

**DEVELOPMENTS IN LABOR LAW:
EXAMINING TRENDS AND
TACTICS IN LABOR
ORGANIZATION CAMPAIGNS**

HEARING

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**STATEMENT OF NANCY SCHIFFER, ASSOCIATE GENERAL
COUNSEL, AFL-CIO**

Ms. SCHIFFER. Thank you. Chairman Johnson, Mr. Andrews, members of the Subcommittee, thank you for inviting me here today, and good morning.

My name is Nancy Schiffer. I am associate general counsel at the AFL-CIO, but I'm also a union member. I'm a member of the National Writers Union, which is Local 1981 of the United Auto Workers. I've submitted written testimony. I will not recite that now.

What I'd like to do is give some context to this discussion by describing for you what an NLRB election representation process is like for workers. And I've selected a particular case that I was very much involved with, and I've—and, coincidentally, it involves a case that Mr. Clyde Jacob cited in his written testimony. And so it will be illustrative in that regard, as well.

This employer was a retail store called Hudsons. It was to Detroit what Macy's has been to New York City. It was the store with everything, including the real Santa. But it was sold and things changed, and the workers contacted the UAW about forming a union.

At the first meeting, which was advertised by word of mouth, there were over a hundred workers. An NLRB petition was filed, and the employer apparently, assuming that they would win handily, agreed to have an election. An election was held fairly promptly, and they were quite surprised when in May 1990 the workers chose to unionize by a vote margin of 95 votes out of 453.

This is where I'd like you now to recall Mr. Charles Cohen's statistics about how quickly elections are conducted and how unions are successful about 50 percent of the time, because, in fact, both are true in this scenario. There was a quick election and the union won, and, yet, this case, as you will see, remains a poster child for labor law reform.

The employer challenged the election, and while that case was pending about a year after the election, the employer claimed that it had evidence from one of the union's two initial supporters that the authorization cards used to support the NLRB petition had been forged. These cards had not been used to obtain recognition but only to initiate the NLRB representation process.

The board denied the employer hearing on this issue, but the 6th Circuit Court of Appeals was more receptive. It remanded the issue of possible forged cards back to the Board for a hearing. After the hearing, the judge said, "The whole basis of the company's motion to reopen the record, that is, that the union used forged authorization cards to portray a false picture of majority support is grounded on fabricated evidence."

There were no forged cards, and in the other two cases that Mr. Clyde Jacob cites in his written testimony, there were also no forged cards. The company appealed this decision to the board. They lost. They went back to the 6th Circuit Court of Appeals. They lost. They filed a petition for—with the Supreme Court of the United States. It was denied.

Now, we're in October 1996, and six and a half years after workers voted by an almost 100-vote margin to organize they finally get



to the bargaining table. And what do you suppose happens to workers' support for their union during six and a half years while the employer gains the NLRB process to deny them the benefits of why they voted for a union. They're denied their right to bargain. They become disillusioned. They give up on their supposedly federally protected right to form a union and engage in collective bargaining.

And in this particular case the woman who had been elected to serve as bargaining chair, died of a massive heart attack 2 weeks before we got to the bargaining table for the first meeting.

Meanwhile back on the campaign, a union election held at a nearby mall store was set aside because of employer misconduct in the election campaign. The remedy; the employer had to post a notice to employees that listed these violations and contained a promise not to commit the violations again. That was the remedy; the posted piece of paper on the bulletin board. While that notice was posted during the 60-day notice period, the employer violated almost every single provision of the notice that it had agreed it wouldn't violate again.

So how effective is this as a remedy for workers? How does this protect the worker's free choice? Do workers have a free choice when their employer has threatened to relocate the store if the union wins? This is what happened. The cook in the restaurant was told by her manager—called in to the office and said, "If the union gets in here, you could lose your job. People could be bumped off their jobs and the store can close."

Do workers have free choice when they see that the NLRB process just doesn't work. A sales employee in the deli department was told by her manager that look at what happened at the Hudsons' West Land store. They voted for a union years ago and nothing has happened there at all.

Do workers have free choice when they see that union supporters are being followed, spied on, harassed, and videotaped, and that's what happened in these stores. Employees' supporters were followed into the bathrooms, in and out of the stores, in and out of the parking lot. They were videotaped, sometimes in the store, sometimes in front of the store in the mall. Not all the employers' wrongdoing came to light.

I talked to workers in that campaign that were afraid to testify. They were afraid that they would lose their health insurance benefit for their children. So does the election process—the so-called secret-ballot process provide these workers with a free choice? No, it does not. And does it keep the focus on the workers? No, it doesn't. The only way it keeps the focus on workers is with video cameras and threats and promises and harassment, and this, to me, doesn't seem like the kind of focus the Act intended. Thank you.

[The prepared statement of Ms. Schiffer follows:]

**Statement of Nancy Schiffer, Esq., Associate General Counsel, AFL-CIO,
Washington, DC**

Thank you for inviting me to testify before the Subcommittee today, my name is Nancy Schiffer, I am the AFL-CIO Associate General Counsel.

Although the notices of today's hearing do not specify a pending legislative initiative, it gives me an opportunity to speak to pending labor law reform legislation introduced in the 108th Congress by Representative George Miller and Senator Ed-



ward Kennedy, the Employee Free Choice Act H.R. 3619 and S. 1925, these members have been joined by over 200 of their colleagues as co-sponsors, 180 Representatives and 30 Senators.

The National Labor Relations Act's (NLRA) stated purpose and intent was not simply to permit, but explicitly to encourage worker self-organization for representation in collective bargaining with their employers. Even with the changes to the law that were effected by the Taft Hartley Amendment in 1947, this continued to be our nation's official, primary goal of its labor-relations policy, as reflected in the preamble of the Act. Unfortunately, in recent times the Act has been too often hijacked by employers and their agents who espouse a "union-free environment", to the detriment of working families.

Today U.S. workers have effectively lost their internationally recognized right to form a union for the purpose of self-organization to advance their common interests in the workplace. Yet, just as much as when the NLRA was passed, workers today need and try to form unions to gain an independent voice in the workplace, and to ensure they are rewarded and fairly compensated for their labor, that the gains of their productivity are shared equitably. Indeed, as U.S. workers today face wage depression, they need unions and collective bargaining more than ever, as an ever-increasing number of them are uninsured and must rely on publicly financed health care services because they lack employer provided health care. Similarly, fewer and fewer workers have guaranteed pensions.

Meanwhile, union workers earn 27% more than non-union workers. Union workers are 53% more likely to have medical insurance through their job. Union workers are nearly four times as likely to have a guaranteed pension, according to the U.S. Department of Labor, Bureau of Labor Statistics. And recent surveys show that some 42 million non-union workers would like to have a union.

The bitter reality, however, is that U.S. workers typically face insurmountable employer opposition today when they seek to form a union. According to NLRB statistics, in 1969, the number of workers who suffered retaliation for union activities was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination when they tried to organize a union. Sadly, it has too often become an acceptable business practice to threaten, intimidate and discharge workers who seek to join with their fellow workers for self-representation. And as employers and their union busting consultants know full well, the discharge of one worker has a chilling effect on an entire organizing campaign, when workers have no job protection or recourse.

Furthermore, even without firing workers who try to organize, the well-advised employer knows how to manipulate the NLRB election process in such a way as to turn the concept of democratic free choice on its head. To appreciate how easy this is to do, consider the differences between an NLRB election and an American civic election. First, imagine a regular civic election for political office where only the incumbent has the voter file, and with it, unfettered, unregulated access to the voters. The challenger, meanwhile, must rely on personal introductions outside the boundaries of the state or district involved, or must stand by the border to that district as voters drive by and try to flag them down. Imagine further the election being held the incumbent candidate's party offices, with voters escorted to the polls by the incumbent's staff. Imagine finally that during the entire course of the campaign, the incumbent has sole authority to electioneer among voters during at their place of employment and during their work time, and further has the right to have these voters deported (or fired) if they refuse to listen to this one-sided electioneering.

Needless to say, NLRB elections are conducted in an inherently coercive environment—the workplace. The employer, not the union, has ultimate power over employees. Only the employer has the ability to withhold wages or grant increases in salary, assign work and shifts, and ultimately discharge workers—the capital punishment of the workplace.

In the end, even when conducted by NLRB staff as professionally as possible, elections under the NLRA are not democratic, because the workplace is not democratic.

The Employee Free Choice Act is intended to remove these obstacles and at the same time improve cooperation between employees and employers by eliminating the requirement of mandatory voting when the majority of workers has already expressed its decision to self-organize. Under current laws, it is perfectly legal for a majority of employees to choose union representation without the need for an election; however, as it now stands, their employee has the right to veto their decision, absent an NLRB election. In civil society we regularly encourage participation and membership in other organizations: book and sporting clubs, religious organizations, and advocacy groups which further our collective and individual interests. In keeping with one long-declared federal policy of encouraging workers to organize and



bargain collectively, we should make it no more difficult for them to form labor unions.

The Employee Free Choice Act would restore the original intent of our nation's public policy under the National Labor Relations Act by doing three things.

First, the legislation would provide for majority verification of a union when employees express their desire by signing authorizations. When the NLRB finds that a majority of employees have signed authorizations, their employer would be required to recognize and bargain with the employees' union. This procedure, commonly known as "card check" has always been legal under the NLRA. However under current law, private sector employers can insist on an NLRB-supervised election process, even after a majority of workers have demonstrated their desire by signing authorizations. Majority verification through authorizations is more democratic than NLRB elections, because it requires a true majority of the eligible voters. In NLRB elections, like political elections, there is no guarantee that all who are eligible to vote will vote. Under majority verification the workers must show that a majority of workers have signed authorizations.

In an NLRB election, which can often take several months or more, the employer is free to wage a campaign where employees are intimidated, threatened, spied upon, harassed, and—in a quarter of all cases—fired, in order to suppress the formation of a union. No less an authority than Human Rights Watch finds that the fundamental human right of America's workers to form unions is seriously infringed upon as a result. The Employee Free Choice Act will enable workers to form unions without going through the meat-grinder of an NLRB election campaign, once a majority of workers sign authorizations demonstrating their desire to form a union.

Second, the Employee Free Choice Act would provide for first contract mediation and arbitration conducted by the Federal Mediation and Conciliation Service (FMCS). Employers who never wanted a union in the first instance too often deny workers the benefits of collective bargaining by refusing to bargain a contract, and current law provides no meaningful remedy. The legislation will give both parties access to mediation and after that, binding arbitration, if a first contract has not been negotiated voluntarily within a reasonable period.

Finally, the legislation would create meaningful penalties for violations of the Act. The bill would not restrict employer free speech, but would ensure the employer speech is not coercive or threatening, or intended to deter employee free choice. Under current law discipline or discharge of workers for union activity, threats to close or move the workplace, harassment and intimidation of workers at "captive audience" or one-on-one meetings with supervisors on work time, interrogation and surveillance of workers suspected of wanting to form a union are all technically illegal under the NLRA. However, there are no real penalties for these and other forms of illegal employer conduct to serve as a deterrent.

For example, the number of instances of illegal discipline or discharge of workers for union activity documented by the NLRB skyrocketed from 1,000 per year in the early 1950s to 15,000–25,000 annually in recent years. In the case of an employer who has been found to have discharged a worker in violation of the Act, the only penalty is back pay—less mitigation for earnings received while the case was pending. On average, for the employer, this means merely a \$3,000 penalty and a cease-and-desist posting. Since employers know they face such an insignificant cost, if they are found to have violated workers rights, violations to thwart organizing campaigns have increasingly become seen as an acceptable cost of doing business.

The Employee Free Choice Act would provide for triple back pay awards to workers found to have been illegally fired. The legislation changes the penalty for threats and other illegal employer conduct from posting a cease-and-desist order in the workplace to fines of up to \$20,000 per infraction. The bill provides for the same kind of timely injunctive relief against egregious illegal employer conduct that employers have enjoyed since 1947 against illegal union conduct.

The Employee Free Choice Act is needed to address a severe violation of human rights: the pervasive denial of America's workers' freedom to form unions and bargain collectively. The harm caused by this denial of fundamental rights is serious, not only for workers and their families but for the entire nation. It suppresses wages, health care and pension coverage, as well as justice and dignity on the job, for union and non-union workers alike. It widens race and gender pay gaps, worsens economic inequality, harms political participation, erodes the safety net, and coarsens our society.

Individual U.S. workers, now more than ever, should have the freedom to join with their fellow workers for self-representation to achieve better wages, pensions and benefits. Employers interference in their employees' decision whether to seek union representation should not be tolerated. In the past decade we have seen significant wage and earning erosion, job loss, and corporate scandals that have dev-



astated worker pensions and job security. It is time to restore the rights of workers to choose to self-organize and join a union for the purposes of collective bargaining. The Employee Free Choice Act would reform the NLRA so that when a majority of workers demonstrate their choice to form a union their representative can be certified by the NLRB without the need for the NLRB election process. The legislation would also guarantee effective and efficient collective bargaining, and create real penalties as a deterrent to unlawful employer conduct. We urge your support of the Employee Free Choice Act, S. 1925/H.R. 3619. Thank you for this opportunity to address the committee.

Chairman JOHNSON. Thank you, ma'am. I appreciate your testimony.

Mr. Jacob, you may proceed. Thank you.

**STATEMENT OF CLYDE H. JACOB, III, PARTNER, JONES
WALKER, NEW ORLEANS, LOUISIANA**

Mr. JACOB. Chairman Johnson and members of the Subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

As you've heard this morning, union authorization cards begin the legal process under section nine of the National Labor Relations Act for a labor union to represent an appropriate unit of employees at an employer. While cards are an integral part of the legal representation process, they should not be final arbiter of employee representation. The circumstances surrounding the solicitation of cards does not insure a creditable process, free of pressure and intimidation, as do government-conducted secret-ballot elections.

Let me relate to you a case example that I believe shows why legislation to require secret-ballot elections is necessary to ensure a private, uncoerced, and creditable legal process for employees to choose whether or not they genuinely want to be represented by a particular labor union.

In May of 2000, a new union federation was formed and headquartered in Houma, Louisiana, and it was called the Offshore Mariners United or OMU. The OMU planned to organize the vessel personnel who work on the boats, which service the offshore oil and gas industry in the Gulf of Mexico and beyond.

The campaign lasted for over 3 years, ending this past summer when the OMU closed its offices. Union cards were solicited from the employees of various boat companies, and one company, Trico Marine Services, Inc., became the principle target of the organizing campaign.

Let me share with you some of the voluntary reports, which employees made about their experiences in the card solicitation process. Some employees when solicited at their homes by union representatives said no to signing a card. Yet, they reported repeated, frequent home visits by union representatives continuing to try to secure their signatures. After eight visits, one vessel officer had an arrest warrant issued against a union organizer.

Another employee reported that union representatives exited their vehicle, approached his home with a video camera, recorded him, which he believed made him a marked man. A vessel captain reported that while he was stationed in Brazil union representatives visited his home, knocked on his door, and when his wife, who



No More Stacked Deck: *Evaluating the Case Against* Card-Check Union Recognition

ADRIENNE E. TATON AND JILL KRISKEY

Much of the management community has long argued against union recognition via “card check,” the presentation to an employer of signed cards authorizing union representation for a majority of employees in a unit. Their core argument, that workers deserve the right to a secret-ballot election, has remained unchanged. But the campaign to oppose these arrangements has recently intensified, perhaps due to the increased forcefulness and success of union efforts to secure card-check and neutrality agreements (whereby an employer agrees to remain neutral during an organizing drive).

The Labor Policy Association (LPA), which published *Employee Free Choice: It's Not in the Cards* in 1998, has been a leader in this effort.¹ This past summer, a House subcommittee held hearings on a bill that would prohibit card-check recognition. Among those testifying in favor of the prohibition were LPA senior vice president Daniel Yager, co-author of *Employee Free Choice*, and Jarol Manheim, a George Washington University professor.

As scholars who have conducted research for several years on neutrality and

card-check agreements (N/CC), we offer an empirical evaluation of the arguments against card check. Whether free choice is “in the cards” is a decision for policy makers. But if policy makers are to deal workers a fair hand on this issue—and many workers would argue that the current situation is far from fair—then they have an obligation to draw from a deck that isn’t stacked. The goal of our research is to bring some empirically grounded, clear thinking to the discussion.²

Neutrality, Card Check, and Corporate Campaigns

Manheim’s written testimony before the House Subcommittee on Workforce Protections emphasizes the link between “corporate campaigns” and N/CC. Manheim identifies himself as an expert on this union tactic, and his testimony argues that “unions decided to marry their campaigns to a tandem of organizing demands—card check and neutrality. . . .”³ In contrast, our interviews with both union and management representatives indicate that corporate campaigns are not a frequently used strategy to secure neutrality and/or card check.⁴

During organizing, the union leverage most often cited by employers is quite old-fashioned—the threat of a work stoppage.

No more than a handful of the agreements we have studied involved cor-



porate campaigns. The union leverage most often cited by employers is quite old-fashioned—the threat of a work stoppage. About one-third of the agreements studied were negotiated within the context of a broader labor-management partnership. In response to union and employee willingness to assist the company in meeting its performance goals, employers agree to an organizing process that is clearly less disruptive of workplace activities than the traditional National Labor Relations Board (NLRB) election process.

When deciding whether or not to agree to N/CC, employers assess the “business case” via the same cost-benefit analysis they use for any union demand. Many employers have refused N/CC demands, and others have successfully bargained “neutrality only” language instead of the card-check arrangements sought by unions.

Employee Rights, Oversight, and Union Abuses

Manheim raises the concern that in deciding whether to enter such agreements employers may be bargaining away employee rights granted by the National Labor Relations Act (NLRA). While employers are bargaining away their *own* rights, there is no evidence of lost workers’ rights. Note also that unions and employers are both waiving their statutory rights with these agreements: three-fourths of the written agreements we analyzed incorporated limitations on union organizing behavior as well as on management. These include union speech limitations, notice requirements, and time limits.

N/CC opponents argue there is a lack of oversight of card-check campaigns as compared with the carefully regulated NLRB election process; Yager, for exam-

ple, told the House subcommittee that card-check campaigns generally have no neutral oversight.⁵ Our data refutes his assertion. A strong majority of the card-check agreements we studied provided for certification by a neutral third party, typically an arbitrator.

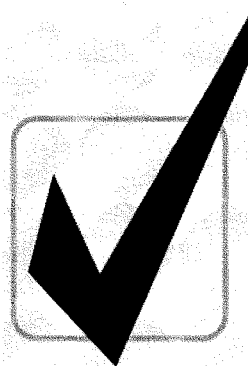
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In *Employee Free Choice* and elsewhere, Yager and his co-authors identify union abuses of the card-check recognition process, which, in their view, the NLRB has failed to address.⁶ One is deliberate union misrepresentation of what the card means. We asked our employer interviewees about this. A majority believed that there had been misrepresentation, but most also reported that misrepresentation is rare, in part because the parties often work together to design the card and/or the material given to employees about the card. Employers combat misrepresentations through workforce education, meetings with union leaders and organizers, grievance arbitration, and NLRB charges.

In its publications, LPA paints a picture of employers so hamstrung by union pressure that they cease to protect their employees.⁷ The NLRB is portrayed as a regulator unwilling to intervene. Our interviews uncovered a different scene. We found only two employers that never respond to allegations of union wrongdoing in the organizing process. In both cases, they had concluded that unionization was desirable in the particular markets in which they operate.

Our research finds that other types of union misconduct involving cards—such as forgery and the use of threats to get employees to sign cards—are extremely rare. As in the case of

Employers combat card-check misrepresentation through workforce education, meetings with union leaders and organizers, grievance arbitration, and NLRB charges.



misrepresentation, employers reported using informal and/or formal means, including arbitration and NLRB complaints, to correct such violations. Employers told us unequivocally that they do not stand by and allow unions to violate N/CC agreements and the law.

Card Check as an Organizing Strategy

Manheim refers to card-check campaigns as “wholesale” organizing, in which “the union needs to convince the company itself, in a sense, to turn over its workers—which is to say, to withdraw from the contest.”⁸ As indicated, though, our research indicates the vast majority of employers agreeing to N/CC are continuing to monitor the process by which employees are making their decision. This process does have more favorable outcomes for unions than NLRB elections: card-check campaigns are more likely to result in union recognition, and a subsequent contract, than NLRB elections. However, the fact that unions win only about 80 percent of the time with these ar-

Employers combat card-check misrepresentation through workforce education, meetings with union leaders and organizers, grievance arbitration, and NLRB charges.

rangements indicates that employees can and do reject unionization in card-check campaigns.

When asked about the impact of the N/CC on organizing tactics, many union respondents indicated that less time was spent on countering management's anti-union message and attacking the employer, and more emphasis was placed on the positive contributions of the union. Beyond that, campaigns were often similar to traditional organizing campaigns. Although N/CC agreements make the hard work of organizing easier, unionists recognize the agreements cannot be viewed as substitutes for that work.

Employer Advantages through Card Check and Neutrality

Finally, our research finds that N/CC organizing has advantages for employers as well as for workers and unions. N/CC lets an employer shape the organizing campaign by bargaining limitations on the union. If house calls are viewed as an intrusion on employee privacy, for instance, then an employer may be able to limit them by negotiating over the organizing process.

N/CC can also improve union-management relations, which may enable management to achieve other bargaining or business goals. After successfully organizing through N/CC, some unions have been willing to accept flexible agreements to help companies in highly competitive or low union density environments.

In addition, N/CC can reduce the impact of an organizing campaign on production. Where unions already add to a business—via partnership, supply of skilled labor, and improved relations with customers, among other things—the negotiation of a N/CC agreement may pave the way for business improvements to continue without the disruption of a traditional campaign. Indeed,

Neutrality and card-check agreements can pave the way for business improvements.

organizing processes negotiated by unions and management currently offer the best chance for employees in any setting to determine whether to form a union without disrupting productive workplace activities.

context given the well-known data on unfair labor practices, particularly illegal discharges, by employers. Indeed, these abuses are what motivate use of N/CC agreements in the first place.

8. Manheim, 2002.

NOTES

1. Yager, D. V., T. J. Baril, and J. J. LoBue. 1998. *Employee Free Choice: It's Not in the Cards*. Washington, DC: Labor Policy Association.
2. The assessment in this article is based on two phases of research. The first, which led to an article published in 2001, included an analysis of interviews with union representatives about their experiences negotiating and organizing under N/CC. It also incorporated a review of the language of over one hundred agreements provided by the interviewees. In the second phase—which produced results presented at the Michigan State University/AFL-CIO Workers' Rights Conference in October 2002—we interviewed employers involved in thirty-four of the aforementioned agreements. See Eaton, A. E., and J. Kriesky. 2001. "Union Organizing Under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, Vol. 55, no. 1, pp. 42-59.
3. Manheim, J. Testimony before the House Education and the Workforce Committee, Subcommittee on Workforce Protections, July 23, 2002.
4. We do not share Manheim's concerns about corporate campaigns. However, the point here is that those concerns are not particularly relevant to the debate on card-check agreements.
5. Johnson, Fawn H. 2002. "Rep. Norwood Calls for Prohibition of Card-Check Union Certification." *Bureau of National Affairs Daily Labor Report*, July 24, A41-2.
6. See Yager, D. V., and J. J. LoBue, "Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-first Century," *Employee Relations Law Journal*, Vol. 24, no. 4 (1999), pp. 21-56.
7. Of course, most trade unionists and many industrial relations scholars will scoff at the idea of employers as protectors of worker rights in the organizing



Adrienne E. Eaton

Adrienne E. Eaton is professor of labor studies and employment relations at Rutgers University where she teaches credit and non-credit courses in collective bargaining and industrial relations. She is also editor-in-chief of the *IRRA*.



Jill Kriesky

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