the signed cards until they obtain the required number, workers have no real privacy rights vis-à-vis Big Labor in this process. And under the watchful eyes of union organizers, workers may be intimidated into signing not just themselves, but all their nonunion fellow employees, over to union-boss control.

When union officials seek the power to bargain with a business only on behalf of those employees who choose to join the union, it need not be determined whether pro-union workers constitute a majority.

As the U.S. Supreme Court has made clear in 1938's *Consolidated Edison* decision and in subsequent rulings, nothing in federal law bars either a minority or a majority union from seeking and obtaining employer recognition as a members-only bargaining agent.

In recent decades, however, union officials have only very rarely exercised their members-only option. Instead, virtually all union organizing drives focus on obtaining bargaining privileges over nonmembers as well as members. The National Right to Work Committee has long favored amending federal labor law to guarantee the individual worker's freedom to bargain on his or her own behalf, regardless of coworkers' union status.

But as long as federal law authorizes union officials to acquire monopoly-bargaining power, they should at least have to clear the hurdle of a secret-ballot vote in order to get it. Congress should certainly not make it easier for Big Labor to deny employees the opportunity to bargain for themselves by endorsing the expansion of card-check organizing.

Card checks frequently go in tandem with misleadingly named "neutrality agreements," which typically require employers to help union officials secure monopoly-bargaining power.

A **neutrality agreement** is actually a contract between a union and an employer under which the employer agrees to *support* union officials' attempt to organize its workforce. Although these agreements come in several different forms, common provisions include:

- **Gag Rule:** Far from promoting employer "neutrality," most neutrality agreements impose a gag order on speech not favorable to the union. The company, including its managers and supervisors, is prohibited from sharing with workers any information that might be construed as negative about the union or unionization, including even uncontested, objective facts. As long as the unionization drive continues, top managers must do everything within their power to ensure employees hear only one side of the story: the version union officers want employees to hear.

- **Preemptive Card Checks:** Most neutrality agreements include a clause in which the company publicly announces in advance that, should over 50% of employees sign union authorization cards, the company will recognize the union as the monopoly-bargaining agent of all employees without first allowing a secret-ballot election. Experience shows that many employees are coerced or misled into signing authorization cards. For instance, employees are often falsely told that authorization cards are merely health insurance enrollment forms, non-binding "statements of interest," requests for an election, or even tax forms. Furthermore, when an employer tacitly declares that it is unconcerned about such abuses and will not investigate alleged instances, employees may well decide that resistance to unionization is futile.

- **Access to Premises:** Neutrality agreements commonly give union officers permission to come on company property during work hours for the purpose of collecting union authorization cards. This differs from the guidelines set by the National Labor Relations Board (NLRB) and the courts, under which an employer has no obligation of, and may actually be prohibited from, providing union bosses with direct access to employees.

- **Access to Employees' Personal Information:** Neutrality agreements frequently require that the company provide personal information about employees to the union, including where employees and their families live. Armed with a company-provided list of the name and address of each employee, union officials can conduct multiple home visits to pressure a targeted employee to sign a union authorization card. Some employees report they cannot stop such intrusive and potentially intimidating visits even by repeatedly telling union organizers they have no interest in signing an authorization card.

- **Captive Audience Speeches:** Employees may be forced to attend company-financed "captive audience" speeches pursuant to neutrality agreements. In these mandatory forums, managers often watch approvingly while union officials put pressure on employees to sign union authorization cards. (However, actual collection of signed cards while managers and/or supervisors are watching is illegal, according to a June 2004 ruling by an NLRB administrative law judge.) Sometimes it is announced that the union and company have already formed a "strategic partnership," making union representation seem a foregone conclusion. In one facility owned by Johnson Controls Inc., it was strongly implied that if workers did not support the union's organizing effort, they risked losing potential job opportunities. (The script for one apparently typical captive audience speech is available at www.nrtw.org/d/jci_captive.htm on the website of the National Right to Work Legal Defense Foundation.

In light of the destruction neutrality agreements wreak on employee-management relations, one may reasonably ask why any employer in his or her right mind would ever agree to sign one. But the sad fact is, employers often sign neutrality agreements under duress, because they believe they have no other way to fend off union picketing, threats, or comprehensive "**corporate campaigns**." (Corporate campaigns utilize many tactics, but typically involve the generation of negative publicity aimed at reducing an employer's goodwill with employees, investors, or the general public.) Some employers are pressured by other employers into signing neutrality agreements. A neutrality agreement itself may require an employer to seek to impose the neutrality agreement on other companies with whom it affiliates.

Moreover, union-label state and local politicians have in recent years passed a number of laws and ordinances mandating that employers who wish to do business with the state or locality must sign card check/neutrality agreements.

In one notorious case, the San Francisco Airport Authority mandated that any concessionaires who wished to lease space at the airport had first to sign a neutrality agreement. However, that regulation was later found to be federally preempted. Its enforcement was enjoined in *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.C. Cal. 2001). Unfortunately, many Big Labor politicians are still attempting to require card check/neutrality agreements as a condition of contracting with the government or of obtaining grants, even though most, if not all, such requirements are barred by federal law.

Recently, union lobbyists have sharply intensified their efforts to promote card-check organizing through federal legislation. The so-called **"Employee Free Choice Act"** (S. 1925/H.R. 3619) would rewrite the rules for unionization drives by allowing union bosses to acquire monopoly-bargaining privileges through card check automatically, without the employer's acquiescence. S. 1925/H.R. 3619 now has 32 Senate and 205 House sponsors.

This cynically labeled measure was introduced in the U.S. Senate by Ted Kennedy (D-Mass.) and in the U.S. House by George Miller (D-Calif.). It may more accurately be referred to as the **Card-Check Forced Unionism Bill**. It would effectively bar employee secret-ballot elections over unionization unless union officials consented to them.

Despite the enormous pressure, alluded to above, that union officials are able to bring to bear on a business to secure its consent for a card-check/neutrality deal, many employers continue to resist selling out employee rights that the law now entitles a business to protect. Under the U.S. Supreme Court's 1974 decision in *Linden Lumber v. NLRB*, an employer "who has not engaged in an unfair labor practice impairing the electoral process" cannot be legally required to recognize a union as employees' monopoly-bargaining agent based on a showing of signed cards alone.

S. 1925/H.R. 3619 would make card checks the norm even where there isn't so much as an allegation of employer misconduct. Consequently, during unionization drives only the views workers express while being monitored by union officials would count.

Union lobbyists arrogantly claim that no one should be concerned about eviscerating employees' freedom to oppose unionization. When union agents intimidate workers, they imply, it's always "for the workers' own good." But the reality is there are many good reasons why a worker might not want to join or be represented by a union.

For example, the latest data from the Bureau of National Affairs (BNA) in Washington, D.C., show that nearly four million private-sector unionized employees nationwide work in sectors for which the mean earnings of unionized employees are *lower* than the earnings of union-free employees. And the BNA data aren't even adjusted for cost of living, which is on average far higher in heavily unionized regions.

Looking at the BNA data alone, many unionized workers in sectors like manufacturing or wholesale and retail trade have good reason to suspect their real take-home pay is lower than it would be if they were union-free. Many others don't like the fact that union bosses seem more interested in militant electioneering than in anything else. There's no logical reason for Congress to pass a measure that destroys employees' opportunity to cast a secret ballot against potentially detrimental union representation.

At the same time it upheld the legality of card checks in 1969's *NLRB v. Gissel*, the U.S. Supreme Court admitted that employees who do not wish to be unionized frequently sign authorization cards as a

result of union-boss misrepresentations, threats, or "group pressure." Union officials themselves agree that the card-check process is fraught with abuses -- when the shoe is on the other foot.

The AFL-CIO hierarchy joined in a 1998 legal brief insisting that unionized employees must be given a chance to cast a secret-ballot vote before the union is decertified, even if most have already signed a petition opposing a union. Echoing *Gissel*, the brief said that a union's workplace status should not be the result of "group pressure."

Clearly, Big Labor is demanding card-check certification out of expediency, not a sincere belief that cards reliably express employees' views.

Any genuine labor-law reform must recognize the fact that the right to join or support a union and the right not to do so deserve equal protection under the law. S. 1925/H.R. 3619 falsely assumes these rights are in conflict, and that purely non-coercive speech or actions that might dissuade a worker from exercising his or her right to join a union somehow violate that worker's right to join a union. Speaking at a May 12, 2004 press conference on Capitol Hill, hotel worker Faith Jetter dismissed such loopy logic out of hand:

> I do not care what decision any employee makes regarding whether or not to be represented by the HERE [Hotel Employees and Restaurant Employees] union, but I think it is each employee's individual choice, to be made with full knowledge of what that choice means. . . .
>
> I would . . . want to hear all sides of the story, not just the union's side.

Ms. Jetter, a housekeeping inspectress for the Renaissance Hotel in Pittsburgh, Pa., was visiting Washington, D.C., in order to express her support for legislation (H.R. 4343) introduced by Congressman Charlie Norwood (R-Ga.) as an alternative to the Card-Check Forced Unionism Bill. H.R. 4343, the **Secret Ballot Protection Act**, is a step toward equal protection of the right to join and the right not to join a union. H.R. 4343 would bar union bosses and (typically intimidated) employers from cutting deals to impose forced representation on employees through card checks.

A total of 11 employees from five states joined Mr. Norwood on the platform as he explained to reporters why he had sponsored H.R. 4343. In his personal statement, a four-year employee of the Freightliner Chassis Corp. in Gaffney, S.C., showed how, as implemented, the card-check system is even more unfair than it is in theory. Materials handler Mike Ivey explained:

> In this process of obtaining the needed signatures, there are a lot of untruths told. Employees are told at off-site meetings that these cards only represent their attendance at these meetings. What they are not told is that these cards are a legally binding document, which states that the employee is pro-union. . . .
>
> Temporary contracted employees are told they will be hired if they sign this card. The union [actually] has nothing to do with the hiring of these employees. Cards of employees who have quit or have been terminated are still included in the count for the union. Where is the fairness there?

The National Right to Work Committee opposes union monopoly bargaining regardless of how it is imposed.

Prohibiting monopoly bargaining while safeguarding employees' freedom to form unions that represent their members only would subject union officials to the same rules that already apply to officers of other private groups and return personal freedom to the workplace.

Since 1991, at least two Free World countries that formerly authorized "exclusive" bargaining, New Zealand and Australia, have switched to systems in which individual workers in unionized businesses may bargain for themselves. Both countries enjoyed above-average growth in production, productivity, and personal income in the years after they made the change.

Some of the potential economic benefits of repealing monopoly bargaining in the U.S. can be seen by contrasting real earnings levels, job growth and other key economic indices in states where monopoly bargaining is most prevalent with indices in states where it is least prevalent.

When interstate differences in cost of living are factored in, the mean weekly earnings in 2001 of employees in the 10 states with the lowest share of private-sector workers under union monopoly bargaining were $683. That's nearly $30 a week, or roughly $1500 a year, more than the mean of $654 earned by employees in the 10 states with the highest share of unionized employees. (The mean earnings data come from the Bureau of National Affairs in Washington, D.C., as adjusted by the "Interstate Cost-of-Living Index" created for the American Federation of Teachers union by Dr. F. Howard Nelson.)

. Low monopoly-bargaining density states enjoy an even greater advantage in economic growth indices than they do in real earnings, as one can see by reviewing the subsequent performances of the states that had the lowest and highest monopoly-bargaining densities in 1992.

Over the next decade, the 10 states with the smallest share of workers under monopoly bargaining enjoyed an aggregate job growth of 27.7%, more than double the 13.5% growth among the states where Big Labor wielded the most monopoly power. For growth in the number of people covered by employment-based health insurance, the advantage for the lowest monopoly-bargaining states was 24.6% vs. 12.5%. The monopoly-bargaining system has, by all evidence, undermined the very economic goals union officials purport to hold near and dear. Imposing more of the same on employees is no solution.

Because it would raise the hurdle union officials need to clear before they can compel union nonmembers to accept unwanted union representation, the Committee supports enactment of H.R. 4343. But more fundamental reforms are also called for. The Committee is also pushing for passage of the National Right to Work Act (S. 1765/H.R. 391), which would bar private-sector compulsory union dues and "fees" in all 50 states, and ultimately for federal monopoly-bargaining repeal.