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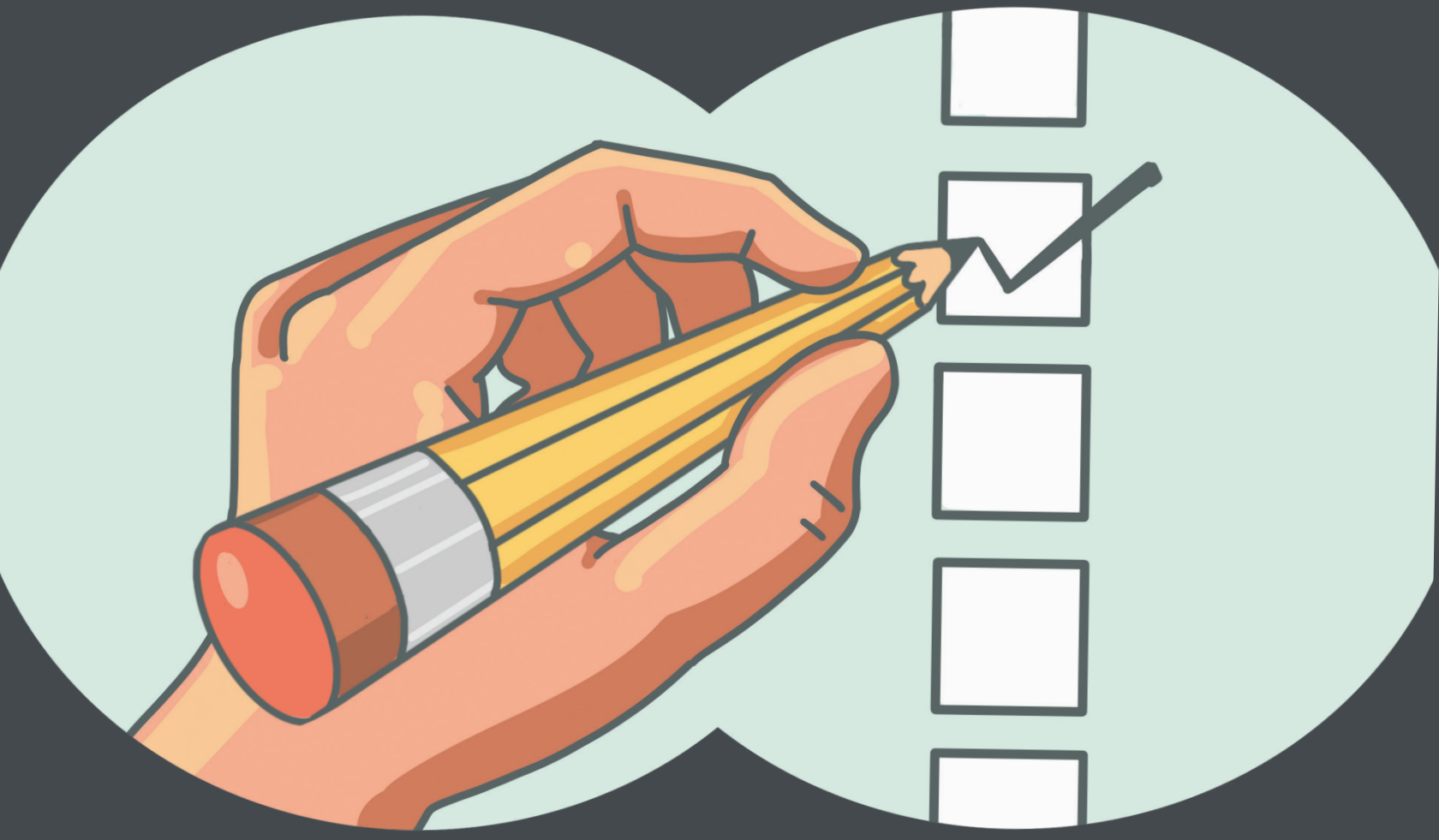
Protecting the Secret Ballot

The Dangers of Union Card Check



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The Mackinac Center for Public Policy

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By F .Vincent Vernuccio

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Introduction*

"Card check" is a form of union organizing that deprives employees of a secret ballot election when deciding whether or not to authorize a union to represent them in a certification election. With card check, unions just need to obtain signatures from a majority of employees in a company to become the exclusive bargaining representative for all workers. Foregoing the protection that a secret ballot provides — the type that voters enjoy when electing their political representatives — card check makes it easier for unions to use coercion, intimidation and deception to bully their way into a workplace.

Unions, through their political allies, have tried several times for over a decade to essentially mandate card check elections. A recent attempt was in 2009 with the ironically named Employee Free Choice Act.[1] EFCA failed, however, in spite of the fact that the political stars appeared aligned with union interests: Democrats, who receive the overwhelming majority of union support, controlled the U.S. House, Senate and White House.[2]

Even though the EFCA failed, unions have continued to push for card check and the latest attempt was introduced in the U.S. House of Representatives on May 2, 2019, and called the "Protecting the Right to Organize Act of 2019," or PRO Act.[3] The PRO Act is a way to get a version of card check into federal law that would impact private employers and employees in all 50 states.†

The PRO Act

Card check takes away the rights of employees to participate in a secret ballot in a free and fair election to decide whether to be represented by a union. The PRO Act's version of card check gives unions two bites at the apple when trying to organize a workplace. Should they fail to gain enough votes in an initial, secret ballot election, the PRO Act would make it easier for unions to organize by disputing the election results and claiming the employer wrongfully interfered. The legislation would require the employer to prove it did not wrongfully interfere in an election, and if it could not, card check could be used to elect and certify the union. Here is the language in the PRO Act that would establish card check in these instances:

> In any case in which a majority of the valid votes cast in a unit appropriate for purposes of collective bargaining have not been cast in favor of representation by the labor organization and the [National Labor Relations] Board determines that the [secret ballot] election should be set aside because the employer has committed a violation of this Act or otherwise interfered with a fair election, and the employer has not demonstrated that the violation or other interference is unlikely to have affected the outcome of the election, the Board shall, without ordering a new

* A significant portion of this paper was originally prepared as an expert report for the Goldwater Institute in the case of National Labor Relations Board v. Arizona, No. CV-11-00913-PHX-FJM, 2012 WL 3848400 (D. Ariz. 2012).

† The federal law referred to here is the National Labor Relations Act. It does not apply to government employees — federal, state or local. It also does not apply to workers in the railroad or airline industries, who are governed by the Railway Labor Act. As a result, this paper and the PRO Act only apply to private sector workers governed by the NLRA and other federal laws. "Jurisdictional Standards" (National Labor Relations Board), https://perma.cc/Z5P2-SB7X.

> election, certify the labor organization as the representative of the employees in such unit and issue an order requiring the employer to bargain with the labor organization […] if, at any time during the period beginning one year preceding the date of the commencement of the election and ending on the date upon which the Board makes the determination of a violation or other interference, a majority of the employees in the bargaining unit have signed authorizations designating the labor organization as their collective bargaining representative.[4]

The PRO Act appears to establish a presumption where the employer has to prove that they did not wrongfully interfere and influence an election. In other words, the burden of proof falls on employers to prove a negative: that they did not interfere in the election. Since there are myriad ways an election could be interfered with, it may require significant effort to demonstrate that none of these possibilities occurred. If the employer cannot show that they did not wrongfully interfere, the NLRB can force a union on private sector employees and employers if the union can gather enough signature cards.

But signatures on cards are not the same as a secret ballot. The right to be free from intimidation and to vote one's conscience in a voting booth is a bedrock principal of American democracy, and workers should not be stripped of this right in union certification elections.

The Current Union Election Process

Under the National Labor Relations Act, a union can organize through a secret ballot election or via card check. The union must turn in cards to the National Labor Relations Board signed by at least 30% of employees voicing their support for a union in order to request a secret ballot election.[5] If a union collects signed cards from a majority of employees (50% plus one), it can then ask the employer and the Board for voluntary recognition via card check.[6] If the employer agrees, then the union is certified as the exclusive bargaining representative without having to win a secret ballot election and can start negotiating a first contract. However, the employer can choose to protect the private choice of their employees and ask for a secret ballot election to determine if the union has sufficient support of the employees.

How this plays out in actual practice is not as cut and dry as this may seem. Unions often bring great pressure on employers to sign what is known as "neutrality agreements." The primary goal of these agreements is to get the employer to recognize the union as the employees' exclusive bargaining representative via card check. In exchange, the union promises a certain level of "labor peace" — not to disturb the workplace as much as they might otherwise in their push to organize workers.[7] If an employer resists signing a neutrality agreement, however, unions often launch what is known as a "corporate campaign" against the employer.

The goal of a corporate campaign is a "death of a thousand cuts," whereby the union, aided by political allies, leads a series of coordinated attacks against the employer in an effort to hurt the business financially and more.[8] These often include personal attack against the owners of the company, trying to damage their reputations in their local community. Unions cease these campaigns only after employers relent and allow the union to organize its workers through card check.[9]

Workers who do not want to join a union can only voice their dissent in a secret ballot election if their employer resists this pressure to recognize card check. Effectively, then, an employer who accepts card check recognition can deny employees this right to a private vote.

If employees are allowed a secret ballot vote, the NLRB will administer the election. Like United States elections for political office, no campaign material is allowed near the voting area and only designated observers from the union and employer are allowed to be present alongside NLRB agents. The final result is determined by the majority of votes cast.[10] If a majority of voters elect to have the union represent them, the employer is obligated to start collective bargaining negotiations with the chosen union.[11]

The NLRB will set the election aside — not recognize the results — "if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice."[12] The NLRB also has other remedies to encourage a fair election, such as reinstatement of employees with back pay if an employer wrongfully dismissed them in an attempt to influence the election and other penalties against either the employer or the union.[13]

Once a union is recognized, either by secret ballot or by card check, neither employees nor other unions may challenge their exclusive representation rights for "a reasonable period of bargaining," not less than six months and not more than one year after bargaining begins.[14]

Card Check Coercion

The most problematic aspect of card check certification is that it requires employees to decide on unionization out in the open, where they can easily be deceived, intimidated and coerced. With a secret ballot, on the other hand, employees are afforded the space to contemplate their decision on their own terms and then make a personal choice in the privacy of a voting booth.

This is not to imply that all unions make use of deception, intimidation and coercion when going through the process of collecting signatures. But this is a reality for many employees. What's more is that some problematic tactics used are considered violations of law and deemed unfair labor practices, but many are permissible under current practice and law.*

In the seminal NLRB case, Excelsior Underwear, Inc., the Board stressed the need for employees to be fully informed and not intimidated, stating: "[W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion … but also from other elements that prevent or impede a free and reasoned choice."[15]

Examples of union deception and intimidation are well documented.† Described below are different types of questionable tactics used by unions in card-check organizing campaigns. Real world examples come from recent NLRB cases, congressional testimony and news reports. The

* Unfair labor practices are defined in 29 U.S.C. § 158.

† For a list of over 100 NLRB cases involving union deception or coercion in obtaining authorization card signatures, see Daniel V. Yager, Testimony before the Subcommittee on Workforce Protections Committee on Education and Workforce, July 23, 2002, Appendix, p. 1-4.

cumulative lesson is that employees need to be protected from these kinds of tactics, and the best protection is a secret ballot election.

Intimidation

Intimidation can take many forms. The most serious threats of intimidation sometimes cannot be traced back directly to a union, yet still work in the union's favor. The way in which unions carry out pressure tactics makes holding them accountable difficult. In fact, courts have offered little protection for workers and have even upheld card check elections where signatures were clearly obtained through threats of violence.

For example, in HCF, Inc. d/b/a Shawnee Manor, the NLRB concluded that statements made by a card solicitor, because they are not directly a "special agent of the Union," are permissible, even if they are threats of violence.[16] In HCF, the Board affirmed an election even though:

> [O]n the day before the election, a bargaining unit employee approached another employee and solicited her to sign a union authorization card. The card solicitor allegedly stated that the employee had better sign a card because if she did not, the Union would come and get her children and it would also slash her car tires.[17]

The reason for the Board allowing this alleged threat was because it agreed "that the card solicitor was not a special agent of the Union" under the precedent set in a previous ruling and "threats of violence made by card solicitors … are not attributable to the Union."[18]

The NLRB precedent holds that "the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union."[19] Except for extraordinary circumstances, employees who solicit cards are special agents of a union "for the limited purpose of assessing the impacts of statements about union fee waivers or other purported union policies" while trying to get employees to sign authorization cards.[20] In other words, a card solicitor who is not considered affiliated with a union, can threaten other employees with violence in an attempt to influence them to sign union authorization cards but that will not be held against the union.

In a secret ballot election, an employee subject to this kind of treatment can simply sign the card in support of an election and rid themselves of a threatening solicitor and then vote "no" in the privacy of a voting booth without fear of reprisal. In a card check certification, however, an employee does not have that option. He must either capitulate and sign the card, authorizing a union he may not want, or risk further harassment, intimidation or even violence.

In the Randell Warehouse of Arizona case, the NLRB found in 2006 that union representatives photographing employees as they took union literature was coercive.[21] However, in 2011, in a different case, the Board decided that this only applied to union employees: "only to union actions, not to the actions of union supporters."[22] Once again, the Board allowed union supporters to engage in intimidating activity as long as they are not direct agents or employees of the union.

In February 2007, the House Committee on Education and Labor's Subcommittee on Health, Employment, Labor and Pensions held a hearing titled, "Strengthening America's Middle Class

through the Employee Free Choice Act." Employees and former union organizers testified to abuses directly undertaken or attempted by unions during the card check process.[23]

Former United Steelworkers union organizer Ricardo Torres testified about how his union wanted him to use intimidation tactics to obtain signed cards. Torres told the committee he quit his job with the union after a senior Steelworkers union official asked him to "threaten migrant workers by telling them they would be reported to federal immigration officials if they refused to sign check-off cards during a Tennessee organizing drive."[24] He noted that "this was the last in a long list of abuses I had observed as a union organizer."[25] Torres described other such tactics:

> Visits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union. In most cases, constant pressure at work and home was enough to make workers break and at least stop talking against the union—neutralizing them, so to speak.[26]

In a secret ballot election, threats of violence, intimidation and harassment have little effect. As noted previously, workers can simply sign the authorization card to get rid of the harasser, then vote their conscience while no one is looking and without fear of retribution for making the "wrong" choice. Employees may take advantage of the secret ballot's protections in this way quite regularly, as it is not uncommon for unions to receives fewer "yes" votes than it received signed cards.*

The U.S. Court of Appeals for the 7th Circuit in 1983 acknowledged:

> Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).[27]

Former UNITE HERE organizer Jennifer Jason echoed Torres's account, telling the Committee, "I was taught to manipulate workers just to get a majority on the cards. I learned that promises made by organizers at the worker's house had little to do with how the union actually functions as a service organization."[28]

She noted that the start of a card check campaign was often called a "blitz," as teams of organizers went "directly to the homes of workers to get cards signed," as a type of "surprise attack on the workers."[29] After participating in these blitzes, Jason testified that she "began to realize that the number of signed cards had less to do with support for the union and more to do with how effective

* Card check usually weighs heavily in favor of the union, so much so that unions rarely settle for a simple majority if they know that there will be a secret ballot election. Unions advise their organizers to wait until they have gotten 60-70% of the workers to sign cards before they submit them to the NLRB. This is because erosion of support is practically inevitable, so the union stands a better chance of winning an election if it goes into it with a substantial margin for error. Organizers know that workers may change their mind or sign cards only so organizers will leave them alone. James Sherk, "Employee Free Choice Act Effectively Eliminates Secret Ballot Organizing Elections" (The Heritage Foundation, Aug. 27, 2008), https://perma.cc/NVW3-RLPZ.

an organizer was at doing their job."[30] This is why, she explained, in a secret ballot election the final vote in favor of a union "is always significantly less than the number of cards actually collected."[31]

At the same hearing, Mike Ivey, a materials handler for Freightliner Custom Chassis Corporation, which the United Auto Workers tried to organize via card check in 2002, testified that the UAW obtained personal information on all of his company's employees. "It wasn't enough that employees were being harassed at work, but now they are receiving phone calls at home," he said. "The union's organizers refuse to take 'no' for an answer. Some employees have had five or more harassing visits from these union organizers. The only way, it seems, to stop the badgering and pressure is to sign the card."[32]

Deception

In the 1966 Excelsior case, the NLRB mandated that employers share their employees' contact information with unions. The Board explained its rationale for this decision:

> Among the factors that undoubtedly tend to impede such a choice [concerning a union election] is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.[33]

The Board was correct to highlight the importance of information in a union election, but card check certification can exacerbate a lack of information in two ways. First, an employee can sign a card authorizing unionization without a full grasp of what that authorization means and what it will cost him, especially with the PRO Act provision allowing the NLRB to set aside an election and accept cards. An employee may sign a card simply hoping for more information and to make a final choice during an election. An employer under pressure from a union, however, can accept that authorization card instead of asking for an election, and if the PRO Act is passed, the employee's secret ballot vote could be more easily cast aside.

Second, a card solicitor can actively deceive an employee to sign the card, either directly or by omission. Unfortunately, the Board's current standard allows many types of deception. Historically, the Board has vacillated on its definition of deception, forcing employers, workers, unions and states to adapt according to the whims of the politically appointed board.

The U.S. Court of Appeals for the 9th Circuit, in NLRB v. Best Products Co., outlines the back-and-forth that continued for decades. The NLRB's current usage of the standard for evaluating misrepresentation in campaign propaganda — of which the 9th Circuit approved — was established in a different case: Midland National Life Insurance Co.[34] This standard holds that elections may be set aside because of misleading information used in an organizing campaign only if the union used "forged documents which render the voters unable to recognize propaganda for what it is."[35]

In cases that use the reasoning established in the Midland case, the Board seems to have assumed extraordinary powers on the part of workers to separate fact from fiction. In Shopping

Kart Food Market, Inc., for example, the NLRB distinguished itself from prior rulings and rejected the idea that "employees needed [the NLRB's] 'protection' from campaign misrepresentations."[36] In 2018, the U.S. Court of Appeals for the 3rd Circuit even upheld an NLRB decision that allowed a union to use fabricated information intended to portray employee support of the union before an election.[37]

Other Board rulings have held that unions may promise wage and benefit increases to workers because "such statements fall within the category of customary and legally unobjectionable pre-election propaganda used by unions in an organizational campaign."[38] And they can do so even when those promises are clearly impossible, because "employees generally understand that a union cannot automatically obtain benefits by winning an election, but must attempt to achieve them through the collective-bargaining process."[39]

No matter how good employees may be at telling fact from fiction, their ability to make an informed decision is undermined when they are provided with misinformation. To make sense of such misstatements, workers deserve time for investigation into the veracity of claims made by unions and their supporters as well as those made by their employer. Card check certification typically does not provide workers the time needed to separate the information "wheat" from the propaganda "chaff." While no one can force an employee to verify the information they've received, a secret ballot election at least allows them more of a chance to do so.

But misinformation is only one way employees can be deceived. In some instances, union representatives will deceive workers about the actual nature of what they are signing with a card check authorization.

For example, at the aforementioned 2007 committee hearing in the U.S. House, Karen M. Mayhew, an employee of Kaiser Permanente, submitted a prepared statement in which she described how the Service Employee International Union tried to organize her workplace using deceptive practices.[40] Kaiser Permanente had entered into a neutrality agreement with SEIU prior to the union's organizing efforts.

In her statement, Mayhew detailed how the SEIU hosted a question and answer session where it told employees that signing cards only meant expressing an interest in receiving more information about the union and that employees would have an election to decide whether or not to bring in the union for representation. "It was made clear to all of us there in attendance that those authorization cards did NOT constitute a vote right there and then for exclusive representation by SEIU," she said. "We were told by the union agents that if 30% of us signed those cards, we would be allowed an election to vote on exclusive representation by the SEIU."[41]

When the union received a majority of the cards, Kaiser Permanente automatically recognized it. As Mayhew told the committee, "When we were told that 50% plus one had signed the union's authorization cards, and that no election would be held, it did not take long for many employees to announce that they would not have signed the cards if they had known that there would be no election."[42]

The misleading statements and other tactics used by the SEIU against Kaiser Permanente employees led Mayhew to file several charges against the union and her employer, called "unfair labor practices." Kaiser Permanente and the SEIU eventually settled the charges, providing that the company revoke the voluntary recognition of the union and stipulating that if the SEIU were to represent Mayhew's department "for the next several years, it would have to obtain such status through a National Labor Relations Board-supervised secret ballot election."[43]

Another example of these types of deceptive tactics comes from Ryan Canney, an employee of Somers Building Maintenance-Siltronic. He alleged that SEIU Local 49, during a card check election at SBM, coerced employees, used out-of-date cards and deceived workers into signing cards which they were told were "information flyers."[44]

SBM agreed to voluntary recognition via card check and the SEIU Local 49 was established as the exclusive bargaining representative. After the majority of SBM employees signed two separate petitions asserting their wish to remain nonunion, Canney, with the help of the National Right to Work Legal Defense Foundation, filed charges against the union with the NLRB. Under a settlement in 2007, SEIU Local 49 was forced to suspend organizing efforts at SBM, and were banned from being recognized through card check for a period of one year.[45]

Both legal and illegal forms of deception can deprive workers of the Excelsior standard of having an opportunity to make a fully informed decision on whether to join a union or not. Forcing employees to make a snap decision during what could be a very stressful encounter with a union organizer, while being subjected to misinformation, undermines the value of their choice.

Corporate Campaigns

Many employers seek to protect their employees' right to a secret ballot election. To get around this, some unions pressure employers to sign neutrality agreements. Among other things, neutrality agreements usually contain a gag order that prohibits an employer from talking to employees about the union, as well as a requirement for the employer to hand over employees' personal information to the union. An employer will generally sign a neutrality agreement to placate a union and avoid a vicious public relations smear campaign. The most important aspect of a neutrality agreement is a requirement for an employer to recognize a union via card check.[46]

If an employer resists, unions often employ what is known as a "corporate campaign," a sustained and wide-ranging assault on a company's reputation that can border on blackmail and extortion.[47] The U.S. Court of Appeals for the District of Columbia Circuit defined corporate campaigns as:

> [A] wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.[48]

In the words of a corporate campaigner, Ray Rogers, "A corporate campaign can best be viewed as a multidimensional campaign that attacks an adversary from every conceivable angle, creating relentless pressure on multiple individual and institutional targets."[49]

In 2011, the SEIU "Contract Campaign Manual" was revealed during the discovery process in a lawsuit. A catering company, Sodexo, had sued the union for racketeering and extortion during its corporate campaign against the company. The manual contains a chapter titled "Pressuring the Employer," which recommends using corporate campaigns to "damage an employer's public image and ties with community leaders and organizations" and to jeopardize "relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds." In some areas, the manual blatantly advises breaking the law, stating, "Union members sometimes must act in the tradition of Dr. Martin Luther King and Mohatma [sic] Gandhi and disobey laws which are used to enforce injustice against working people."[50]

David Bego, president and CEO of Executive Management Services, Inc., told the House Subcommittee on Health, Education, Labor and Pensions how the SEIU ravaged his company through a corporate campaign. Bego would not capitulate to the SEIU's demands for a neutrality agreement, which included handing over his employees' personal information and agreeing to a card check authorization of the union. According to Bego's testimony, an SEIU organizer told him, "Mr. Bego, we enjoy conversation but embrace confrontation. If you do not execute this neutrality agreement, we will begin to target you, your employees and your customers."[51]

In 2016, a jury awarded Professional Janitorial Service of Houston $5.3 million dollars in damages as the result of a corporate campaign.[52] The damages were awarded by a jury in response to a defamation suit filed by PJS against the SEIU for their aggressive corporate campaign which included:

> [P]ublishing defamatory statements about PJS to its customers, tenants of buildings cleaned by PJS, and other third parties. The union published its statements about PJS on the union's website and in flyers, handbills, letters, reports, emails, newsletters, and speeches. Most of the union's statements accused PJS of violating wage-and-hour and other labor laws. The union's admitted goal in publishing these accusations to PJS's customers and others was to cause PJS to lose business to union contractors. According to PJS, it lost more than one dozen accounts due to the union's publications.[53]

There should be a natural limit on how much damage a union would want to do with a corporate campaign. After all, if the business suffers, eventually, so will its employees — whose best interest unions claim to represent. But some unions have demonstrated a willingness to go to the extreme with corporate campaigns against certain employers. Consider the words of Joe Crump, a former local secretary-treasurer for the United Food and Commercial Workers. Writing in the Labor Research Review, Crump bragged:

> After a three-year [corporate campaign], the battle with Family Foods is over. Do we represent the employees? No. The company went out of business. The good news is that some of the stores were purchased by companies already under a Local 951 contract. A couple stores are empty, but I am sure that many of their former patrons are now shopping in unionized stores. Perhaps even more important is the message that has been sent to nonunion competitors: There is no "free lunch" in our jurisdiction.[54]

Some unions would apparently rather see a company go out of business and be forced to lay off its employees than stay nonunion. The UFCW's campaign against Family Foods is similar to one it waged in 2001 against the Arizona-based Basha's supermarket chain. Basha's executives blamed the UFCW for the company being forced to file Chapter 11 in 2009 and closing 10 stores.[55]

The above examples describe the lengths to which unions will go to pressure employers to take away the secret ballot from employees. It is not the employees who seek card check certification, but the union. As former NLRB member Charles I. Cohen, a President Clinton appointee, told the U.S. Senate Subcommittee on Labor, Health and Human Services, and Educators, "[N]eutrality/card check agreements are almost always the product of external leverage by unions, rather than an internal groundswell from unrepresented employees."[56]

Banning the practice of corporate campaigns runs up against First Amendment protections. Absent libel, slander, extortion and blackmail, free speech should not be restricted. Rather than infringing on free speech, the key to ending the practice of corporate campaigns is to take away the primary goal of such campaigns: card check.

Courts Preference for Secret Ballots

Despite the use of card check certification, courts around the country have pointed to the superiority of the secret ballot in union elections. As Cohen testified, "As the Board and the Supreme Court have acknowledged the use of authorization cards to determine majority support is the method of last resort."[57]

The U.S. Supreme Court, in NLRB v. Gissel Packing Co., noted, "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support."[58]

Despite the "acknowledged superiority of the election process," however, the Court also noted that card check was not "totally invalid." It pointed to instances where an employer disrupts the election process and said that card check may be preferred in those cases.

In its Gissel decision, the Court did not address — and is unlikely to have envisioned — legislation to effectively mandate card check or unions' increased reliance on strong-arm tactics, such as corporate campaigns, to obtain card check authorization.

The U.S. Court of Appeals for the 2nd Circuit, in NLRB v. Flomatic Corp., wrote, "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check

of authorization cards collected at the behest of a union organizer."[59] It then referred to a 5th Circuit case that held, "[T]he authorizations on which the union relies did not represent the thoughtful and deliberate action of the employees but were the results of a rash act."[60] Likewise, the 6th Circuit said in United Services for Handicapped v. NLRB, "An election is the preferred method of determining the choice by employees of a collective bargaining representative."[61]

The NLRB has a long history of expressing a preference for secret ballots as well. In 1952, in a case involving Sunbeam Corp., it noted, "This Board has also long recognized that authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract where competing unions are soliciting cards."[62] The NLRB's own publications acknowledge the secret ballot as a right. A voter's guide states, "You are entitled by federal law to vote your free choice in a fair, honest, secret-ballot election to determine whether employees want union representation."[63] An NLRB case manual reads, "The ultimate device by the Board in resolving a valid question concerning representation is the election by secret ballot."[64]

It is clear that courts prefer the secret ballot to card check elections. It is also clear from the Gissel case and its progeny that card check's original intent was to only be used to remedy the most flagrant election abuses and that it was not meant to be used as a common or default organizational process. However, the PRO Act's requirement that employers prove a negative when charged with interfering in an election — effectively defaulting to a guilty verdict — could make card check the most commonly used method to certify unions. Instead of being an exception, card check would likely become the rule.

Further, card check elections are redundant as a remedy to disruptions of the NLRB election process. Remedies can be achieved by enforcing existing unfair labor practices at the NLRB. For instance, the Board has the ability to reinstate and compensate employees whom an employer unlawfully discharged during an election campaign. The Board also has the ability, in extreme cases, to order an employer to bargain with a union without an election.[65]

Problems with Decertification

It is much more difficult for workers to decertify a union — remove it as the exclusive bargaining representative — than it is to establish a new one at a workplace. Once a union is recognized as the collective bargaining agent, employees cannot decertify it or vote for another union for at least one year, per federal law.[66] This is called a "certification bar."[67] A similar "contract bar" applies for the period when the union has a current collective bargaining agreement with the employer, which can last up to three years.[68]

Thus, employees often must wait up to four years after certification before they can even consider decertifying a union. After that, employees have only a 45-day window to file a decertification petition with the NLRB. This window occurs between 60 and 105 days prior to the end of the collective bargaining agreement.[69] If the union contract expires or reaches the three-year mark, employees can file a decertification at any time. However, if the employer and union sign a successor contract, the contract bar starts again and employees may need to wait another three years.

In a case involving Dana Corp., the NLRB reinterpreted the contract bar rule to allow for a 45-day period after the initial certification in which employees could file a decertification petition following a card check certification.[70] If 30% of employees signed the petition, they could file with the NLRB to ask for a secret ballot election. However, in 2011, the Board overruled Dana in the Lamons Gasket Co. case and removed this card-check safety valve.*

On Sept. 22, 2011, Barbara Ivey, an employee of Kaiser Permanente Northwest, told the House Education and the Workforce Committee that in July 2011 her workplace was organized by the SEIU via card check in less than two weeks. She said that she was never presented with a card.[71]

Ivey and her colleagues then collected signatures for a Dana decertification election. After receiving the requisite number of signatures, she applied to the NLRB for a decertification election. Unfortunately, the Board handed down the Lamons Gasket decision between the time of the petition and the time of the election. As a result, Ivey and her colleagues were denied a secret ballot vote. She told the committee, "I was shocked and quite upset. I thought, 'How could this be?' All we were asking for was a fair vote and a private vote, giving everyone a voice."[72]

Without the Dana safety valve, Ivey and other workers who may have been coerced or made an uninformed choice (or not given a choice at all) during a card check campaign will need to wait four years to attempt to decertify the union.

The four-year period in which workers must wait to ask for a secret ballot election for decertification after card check recognition, coupled with the overruling of Dana, makes addressing the problems associated with card check unreasonably difficult.

* Lamons Gasket Co., 357 NLRB 739 (2011). Note: The NLRB is currently reviewing this rule. For more information, see: "NLRB Proposes Rulemaking to Protect Employee Free Choice" (National Labor Relations Board, Aug. 9, 2019), https://perma.cc/A5HZ-67FN.

Conclusion

Card check certification encourages and often includes coercion and intimidation. It can result in rushed, uninformed decisions made by workers, who may lack adequate time to reflect on what is in their best interest regarding unionization. The consequences of these decisions can result in years of affiliation with a group with which employees may not agree and to which they will nevertheless be required to pay dues thanks to other provisions in the PRO Act that would outlaw state right-to-work laws.

The secret ballot, on the other hand, is a basic democratic right. It is the best method for ensuring that all workers are given an equal opportunity to make their opinion count. This fact has been acknowledged repeatedly by courts for decades.

Unions have learned from the EFCA fight about a decade ago that they cannot mount a direct assault on the secret ballot through Congress. However, they continue their efforts to pressure employers to take away the rights of their employees through corporate campaigns.

The PRO Act would effectively empower unions to make use of card check once again, without the need to get employers to sign a neutrality agreement. This will rob employees of their right to a secret ballot and subject them to a greater risk of being intimidated, cajoled and coerced by strong-arm union organizers. If the interests of all workers are kept in mind, the secret ballot for union certification must be preserved.

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