

Testimony of Cynthia L. Estlund
Catherine A. Rein Professor of Law
New York University School of Law
Before the Senate Committee on Health, Education, Labor, and Pensions
March 27, 2007

My name is Cynthia Estlund, and I am a law professor at the New York University School of Law. Since 1989, after several years of practicing labor law at the firm of Bredhoff & Kaiser here in Washington, I have studied, taught, and written about labor and employment law at the University of Texas School of Law, Columbia Law School, and now at NYU. I have published and lectured extensively on the law of the workplace. A significant part of my scholarship has addressed the serious weaknesses of our nation's labor laws and particularly the law of the organizing and representational process.

I. Why Reform is Needed

Congress has not revisited the core of the National Labor Relations Act (NLRA) since 1947, when President Truman was in office, the U.S. economy and its manufacturing base were unrivaled, and nearly one-third of the workforce was represented by unions. Much has changed. The system is now seriously broken, and it needs fixing.

There are many problems with the labor laws, and this bill only addresses a few of them. But it does address one of the major problems with the statute, and that is the law's wholly inadequate response to employers' fiercely aggressive and often illegal response to union organizing drives.

Any discussion of union organizing, and of fair ground rules for determining employees' choices about representation, has to begin with a few facts that the law is not going to change: The employer owns the workplace, runs the business, determines its scope and its location, establishes the rules, and hires and fires its workers. And all those things will remain true if the union wins its bid for representation. Unlike a political election, the incumbent employer that "loses" a representation contest retains its position and power over the voters.

So when workers are told that the employer strongly opposes unionization, what many are bound to hear is that union supporters will be deemed traitors and dealt with accordingly, or that the employer will move or shut down its operations to avoid dealing with a union. Many employers faced with an organizing effort explicitly threaten job loss. About half of employers faced with a union organizing campaign threaten to close or relocate all or part of their business in the

event of a union victory.¹ Employees fear job loss even without any explicit threats. A commission headed by John Dunlop, former Secretary of Labor under President Ford, reported that 40 percent of non-union, non-managerial employees believed that their own employer would fire or otherwise mistreat them if they campaigned for a union.² Unfortunately, those beliefs are not unfounded. Studies have found that between 25 and 30 percent of employers faced with an organizing drive fired at least one union activist.³ A recent study using rather conservative assumptions and methods estimated that about one in five active union supporters was discriminatorily fired during organizing campaigns in 2005.⁴ Whatever uncertainty there may be about the exact numbers, it is safe to say that thousands of employees have been fired in the last 10 years alone for their legally-protected union organizing efforts. Union organizers can no longer assure employees that the law will protect them if they support the union.

What does the law do about it? Of course, the law does nothing unless Board officials can prove a discriminatory motive on the part of an employer who creates and controls nearly all the relevant documents and employs nearly all the relevant witnesses. Even if those hurdles are overcome and an employee is found to have been illegally discharged, often years after the discharge, the employee may be granted reinstatement (rarely implemented when years have gone by) and backpay (minus any wages the employee has earned, or should have earned, in the meantime). In many cases that amounts to almost nothing. The employee does not get traditional compensatory damages or punitive damages, and no fines are assessed. In the meantime, the damage to the organizing effort has long been done, and the law does nothing to repair that.

When comparing these remedies to what is available under other federal antidiscrimination statutes, one can only conclude that the law doesn't regard anti-union discrimination, a violation of federal law since 1935, as all that bad.

One study of the U.S. labor laws for a major international human rights organization concluded that "many employers realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers."⁵ The law's pallid response to illegality has led many employers to regard the prospect of legal sanctions "as a routine cost of doing

¹ Chirag Mehta & Nik Theodore, *Undermining the Right to Organize, Employer Behavior During Union Representation Campaigns*, p. 5 (American Rights at Work, 2005).

² See DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 75 (1994).

³ *Id.* at 70; Mehta & Theodore, *supra* note 1, at p. 9.

⁴ See John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, p. 1 (Center for Economic & Policy Research 2007)

⁵ LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, p. 16 (2000).

business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice."⁶

II. How EFCA Would Help

So what would EFCA do to change this egregious state of affairs? It would not further restrict what employers can do or say. Everything that is lawful now during the organizing campaign would remain lawful under EFCA. Employers would remain entitled to exclude union organizers from the workplace – the only place where workers can be counted on to convene – and to force organizers to buttonhole employees on their way to and from work and to beg for a bit of their precious and pressured time outside of work. Employers would remain entitled to compel workers to attend “captive audience” meetings, *en masse* and one-on-one, as often as they want during the work day, at which their supervisors or managers express opposition to unionization, predict various dire consequences of unionization, and urge workers to oppose the union.⁷ I and other labor law scholars believe that these are serious problems in the law of union organizing, but this bill does not change any of this.

What the bill does do to reform the union representation process is, first, to provide meaningful remedies and, in appropriate cases, penalties for serious unfair labor practices during the organizing process; and, second, to reduce the employer's opportunity to mount an aggressive and coercive anti-union campaign by providing for the option of union recognition on the basis of majority sign-up.⁸

A. Enhanced Enforcement

EFCA's enhanced enforcement provisions are designed to give some teeth to a law whose toothlessness has become an international embarrassment. The trebling of backpay for an employee who suffers anti-union discrimination during the representation and initial bargaining phase operates as a rough proxy for the more generous damages remedies that exist under most antidiscrimination statutes. Given the modest amount of backpay that is typically awarded in an individual discharge case, this is the least that can be expected to deter anti-union discrimination that may be calculated to head off the prospects of unionization and

⁶ *Id.* at 10.

⁷ These meetings are at the center of the union avoidance strategies urged by well-paid consultants. See John Logan, *Consultants, Lawyers, and the 'Union-Free' Movement in the USA since the 1970s*, 33 INDUS. REL. J. 197 (2002). One recent study found that over 90% of employers hold one-on-one meetings, and 87% hold larger mandatory meetings. Mehta & Theodore, *supra* note 1.

⁸ The bill also recognizes that many employers who lose hard-fought organizing campaigns continue their resistance by refusing to bargain in good faith over a first contract. They do so in the knowledge that the law's only response will be an order to bargain some more, and that the employees' response will often be frustration, demoralization, and the erosion of support for the union. In that light EFCA would allow recourse to arbitration to establish the terms of a first contract. The focus of my comments will be on the first two reforms: enhanced enforcement and the majority sign-up process.

collective bargaining that many employers so vehemently resist. For employers who persist, and who engage in egregious or repetitive acts of discrimination and coercion, the bill would authorize the assessment of civil penalties.

EFCA also provides for expedited investigations and injunctive relief in appropriate cases. The statute already recognizes that certain violations of the Act threaten to accomplish their unlawful aims long before the law's ordinary remedial proceedings have a chance to run their course; if those wrongs are to be effectively remedied, it must be done expeditiously and by injunction. As the law stands, however, it is only certain *union* conduct – illegal secondary pressures and recognitional picketing – that trigger that extra measure of urgency.⁹ Once again, the implicit premise of existing law seems to be that employer interference with the basic right to form a union is just not that serious. EFCA would introduce some symmetry to the law's remedial scheme.

The discharge of a union activist during an organizing drive is the quintessential case of a violation that must be remedied quickly if it is to be effectively remedied at all. Too often, the real objective of such a discharge is not just to rid the workplace of one employee but to intimidate his or her co-workers and stall the organizing drive itself. Prompt injunctive relief, subject to all the usual requirements and safeguards of injunctive proceedings, is the only effective answer to such direct and forceful interference with the right to organize.

B. Majority Sign-Up

Nearly all of the controversy surrounding this bill has been generated by the provision for certification of a union not only on the basis of a secret-ballot election but also on the basis of majority sign-up, or presentation of valid authorization cards signed by a majority of workers designating the union as their representative. Under EFCA, elections will still take place, for example, if workers prefer a secret ballot (such that a majority does not sign cards seeking immediate recognition), or if unions and employers agree to proceed by election. But under EFCA, employees and unions would have the option of proceeding instead through majority sign-up.

As a historical matter, the hue and cry surrounding this provision is a bit overwrought. The NLRA has provided for recognition and bargaining on the basis of authorization cards since its inception, although mainly at the option of the employer.¹⁰ Moreover, the law not only allows but requires an employer to

⁹ Sec. 10(l) of the NLRA, 29 U.S.C. §160(l).

¹⁰ Although the law has long required an election for *certification* of a union, for much of the Act's history the Board would nonetheless order an employer to *bargain* with a union that presented a valid majority of authorization cards (unless the employer petitioned for an election to test the union's claim of majority status). It was first in *Linden Lumber* that employers were held to have no duty to bargain with a union on the basis of a card majority (absent independent ULPs that tended to erode majority support). See *Linden Lumber Co. v. NLRB*, 419 U.S. 301 (1974).

withdraw recognition from an existing union if the employer knows, on the basis of valid cards or other evidence, that a majority of employees does not support the union.¹¹ Current law thus allows *employers* to rely on valid authorization cards in lieu of an election to displace an incumbent union, and, if the employer chooses, to recognize a new union. Yet current law does not allow employees and unions to rely on valid authorization cards in lieu of an election to initiate union representation. The implicit premise behind that contrast seems to be that it is far worse to saddle employees with a union when there is a hypothetical possibility that a majority does not want one than it is to deny employees a union when in fact a majority wants one. That implicit premise, to which I will return, has no basis in the policies of the Act, and should be abandoned.

There is also an affirmative rationale for allowing employees and unions to opt out of the formal election process in favor of majority sign-up: The formal election campaign – which typically lasts about six weeks from the filing of the union’s petition but can often be prolonged by procedural maneuvers – has become a gory battle scene in which employers chop away, by legal and illegal means, at the employees’ support for the union.

In principle, the secret ballot, with its strong democratic pedigree, seems unimpeachable. And if the only problem with the electoral campaign were employees’ fear of individual reprisals based on their vote, then the secret ballot might seem to be the obvious answer. But the modern anti-union campaign, as it has been honed in recent years by growing legions of well-paid “union avoidance” consultants, makes the secret ballot a wholly inadequate guarantee against coercion and intimidation. That is true for two reasons.

First, a main objective of the employer’s campaign is to detect employee sympathies well ahead of the election; and, unlike most political incumbents, the employer has motive, means, and opportunity to do that. Although employers may not lawfully “interrogate” employees about their sympathies or engage in “surveillance” during off-duty time, they commonly do so anyway. And the employer can in any event direct supervisors to discover employees’ union sympathies by confronting them day after day with anti-union diatribes and observing their reaction, and by watching who employees talk to at work. It may be possible for some individuals to conceal their union sympathies throughout the campaign, and then to vote “yes” in the election. But it is not normal human behavior, and it is not the nature of an organizing campaign, to maintain the secrecy of employees’ union support up to the day of the election. So the secret ballot is often a fiction, if not a farce, in the context of an electoral campaign process that takes place on the employer’s own turf and under the employer’s determined and omnipresent gaze.

¹¹ See *Levitz Furniture Co.*, 333 NLRB 717 (2001).

Second, the secret ballot does nothing to allay employees' fear of adverse consequences for the workers as a group; and instilling such fear is another tried and true feature of the modern anti-union campaign. The standard employer campaign includes express or implied threats to shut down or relocate the business, predictions of violence and confrontation, of lost business and degraded workplace relations, of refusal to grant concessions or even maintain existing benefits.¹² Most of these threats and predictions are currently legal and will remain so; some of them are illegal and might be deterred by the enhanced enforcement provisions of EFCA if it becomes the law. But there is no reason to believe that employers will stop making exaggerated predictions of disaster and of their own recalcitrance that lead employees to fear the consequences of forming a union. The secret ballot is no protection whatsoever against that kind of intimidation.

Indeed, the employer's ability to bring about many of the consequences that it "predicts" will follow a union victory puts in question the very idea of a fair election in this setting. In a political election, the incumbent may predict dire consequences if the challenger prevails, but if the incumbent loses in our democratic system, that incumbent gives up power and is not around to bring about those dire consequences. In a representation election, by contrast, even if the union wins the election, the employer will be still be the employer, and will still exercise control over the workplace, the employees, and their jobs.

EFCA meets these concerns not by regulating what employers can say about unions any more than current law does, but by seeking to limit the employer's opportunity to mount this aggressive campaign – that is, by narrowing the time period during which the employer is aware of the organizing drive and can mount its counter-campaign. Under EFCA, *employees and unions* – and not only the employer – would have the option of proceeding instead through majority sign-up. And much as the employer now must withdraw recognition from an incumbent union when a majority of employees clearly express that choice through authorization cards or other evidence, the employer would be required to grant recognition to a new union on the basis of a majority of valid cards in favor of the union.

Opponents argue that, without a formal campaign, employees will be deprived of essential information about unions. Information is good. But employers who are committed to avoiding unionization are not especially reliable sources of such information. The best way to learn what it is like to have a union is having a union. That, after all, is how employees learn most of what they need to know about their employer – by working for the employer. It is hard for an applicant to get good information about what it is like to work in a particular firm or department, and even harder to know what will happen if a new manager takes

¹² See Logan, *supra* note 7.

over or if a new product flops. Applicants ask the questions they feel they can ask up front (as employees can with the union). Once on the job, they may learn lots of things they did not know ahead of time, some good and some bad (as they may with the union). Employees, armed with this new information, may decide to stay or to quit; the exit option is equally available to employees who find they do not like having a union. But employees who are dissatisfied with their union – if their views are shared by a majority of their co-workers – have two options that employees dissatisfied with their employers do not: They may tell their employer that they no longer support the union, at which point the employer may or even must withdraw recognition; or, if they are union members, they may vote out the union’s leadership in internal union elections.

Most of the controversy surrounding the proposed use of authorization cards is based on fears of union coercion and misrepresentation in the solicitation of cards. It is certainly possible for that to happen, just as it is possible for employers to coerce employees to sign cards seeking decertification of a union. In either case, the coercion would be illegal and the cards would be invalid, and the Board must pass on those issues before ordering certification or decertification.

But in fact there is very little evidence of union coercion or fraud in securing authorization cards during the very long history of Board reliance on such cards in the representation context. A recent study of both card-check and election-based campaigns found that employees experienced less pressure from any source in card-check campaigns than in NLRB elections, and much less pressure from unions than from management in either kind of campaign.¹³ When it comes to adjudicated cases, there is even less reason for concern about union coercion. The HR Policy Association, an opponent of card-check recognition, identified 113 cases in the 70-plus year history of the Act that it claimed involved coercion, fraud, or misrepresentation in the securing of union authorization cards. A skeptical review of those cases suggested that such misconduct was actually found in only 42 of those cases.¹⁴ Either way, it is a drop in the bucket compared to the thousands of cases of illegal employer discrimination against union supporters every year.

There are two reasons why unions would not generally be expected to

¹³ Based on a 2005 survey of 430 workers from both election and card-check campaigns, Professors Adrienne Eaton and Jill Kreisky found the following: Among all workers in both campaigns, 22% said management coerced them “a great deal” (vs. 6% for the union). In NLRB elections, 46% of workers complained of management pressure, while, in card check campaigns, 23% reported management pressure and 14% reported union pressure. Fewer than 5% of workers who signed a card in the presence of an organizer felt that the organizer’s presence made them feel pressured to sign. Fewer workers in card check campaigns than in election campaigns felt pressure from co-workers to support the union (17% vs. 22%). Adrienne Eaton & Jill Kreisky, *Fact Over Fiction: Opposition to Card Check Doesn’t Add Up*, p2 (American Rights at Work, 2006).

¹⁴ See Testimony of Nancy Schiffer before the House Subcommittee on Health, Education, Labor, and Pensions, Feb. 8, 2007, at p. 9.

coerce and intimidate workers into signing cards: First, unions do not have the kind of leverage that employers have over workers. Second, union coercion and intimidation of employees is a strategy that is likely to backfire. It is no way to build trust among employees and in the union, without which a union can accomplish very little. A union does not own the workplace; it does not decide whether the employees have a job; it has no power at all in the workplace unless a majority of workers support it. Without an uncoerced majority, the union cannot accomplish anything over the long or medium term (and is vulnerable to decertification).

Again, this is not to say that unions never coerce employees to sign cards, but that there is no reason to believe that it is or is likely to become a systemic problem, especially as compared to the documented history of employer abuses during the formal electoral process to which the proposed majority sign-up procedure affords an alternative.

III. Conclusion: Taking the Right to Organize Seriously

There will always be some risk of abuse by both employers and unions, and some uncertainty about whether employees have been able to express their true preferences. The law should aim to minimize those risks and uncertainties on both sides. But current law, and the opponents of this bill, seem to assume that the risk that a union might be foisted upon employees in the absence of an uncoerced majority is much, much worse – orders of magnitude worse – than the risk that employees may be denied representation when a majority of employees wants it.

It is hard to see how the status quo could be justified without that unspoken premise, given the slight and ephemeral evidence of union coercion of card-signers as compared to the overwhelming evidence of employer coercion of union supporters under the existing regime. That seems to be the unspoken premise, as well, behind existing law's reliance on valid cards to command the employer's withdrawal of support for an incumbent union and its refusal to rely on valid cards to command recognition of a new union.

If that is indeed the unspoken premise behind the status quo, it would be quite consistent with another set of facts: Surveys indicate that between 32 and 53 percent of non-managerial workers who don't have union representation wish they did, while only 10 to 13 percent of workers who do have union representation wish they did not.¹⁵ An exceedingly generous assessment of the existing regime is that, in order to minimize the (very small) risk that workers will be stuck with a union in the absence of uncoerced majority support, it virtually guarantees that many more workers will be denied union representation when an uncoerced majority would have chosen it.

¹⁵ RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT, pp. 18, 20 (2d ed. 2006).

But that is not what the law is supposed to do. The law is supposed to protect employees' right to form a union and bargain collectively; that right is every bit as important as the right to refrain from those activities. In a world in which employers, who own and control the workplace and on whom employees are inescapably dependent, vehemently oppose unionization, the law must stand solidly behind employees who seek to exercise that right. The law's failure to do so has contributed in some measure to the drastic decline in union membership in the private sector, and to the well-documented "representation gap" – the wide gap between what employees have and what they say they want in terms of collective representation.¹⁶ EFCA would take a modest step toward enabling employees to narrow that gap by forming a union.

¹⁶ Freeman and Rogers found in the mid-1990s that 63% of employees wanted more influence over workplace decisions than they had, and that 43 to 56% of them believed collective representation was a better way to achieve that than individual action. *Id.* at 12-13. A more recent California survey found that 51% of respondents thought it was very important, and 38% thought it was somewhat important to have more say in workplace decisions. *Id.*