

Let Them Sign Up

When their wishes are clearly written, employees must be free to choose a union.

BY SARAH FOX

The recent announcement that Circuit City is laying off 3,400 sales clerks because they are earning more than starting-level wages is just the latest demonstration of the growing imbalance in power between employers and employees. It also underscores why the Employee Free Choice Act, which seeks to restore to U.S. workers the right to choose collective bargaining to lift long-depressed wages and benefits, may be the most significant economic legislation now pending before Congress.

Last month (“To Be or Not to Be Unionized,” March 26, Page 58), Acting Solicitor of Labor Jonathan Snare joined the chorus of Bush administration officials who have aligned themselves with the U.S. Chamber of Commerce and other business groups opposing this historic legislation.

Like its business allies, the administration has focused its opposition primarily upon bill provisions that would allow the National Labor Relations Board to certify a union on the basis of signed authorization cards from a majority of employees. And like those business groups, the administration purports to object to these provisions not because of their impact on employers, but because of the supposed damage they would do to the ability of employees to freely exercise their rights to organize and bargain collectively under the National Labor Relations Act.

Anyone familiar with the U.S. business community’s history of relentless opposition to workers’ efforts to form unions—and with the billion-dollar “union avoidance” industry it has spawned—can be forgiven for taking corporate America’s new-found concern for the associational rights of employees with a grain of salt. As the Supreme Court observed in *Auciello Iron Workers v. NLRB* (1996), there is, after all, “nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.”

One could also be excused for viewing with skepticism the Bush administration’s own professed commitment to employee

free choice, given the hostility with which it treats the unions to which millions of U.S. workers have chosen to belong.

But what rankles most about the campaign against the bill is its misleading characterization of the majority sign-up process as a radical departure not only from current practice but from basic democratic norms. The headline that accompanied Snare’s article reflects the tenor of the attack: “Free people,” it declared, “use the secret ballot, not card check, to choose their representatives.”

Says who? This would be news to our neighbors in Canada, where the labor laws of half of the provinces, as well as the federal government, provide for certification of collective-bargaining representatives through card-check procedures. It would be news to the people of the United Kingdom, where the trade-union recognition process is expressly designed to encourage recognition of unions without resort to a formal ballot procedure. And it would also surprise the millions of people here in the United States who have joined unions through majority sign-up procedures during the 72 years that the NLRA has been in effect.

TWO ROUTES

A government-supervised election is not and has never been the only means to establish majority support for a union. When it enacted the NLRA in 1935, Congress imposed upon employers the obligation to recognize and bargain with representatives “designated or selected” by a majority of their employees, but it did not specify how representatives were to be selected. From the earliest days of the act, there have been two routes by which a union can establish its majority and obtain recognition. Under one route, a union can file a petition for an election with the NLRB. But under the other, a union can simply sign up a majority of the employees and present a demand for recognition directly to the employer.

For the first 30-odd years under the act, the NLRB held that an employer, if presented with a demand for recognition supported by signed authorizations or other convincing evidence of majority support, was required to recognize and bargain with the union.

But in the late 1960s, without any change in the underlying statute, the NLRB began to allow employers the option to refuse recognition and force workers to petition for an election—no matter how strong the evidence of support for the union.

Even under this interpretation of the law, recognition based on a card majority remained perfectly lawful, and it continues to be lawful to this day. The hitch is that the employer gets to decide whether to honor the employees' choice to use the majority sign-up process.

This means that at companies such as Cingular Wireless, where management has made a business decision to accept collective bargaining, workers who opt for union representation can do so through a majority sign-up process. Yet at Verizon Wireless, where management has adopted an aggressively anti-union stance, employees are forced to use the adversarial NLRB election process.

The Employee Free Choice Act would correct this anomalous state by restoring to employees and their representatives, rather than employers, the choice of which method to use to determine majority support for unionization. The proposed legislation would not end elections. It would simply add to the existing provisions an alternative process whereby unions could be certified on the basis of signed authorizations.

RELIABLE CARDS

Snare asserts that “because of widespread coercion of workers” Congress amended the NLRA in 1947 to “eliminate the general use of card check.” And he quotes extensively from a 1967 decision by the U.S. Court of Appeals for the 4th Circuit attacking authorization cards as an unreliable means of determining true employee preference. But he's got his history wrong.

The claim that the 1947 Taft-Hartley amendments disapproved the use of authorization cards was flatly rejected by the Supreme Court in *NLRB v. Gissel Packing Co.* (1969). As the Court pointed out, the Taft-Hartley Congress rejected an amendment that would have limited employers' obligation to bargain only to those unions certified by means of an NLRB election (or already recognized by the employer).

As Snare fails to mention, the 4th Circuit views that he cites on the “inherent unreliability” of authorization cards were also expressly rejected by the Court in *Gissel*. “We cannot agree that employees as a rule are too unsophisticated to be bound by what they sign,” the Court explained, particularly since Congress “[i]n addition to approving the use of cards . . . has expressly authorized reliance on employee signatures alone in other areas of labor relations, even where criminal sanctions hang in the balance.”

As for the claim that cards are “too often obtained through misrepresentation and coercion,” the Court added, that objection “must be rejected also in view of the Board's present rules for controlling card solicitation, which we view as adequate to the task.”

The notion that signed authorization cards are not reliable indicators of employee sentiment is, in any event, belied by current law and practice. As noted, cards are considered perfectly acceptable proof of support for a union—when the employer is willing to accept them.

And notably, at the other end of the process, signed statements

by employees disavowing support for an incumbent union are given conclusive weight as evidence of lack of support. Under current law, when an employer is presented with a signed petition or similar evidence that a majority of workers no longer wish to be represented, the employer is not only permitted but required to withdraw recognition from the union, unless it files its own petition for an election.

In sum, the only circumstance in which the law refuses to give effect to signed statements expressing employees' desires regarding union representation—other than where there is actual evidence of coercion—is when employees seek recognition of a union and the employer decides not to grant it. And that is the anomaly that the Employee Free Choice Act seeks to remedy.

UNDEMOCRATIC RULES

Space does not allow a recital here of the well-developed critique of the modern-day NLRB election process that underlies the drive for the Employee Free Choice Act. This critique not only focuses on undemocratic rules that allow employers to exploit their control of the workplace and power over employees' livelihoods to influence elections; it also looks at the problems inherent in the NLRB's adoption of a political election model for representation elections. This model wrongly casts the choice of whether to deal with an employer on a collective or individual basis as an acrimonious contest between the union and the employer. (A summary of that critique can be found in the House Education Committee report on the bill, available at www.thomas.gov.)

Strikingly, Snare and other opponents of the bill have had very little to say in response, other than to invoke the supposed sanctity of the secret-ballot election as the only appropriate means of choosing whether to form a union.

But the mere fact that an election process ends in a secret ballot does not mean that it is free and fair, if the process leading up to the actual casting of ballots fails to protect voters from undue influence or coercion. And as noted, there is nothing dramatic, new, or undemocratic about using a majority sign-up to choose union representation.

Independent surveys confirm that a majority of nonunion workers would like to have a union in their workplace. The same surveys show that overwhelming majorities of workers who already have unions want to keep them.

Yet our legal system tells workers who have decided to form a union the following: Before we will honor your decision—before we will give it any legal effect—you must first subject yourself to a process that lets your employer use every means at its disposal to pressure you into renouncing that decision. Clearly that system is broken.

Workers should be able to form a union as easily under current law as they can disband a union—by getting together with their fellow employees and demonstrating their choice in writing. And that is what the Employee Free Choice Act is intended to allow them to do.

Sarah Fox is of counsel at Bredhoff & Kaiser in Washington, D.C. She was a member of the National Labor Relations Board from 1996 to 2000.