

Will the Sun Belt Turn Rusty?

THE RESURRECTION AND EXPANSION OF BIG LABOR UNDER THE EFCA

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Labor law has always been resistant to change. Administrations have put their various stamps on the interpretation of labor relations. But fundamental change is coming in the form of the Employee Free Choice Act of 2007 ("EFCA"). The EFCA seeks "[t]o amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations..." The desired effect goal is clear of greater unionization in the U.S. Inherent in this goal are two premises: (1) there are too few union members in America and (2) the methods by which employees can form and join unions is inefficient.

The EFCA, the prescription for these perceived maladies, passed the House of Representatives on March 1, 2007, but stalled in the Senate.¹ President George W. Bush declared that he would veto the EFCA if it ever passed Congress. However, under President-elect Barack Obama and a Democratic Congress, the EFCA will almost certainly be enacted. Senator Obama co-sponsored and voted for the EFCA on June 26, 2007. On March 4, 2007 he declared: "We will pass the [EFCA]. It's not a matter of if, it's a matter of when."² The recession of 2008 and the concomitant urge to create and preserve jobs help to create the climate needed for a leftward lurch in labor law.

Opponents fault the EFCA for (a) streamlining the recognition process *too* much, (b) effectively forcing a collective bargaining agreement ("CBA") on unwilling companies, and (c) bringing unprecedented remedies for unfair labor practices ("ULP"). Legal scholars fault the EFCA for making too radical a change in labor-management relations and undermining the concept of individual choice about unionization.

Even former South Dakota senator and 1972 Democratic Party presidential candidate George McGovern famously broke with his political friends by opposing the EFCA, calling it "a disturbing and undemocratic overreach" that "runs counter to ideals that were once at the core of the labor movement."³ Mr. McGovern worried that the EFCA "may ... disrupt a tried and trusted method for conducting honest elections."

Proponents counter that union membership has been falling since the 1970's. John Wilhelm, of UNITE HERE (a merger of needle trades and hotel unions) declared: "...what we're doing in the labor movement isn't working. There has to be dramatic change."⁴ The existential issue facing unions is how to stop the losses in membership and reverse

¹ The vote to invoke cloture and end filibuster failed on June 26, 2007 because only 51 senators approved.

² *Chicago Tribune*, March 4, 2007.

³ "My Party Should Respect Secret Union Ballots," George McGovern, *The Wall Street Journal* (Aug. 8, 2008).

⁴ Sept. 13, 2004 (http://www.businessweek.com/magazine/content/04_37/b3899001_mz001.htm).

the tide. Differences of opinion among union leaders about how to change the trend are profound. The AFL-CIO split up in 2006 on this very issue; the breakaway Change to Win coalition now focuses on being an “organizing machine.”⁵

However, Big Labor has long sought change in the labor law itself. President-elect Obama agrees; he notes “we should change the law” because employers can follow “the letter of the law” and still prevent unionization even if a majority of workers signed union cards.⁶

Thus, the revolutionary EFCA is very likely to pass in something near to its current form in 2009. All 41 (or 42⁷) Republican senators have to oppose the senatorial device used to end debate and move to a vote, to stymie the EFCA. While a few modifications may be needed to sway moderate Republicans like Maine Senator Collins, the EFCA will almost surely become the law of the land with the card check feature in place.

The EFCA represents a sea change from various iterations of the NLRA.⁸ At no point in time in the 80 years since has American law allowed as easy certification as the EFCA proposes, come as close to mandating a CBA, nor imposed such draconian penalties. Various administrations have swung the pendulum to the left or right in their enforcement and interpretation of the NLRA. The EFCA would take the pendulum out of the clock altogether. A company targeted by a union could no longer rely on traditional strengths:

- A vigorous campaign to sway voters who had previously signed union cards.
- The lack of monetary fines for actions found to have been ULPs.
- An ability to resist entering into any CBA.

Under the EFCA, a company never gets the chance to counter-campaign, must pay multiplied back-pay and \$20,000 fines per ULP, and *will* wind up with an involuntary CBA after mandatory arbitration.

WHERE LABOR MUST GROW

The part of the country where the effects of the EFCA will ripple most are in the 21 Southern and High Plains states with “right to work” laws.⁹ Protected by the Supreme Court’s landmark 1949 decision in *Lincoln Fed. Lab. Union 19129 v. Northwestern Iron &*

⁵ September 27, 2005 statement by James Hoffa at Change to Win Founding Convention, at www.teamster.org.

⁶ *Investors Business Daily*, March 30, 2007.

⁷ Depending on the final result in Minnesota between Norm Coleman and Al Franken.

⁸ Codified at 29 U.S.C. §§ 151-169 (2000). The NLRA passed originally as the Wagner Act in 1935.

⁹ Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

*Metal Co.*¹⁰ and specific language at §14(b) of the NLRA, workers can work under a CBA without joining a union or paying union dues. Union membership has been comparatively low in the “right to work” states. In 2006, only 476,000 (or 4.9%) of 9,751,000 privately-employed workers in Texas were union members.¹¹

There was a time (the high water mark coming in 1953) when more than one-third of all private sector workers in the U.S. were union members, which necessarily shows how unionized the Rust Belt was (and is).¹² To this day, the rates of union membership in the Rust Belt far exceed that of the Southwest’s labor force. On a purely statistical basis, if union membership is to dramatically increase in the U.S. (the goal of the EFCA and Big Labor), the Sun Belt will need to be targeted and *organization must result in certification, recognition, CBA, and membership.*

A massive demographic migration from the Northeastern to the Sun Belt has occurred. For instance, Texas has been apportioned additional congressional seats after almost every census, rising from 22 seats in 1953 to 32 today. California had 30 in 1953; 53 currently. Arizona, Georgia and Colorado have experienced similar phenomenal rates of growth. During the same time period, New York has lost 14 seats, Massachusetts lost four, Pennsylvania lost eight, and Ohio five. In the 2010 Census, Sun Belt States Texas (4), Arizona (2), and Florida (2) are all projected to gain and New York and Ohio will most likely lose two each.

The EFCA provides Big Labor their best chance to bypass election tough negotiations: the path to unionizing the Sun Belt.

STREAMLINING RECOGNITION

Why do unions fear elections? Because many employers use the campaign phase very well. Employers have always been given the right under Section 8(c) of the NLRA to spend weeks before a secret ballot election expressing “any views, arguments, or opinion” concerning unionization.¹³ Obviously, much of the employer’s campaign involves highlighting the negative aspects of the union movement. Unions win approximately 59% of secret ballot elections after campaigns.¹⁴ On the other hand, if employers have bound themselves to neutrality and only card check procedures are

¹⁰ 335 U.S. 525 (1949).

¹¹ BUREAU OF LABOR STATISTICS, “Union Members in 2006,” Table 5, Jan. 25, 2007.

¹² Bureau of Labor Statistics.

¹³ 29 U.S.C. § 158(c)(2000).

¹⁴ *EFCA: Hearing on S. 842 Before the Subcommittee on Labor, Health & Human Services of the S. Comm. on Appropriations*, 108th Cong. 6 (2004). The success rate in October 2008 was better: 71.4%. NLRB Election Report (October 2008), November 13, 2008.

used, unions achieve majority recognition about 78% of the time.¹⁵ Generally, union support wanes in the last weeks leading up to the election.

Not surprisingly, union organizers and their political allies wish to bypass the obligatory anti-union campaign, which has grown increasingly sophisticated. The EFCA is the end run, providing:

If the Board finds that a majority of the employees in a unit ...has signed valid authorizations designating the ...labor organization ...as their bargaining representative ... **the Board shall not direct an election but shall certify the individual or labor organization as the representative ...**¹⁶

This core feature of the EFCA—skipping the campaign and rendering a secret ballot election unnecessary—is a hot button politically. The EFCA’s apparent animating impulse is to bypass a vigorous debate out of fear that individual workers would exercise their free choice differently if the issues are fully expounded. In that sense, the “free choice” part of the EFCA title may be a misnomer. Indeed, the EFCA does not allow employees who wish to de-certify a union the same easy path. Critics have a point when they say the EFCA is overtly pro-union.

FACILITATING INITIAL CBA AGREEMENTS

An estimated 44% of newly certified unions fail to get a first CBA.¹⁷ The unions have very little leverage to force a CBA, besides work stoppage. If a company is found to have bargained in bad faith, the NLRA only grants the NLRB the power to resume and prolong bargaining. If bargaining lasts longer than a year, unions lose their presumption of majority status, often leading to decertification.

The EFCA would require parties to submit to mediation and binding arbitration if the parties are not able to reach a CBA after a mere 90 days of collective bargaining. This arbitration decision is binding for up to two years. Specifically, the EFCA provides that in negotiations for a first CBA:

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced ... the parties have ... failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service[“FMCS”] ... and request mediation. **[I]t shall be the duty of the Service ... to use its best efforts, by mediation and conciliation, to bring them to agreement.**

¹⁵ James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 831 (2005).

¹⁶ The Employee Free Choice Act, H. R. 800, 110th Cong. §2 (a)(6) (2007).

¹⁷ John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 1999-2004, 62 Industrial & Labor Relations Review I (2008).

(3) If ... the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board.... The arbitration panel **shall render a decision** settling the dispute and such decision shall be binding upon the parties for a period of 2 years, ...¹⁸

Thus, an arbitrator—not the employer or the union representatives—would decide wages, benefits, termination procedures, work rules, and seniority schemes. The power to dictate (a) that a CBA would be reached and (b) what that CBA would say, has never been exercised by the federal government thus far. Under the EFCA, the federal government would arrogate to itself the power to force a business to operate with a two year contract that has been imposed on it by a third party without any real understanding of all aspects of the business or its competition. Furthermore, the EFCA’s own language clearly makes it the mission of the FMCS to bring about a CBA.

Of all the features in the EFCA, this “power to force a contract” is the most radical. Particularly in the Sun Belt, where many companies will face union organization for the first time, the spectre of a federally-imposed contract *when the company may have been ready, willing and able to incur the consequences of not reaching a CBA* seems especially unfair.

For 80 years under the NLRA, “first CBA” collective bargaining has been a relatively free-for-all test of wills, stamina and determination. The Supreme Court ruled in *H.K. Porter Co. v. NLRB*¹⁹ that the NLRB cannot insert even one provision into a CBA. Indeed, the Court held in *H.K. Porter* that the NLRB is “without the power to compel a company or a union to agree to any substantive contractual provision of a [CBA]...” The Supreme Court has not only restrained the NLRB from writing or forcing an agreement, it has held courts have no power to adjudge whether CBA language is reasonable.²⁰ Fundamentally, the law of the land has been to leave employers and unions to negotiate a CBA (or impasse) free of government intervention. The EFCA, for the first time, would insert into the organize process:

- An artificial deadline (90 days)
- The certainty of some sort of CBA
- Federal dictation of terms

As the AFL-CIO puts it on its website: **The EFCA guarantees that every worker who forms a union will get a contract.**²¹

¹⁸ The Employee Free Choice Act, H. R. 800, 110th Cong. §3(h)(2)(3) (2007).

¹⁹ 397 U.S. 99 (1970).

²⁰ *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

²¹ www.afl-cio.org.

BEEFING UP ENFORCEMENT AND PENALTIES

The EFCA would also usher in stiff new remedies for unfair labor practices (“ULP”). It provides:

... if the Board finds ... an employer has discriminated against an employee ... the Board ... shall award the employee back pay and, in addition, 2 times that amount as liquidated damages...

Any employer who willfully or repeatedly commits any unfair labor practice ... shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed \$20,000 for each violation.²²

Given that the NLRB has at times received over 44,000 ULP charges in a single year²³ and unions can often file 30, 40 or more ULP charges against one employer during negotiations with, the added leverage (to one side) is immense.

In addition, the EFCA requires the NLRB to seek a federal court injunction when there is reasonable cause to believe a company has fired or discriminated against employees or interfered with their rights.

These new remedies expand NLRB power. Before the NLRB could only “make the employee whole” through backpay. Under the EFCA, the NLRB would have – for the first time – the power to punish. A union can file as many ULP charges as it wants – knowing they may take months to resolve in hearing – to amass greater off-the-table bargaining leverage than ever existed.

A PLACE IN THE SUN

An example of what the future may hold under the EFCA—with streamlined recognition, card check, and no election—can be seen in the surprising CBA between five national janitor companies who have 80% of Houston’s downtown commercial high-rise cleaning market and the Service Employees International Union (“SEIU”)²⁴ entered in November of 2006. The SEIU persuaded the cleaning companies to sign a neutrality agreement (not to oppose SEIU’s organizing effort), provide SEIU the names and home addresses of all janitors, and forego an election in favor of merely having a “card check” process. The SEIU obtained signed union authorization cards from a majority of the janitors and about 5,300 Houston janitors were unionized. SEIU is hopeful the EFCA will pass as part of any economic stimulus package.

²² The Employee Free Choice Act, H. R. 800, 110th Cong. §4 (b) (2007).

²³ NLRB, 45th Annual Report (1980) p. 1.

²⁴ <http://www.seiu.org/2008/12/barack-obama-on-the-employee-free-choice-act.php>

This is the hope and aspiration of Big Labor: to make union recognition easier in Houston, Dallas, Austin, Denver, Charlotte, Nashville, Little Rock, Oklahoma City, Phoenix, Atlanta, Los Angeles, Salt Lake City, Reno and all parts in between. The fields are green and ready to harvest. In Barack Obama, labor reformers have a powerful, articulate champion. The recession provides the context. The EFCA contains the language of change. Sun Belt states Colorado, New Mexico, Nevada turned the shade of blue Big Labor likes in the 2008 election. The corrosive forces of unions may come sooner than thought to the Sun Belt. Time will tell if the change brought rust or justice.