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Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

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Labor Union Recognition Procedures: Use of Secret Ballots and Card Checks

Summary

The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions. An issue before Congress is whether to change the procedures under which workers choose to join, or not join, a union.

Under current law, the National Labor Relations Board (NLRB) conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by a union, employees, or an employer. Employees or a union may request an election if at least 30% of employees have signed a petition or authorization cards (i.e., cards authorizing a union to represent them). The NLRA does not require secret ballot elections, however. An employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees. An employer may also enter into a card check agreement with a union before organizers begin to collect signatures.

Legislation introduced in the 109th Congress, H.R. 874, would require secret ballot elections for union certification. Other legislation, S. 842 and H.R. 1696, would require the NLRB to certify a union if a majority of employees sign authorization cards (i.e., card check recognition).

In general, proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during a secret ballot campaign, employers have greater access to employees. Employers argue that, under card check recognition, employees may only hear the union's point of view. Employers argue that employees may be misled or pressured into signing authorization cards. Unions argue that, during a secret ballot campaign, employer threats and intimidation may cause some employees to vote against a union. Unions argue that card check recognition is less costly than a secret ballot election. Employers argue that, in the long run, unionization may be more costly to employees, because of union dues and fewer union jobs.

Universal card check recognition may increase the level of unionization, while mandatory secret ballot elections may decrease it. Research suggests that the union success rate is greater with card check recognition than with secret ballots, that unions undertake more union drives under card check recognition, and that the union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement (i.e., an agreement where the employer agrees to remain neutral during a union organizing campaign).

To the extent that mandatory secret ballots or universal card check recognition would affect the level of unionization, the economic effects may depend on how well labor markets fit the model of perfect competition. Universal card check recognition may reduce earnings inequality — if more workers are unionized. Mandatory secret ballot elections may increase inequality — if fewer workers are unionized. This report will be updated as issues warrant.

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The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions.[1] An issue before Congress is whether to change the procedures under which workers choose to join, or not join, a union.

This report begins with a summary of legislation that would, if enacted, change existing union recognition procedures. The report then reviews the rights and responsibilities of employers and employees under the NLRA. The report then examines the potential impact of changes in union recognition procedures. Finally, the report considers whether there is an economic rationale for granting workers the right to organize and bargain collectively.

Legislation and NLRB Action

Legislation has been introduced in the 109th Congress that would, if enacted, change union recognition procedures. In addition, the National Labor Relations Board (NLRB) is currently reviewing two cases that may affect recognition procedures under a card check agreement.[2]

H.R. 874, the "Secret Ballot Protection Act of 2005," would require a secret ballot election for union certification. The bill would make it an unfair labor practice for an employer to recognize or bargain with a union that has not been selected by a majority of employees in a secret ballot election conducted by the NLRB. It would also be an unfair labor practice for a union to cause or attempt to cause an employer to recognize or bargain with a union that has not been chosen by a majority of employees in a secret ballot election. H.R. 874 was introduced by Representative Charlie Norwood and has been referred to the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce.

S. 842 and H.R. 1696, the "Employee Free Choice Act," would require the NLRB to certify a union if a majority of employees sign authorization cards (i.e., cards authorizing a union to represent them). The bill would also establish procedures for reaching an initial contract agreement. If a union and employer cannot reach an agreement within 90 days (or a longer period if agreed to by both the union

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[1] The NLRA is also known as the Wagner Act, after Sen. Robert Wagner of New York who sponsored the bill in the Senate. Rep. William Connery of Massachusetts sponsored the bill in the House of Representatives.

[2] This section uses terms — unfair labor practices and neutrality agreements — that are described below in the section on "The National Labor Relations Act."

and employer), either party could request mediation by the Federal Mediation and Conciliation Service (FMCS). Disputes that cannot be settled through mediation would be subject to binding arbitration. The legislation would increase penalties for employer violations of certain unfair labor practices committed during a union organizing campaign or during negotiation of a first contract. S. 842 was introduced by Senator Edward Kennedy; H.R. 1696 was introduced by Representative George Miller. The Senate measure was referred to the Committee on Health, Education, Labor, and Pensions. The House bill was referred to the Committee on Education and the Workforce.[3]

NLRB

The NLRA is administered and enforced by the NLRB, which is an independent federal agency that consists of a five-member board and a General Counsel. The five-member board resolves objections and challenges to secret ballot elections. It also hears appeals of unfair labor practices and resolves questions about the composition of bargaining units. The General Counsel's office conducts secret ballot elections, investigates complaints of unfair labor practices, and supervises the NLRB's regional and other field offices.[4]

Under current law, if a union has been certified by the NLRB in a secret ballot election, the certification is binding for at least one year. During this period, petitions for a decertification election are dismissed. Once a union and employer enter into a first contract, petitions are subject to a "contract bar." A contract of three years or less bars an election for the period covered by the contract.[5]

The NRLB is currently reviewing two cases where bargaining unit employees filed a decertification petition within weeks after the employer recognized a union under a card check agreement. In the first case, the United Auto Workers (UAW) and Metaldyne Corporation entered into a card check and neutrality agreement in September 2002. Metaldyne recognized the UAW as the bargaining representative of production and maintenance workers at its St. Marys, Pennsylvania plant in December 2003. In the second case, the UAW and Dana Corporation entered into a card check and neutrality agreement in August 2003. The company recognized the union at its Upper Sandusky, Ohio plant in December 2003.

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[3] While not related to union recognition procedures, H.R. 1748, the "Union Member Freedom from Strikes Act of 2005," would make it an unfair labor practice for a union to strike over a contract dispute unless employees have voted by secret ballot to reject the employer's last contract proposal. H.R. 1748 was introduced by Rep. Charlie Norwood and was referred to the House Committee on Education and the Workforce.

[4] National Labor Relations Board, *Basic Guide to the National Labor Relations Act*, U.S. Govt. Print. Off., 1997, p. 33, available at [http://www.nlrb.gov], (Hereafter cited as NLRB, *Basic Guide to the NLRA*.) William N. Cooke, *Union Organizing and Public Policy: Failure to Secure First Contracts* (Kalamazoo, MI., W.E. Upjohn Institute), 1985, p. 85.

[5] NLRB, *Basic Guide to the NLRA*, p. 10

In both the Dana and Metaldyne cases, the UAW and the employers entered into card check and neutrality agreements before authorization cards were collected. The signatures were validated by a neutral third party. In both cases, employees filed decertification petitions after the UAW was recognized but before an agreement was reached on a contract. Regional NLRB directors dismissed both petitions, saying that "a reasonable time" had not passed since the UAW was recognized as the workers' bargaining representative. Employees at both companies petitioned the NLRB to review the dismissals. The employees are represented by the National Right to Work Legal Defense Foundation. The NLRB granted the request, saying that the issue is whether voluntary recognition should prevent employees from filing a decertification petition within a reasonable time in cases where an employer and union enter into a card check agreement.[6] The NLRB has indicated that decisions in the two cases are not expected before spring 2005.[7,8]

The National Labor Relations Act

The NLRA, as amended, provides the basic framework governing labor-management relations in the private sector.[9] The act begins by stating that the purpose of the act is to improve the bargaining power of workers:

> The inequality of bargaining power between employees ... and employers ... substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners ... and by preventing the stabilization of competitive wage rates and working conditions within and between industries....
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining....[10]

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[6] National Labor Relations Board, *Order Granting Review*, June 7, 2004, Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519, available at [http://www.nlrb.gov/nlrb/shared_files/decisions/341/341-150.pdf]. Bureau of National Affairs, "NLRB 3-2 Agrees to Review Dismissal of Petitions Filed Shortly After Recognition," *Daily Labor Report*, no. 110, June 9, 2004, p. AA-1.

[7] Bureau of National Affairs, "Battista Tells Labor Law Conference Neutrality Ruling Not Likely Before Spring," *Daily Labor Report*, no. 216, Nov. 9, 2004, p. C-1.

[8] The General Counsel of the NLRB has proposed that employees be allowed to file a decertification petition within 21 days following an employer recognition of a union under a card check agreement. The decertification petition would have to be signed by at least 50% of bargaining unit employees. Bureau of National Affairs, "Rosenfeld Discusses Voluntary Recognition, Decertification Bar During Labor Law Forum," *Daily Labor Report*, no. 224, Nov. 22, 2004, p. A-7.

[9] More specifically, the NLRA applies to employers engaged in interstate commerce. 29 U.S.C. § 152(6).

[10] 29 U.S.C. § 151. Many economists argue that there is not an inequality of bargaining (continued...)

The NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions through a representative of their choosing. Under the act, workers also have the right not to join a union. To protect the rights of employers and employees, the act defines certain activities as unfair labor practices.[11,12]

The NLRA does not apply to railroads; airlines; federal, state, and local governments; agricultural laborers; family domestic workers; supervisors; independent contractors; and others.[13]

Forming or Joining a Union

Employees may form or join a union either through a successful secret ballot election or through voluntary recognition. Under some circumstances, the five-member board may order an employer to bargain with a union, even though the union lost a secret ballot election.

Secret Ballot Elections. The NLRB conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by a union, employees, or an employer. Employees or a union may petition the NLRB for an election if at least 30% of employees have signed a petition or authorization cards. An employer may file a petition if a union has claimed to represent a majority of its employees and has

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[10] (...continued)
power between employers and employees. For example, see Morgan O. Reynolds, *Power and Privilege: Labor Unions in America*, (N.Y., Universe Books, 1984), pp. 59-62; and Morgan O. Reynolds, "The Myth of Labor's Inequality of Bargaining Power, *Journal of Labor Research*, vol. 12, spring 1991, pp. 168-183. The argument that workers and employers have equal bargaining power is generally based on the premise that labor markets fit the economic model of perfect competition. See the section below on whether there is an economic rationale for granting workers the right to organize and bargain collectively.

[11] NLRB, *Basic Guide to the NLRA*, p. 1.

[12] The Labor Management Relations Act of 1947 (the Taft-Hartley Act) amended the NLRA to add language that employees have the right to refrain from joining a union, unless a collective bargaining agreement with a union security agreement is in effect. A union security agreement may require bargaining unit employees to join the union after being hired (i.e., a union shop) or, if the employee is not required to join the union, to pay a representation fee to the union (i.e., an agency shop). Under Section 14(b) of the Taft-Hartley Act, states may enact right-to-work laws, which do not allow union security agreements. Michael Ballot, Laurie Lichter-Heath, Thomas Kail, and Ruth Wang, *Labor-Management Relations in a Changing Environment*, (New York, John Wiley and Sons, Inc., 1992), pp. 265-268.

[13] NLRB, *Basic Guide to the NLRA*, p. 37.

sought to bargain with the employer on behalf of the workers.[14] The NLRA does not provide a specific timetable for holding an election.

After a petition is filed requesting an election, the employer and union may agree on the time and place for the election and on the composition of the bargaining unit. If an agreement is not reached between the employer and union, a hearing may be held in the regional office of the NLRB. The regional director may then direct that an election be held. The regional director's decision may be appealed to the five-member board.[15]

In a secret ballot election, employees choose whether to be represented by a labor union. If an election has more than one union on the ballot and no choice receives a majority of the vote, the two unions with the most votes face each other in a runoff election.[16]

The right of an individual to vote in an NLRB election may be challenged by either the employer or union. If the number of challenged ballots could affect the outcome of an election, the regional director determines whether the ballots should be counted. Either the employer or union may file objections to an election, claiming either that the election or the conduct of one of the parties did not meet NLRB standards. A regional director's decision on challenges or objections may be appealed to the five-member board.[17]

A union and employer may also agree to a secret ballot election conducted by a third party, such as an arbitrator, clergyman, or mediation board.[18]

The NLRB also conducts elections to decertify unions that have previously been recognized. A decertification petition may be filed by employees or a union acting on behalf of employees. A decertification petition must be signed by at least 30% of the employees in the bargaining unit represented by the union. A secret ballot election is required for decertification.[19]

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[14] 29 U.S.C. § 159(c). National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2004*, U.S. Govt. Print. Off., Apr. 29, 2005, available at [http://www.nlrb.gov], pp. 45, 193-195. (Hereafter cited as NLRB, *Annual Report, Fiscal Year 2004*.) National Labor Relations Board, *The NLRB: What it is, What it Does*, National Labor Relations Board, p. 3, available at [http://www.nlrb.gov], NLRB, *Basic Guide to the NLRA*, p. 8.

[15] NLRB, *Basic Guide to the NLRA*, pp. 8-9. Stephen I. Schlossberg and Judith A. Scott, *Organizing and the Law*, 4th ed., Bureau of National Affairs, Washington, 1991, pp. 192-195. (Hereafter cited as Schlossberg and Scott, *Organizing and the Law*.)

[16] NLRB, *Basic Guide to the NLRA*, p. 36.

[17] NLRB, *Annual Report, Fiscal Year 2004*, pp. 5, 190, 193.

[18] Schlossberg and Scott, *Organizing and the Law*, p. 176.

[19] NLRB, *Annual Report, Fiscal Year 2004*, p. 45. National Labor Relations Board, *The National Labor Relations Board and YOU: Representation Cases*, p. 2., available at [http://www.nlrb.gov], House, Committee on Education and the Workforce, Subcommittee

(continued...)

Number of NLRB Elections. **Table 1** shows the number of secret ballot elections conducted by the NLRB in FY1994 through FY2004. In FY2004, the NLRB conducted 2,826 elections. Unions won 51.2% of these elections, which was up from 44.4% in FY1994. Certification of a union by the NLRB does not require that a union and employer reach a contract agreement.[20]

In most elections conducted by the NLRB, the employer and union agree on the composition of the bargaining unit and on the time and place for an election. In FY2004, of the 2,826 elections conducted, 2,312 (or 81.8%) were based on agreements between the parties.[21]

Although the NLRA does not provide a specific timetable for holding an election, most elections are held within two months of the filing of a petition. In FY2004, 93.6% of initial representation elections were conducted within 56 days of filing a petition.[22]

In FY2004, objections were filed in 242, or 8.6%, of the 2,826 elections conducted. Most (61.2%) of the objections were filed by unions. The remainder were filed by employers (37.6%) or by both parties.[23]

For decisions reached in FY2004, it took a median of 133 days between a regional hearing on a contested election and a decision from the five-member board.[24,25]

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[19] (...continued)
on Employer-Employee Relations, *H.R. 4343, Secret Ballot Protection Act of 2004*, hearings, 108th Congress, second session, Serial No. 108-70, Sept. 2004, (Washington, U.S. Govt. Print. Off.,) p. 11. (Hereafter cited as House Education and the Workforce, *H.R. 4343, Secret Ballot Protection Act of 2004*.)

[20] Some evidence indicates that within three years of winning an election, approximately one-fourth of unions have not reached a first contract with the employer. Thomas F. Reed, "Union Attainment of First Contracts: Do Service Unions Possess a Competitive Advantage?" *Journal of Labor Research*, vol. 11, fall 1990, pp., 426, 430. William N. Cooke, "The Failure to Negotiate First Contacts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, vol. 38, Jan. 1985, p. 170.

[21] NLRB, *Annual Report, Fiscal Year 2004*, Table 11A.

[22] National Labor Relations Board, General Counsel, *Summary of Operations: Fiscal Year 2004*, Dec. 10, 2004, p. 7, available at [http://www.nlrb.gov].

[23] NLRB, *Annual Report, Fiscal Year 2004*, Table 11C.

[24] Ibid., Table 23.

[25] An analysis by the General Accounting Office (GAO) of cases appealed to the five-member board found that among cases closed between 1984 and 1989 the median time from the date of regional action on an appeal to a decision by the board was between 190 and 256 days. U.S. General Accounting Office, *National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters*, Report HRD-91-29, Jan. 1991, pp. 21-22. The General Accounting Office is now called the Government Accountability Office.

Table 1. Number of Representation Elections Conducted by the NLRB, FY1994-FY2004

Fiscal Year	Number of Elections Conducted	Number of Elections Won by Unions	Percent of Elections Won by Unions
2004	2,826	1,447	51.2%
2003	3,077	1,579	51.3%
2002	3,151	1,606	51.0%
2001	3,975	1,591	40.0%
2000	3,467	1,685	48.6%
1999	3,743	1,811	48.4%
1998	4,001	1,856	46.4%
1997	3,687	1,677	45.5%
1996	3,470	1,469	42.3%
1995	3,632	1,611	44.4%
1994	3,752	1,665	44.4%

Source: National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2004*, U.S. Govt Print. Off., Apr. 29, 2005, available at [http://www.nlrb.gov], p. 20. National Labor Relations Board, *Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 2003*, U.S. Govt Print. Off., Apr. 20, 2004, available at [http://www.nlrb.gov], p. 18.

Note: The number of elections conducted includes elections that resulted in a runoff or rerun.

Voluntary Recognitions. The NLRA does not require secret ballot elections. An employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees. An employer may also enter into a card check agreement with a union before organizers begin to collect signatures. A card check agreement between a union and employer may require the union to collect signatures from more than a majority (i.e., a supermajority) of bargaining unit employees.[26] A neutral third party often checks, or validates, signatures on authorization cards. A collective bargaining contract may include a card check arrangement for unorganized branches or divisions of a company.[27]

Bargaining Orders. Under some circumstances, an employer may be ordered to bargain with a union even though the union lost the election. If the five-member board determines that "pervasive" employer violations of unfair labor practices undermined the election and if a majority of employees signed authorization cards, the board may order the employer to bargain with the union. The union must file

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[26] One study of card check agreements found that, under some agreements, a union needed signatures from at least 65% of bargaining unit employees. Adrienne E. Eaton and Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, vol. 55, Oct. 2001, p. 48. (Hereafter cited as Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*.)

[27] Ibid., p. 48.

objections to the election and file unfair labor practice charges against the employer.[28] (See the discussion of "Unfair Labor Practices" below.)

Neutrality Agreements. A card check arrangement may be combined with a neutrality agreement. Not all neutrality agreements are the same. But, in general, an employer agrees to remain neutral during a union organizing campaign. The employer may agree not to attack or criticize the union, while the union may agree not to attack or criticize the employer. The agreement may allow managers to answer questions or provide factual information to employees. A neutrality agreement may give a union access to company property to meet with employees and distribute literature. An employer may also agree to give the union a list of employee names and addresses. A neutrality agreement may cover organizing drives at new branches of the company.[29,30]

The NLRB does not collect data on voluntary recognitions. The FMCS, however, is involved in voluntary recognitions. The FMCS was created by the Labor Management Relations Act of 1947 (the Taft-Hartley Act). The main purpose of the FMCS is to mediate collective bargaining agreements. FMCS mediators act as a neutral third-party to help settle issues during the bargaining process.[31] Some of the requests received by the FMCS are for mediation where an employer has voluntarily agreed to negotiate with a union. **Table 2** shows the number of voluntary recognitions, for FY1996 to FY2004, where the FMCS helped mediate a first contract. Cases where an employer voluntarily recognized a union and reached a first contract without FMCS assistance are not included in these numbers. Therefore, the actual number of voluntary recognitions is probably greater than the numbers shown in **Table 2**.

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[28] If employer unfair labor practices make it unlikely that a fair election can be held, the board may issue a bargaining order without holding an election. Bruce S. Feldacker, *Labor Guide to Labor Law* (3rd ed., Prentice Hall, Englewood Cliffs, N.J., 1990), pp. 90-93. (Hereafter cited as Feldacker, *Labor Guide to Labor Law*.) Schlossberg and Scott, *Organizing and the Law*, pp. 180-181.

[29] Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 47-48. Charles I. Cohen, "Neutrality Agreements: Will the NRLB Sanction Its Own Obsolescence?" *The Labor Lawyer*, vol. 16, fall 2000, pp. 203-204. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, Public Law and Legal Theory Working Paper Series No. 28, Nov. 2004, pp. 5-6, available at [http://.www.law.bepress.com/osulwps]. (Hereafter cited as Brudney, *Neutrality Agreements and Card Check Recognition*.)

[30] It has been argued that, under the NLRA, neutrality and card check agreements, may be unlawful. See Arch Stokes, Robert L. Murphy, Paul E. Wagner, and David S. Sherwyn, "Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot," *Cornell Hotel and Restaurant Administration Quarterly*, vol. 42, Oct.-Nov. 2001, pp. 91-94. A counter argument can be found in Brudney, *Neutrality Agreements and Card Check Recognition*, pp. 28-53.

[31] Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004*, p. 29, available at [http://.www.fmcs.gov].

Table 2. Number of Voluntary Recognitions in Which the Federal Mediation and Conciliation Service (FMCS) Provided Assistance for Initial Contracts, FY1996-FY2004

Fiscal Year	Number of Voluntary Recognitions
2004	258
2003	240
2002	273
2001	420
2000	381
1999	260
1998	227
1997	249
1996	173

Source: Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2004*, p. 18, available at [http://.www.fmcs.gov]. Federal Mediation and Conciliation Service, *Annual Report, Fiscal Year 2000*, p. 39, available at [http://.www.fmcs.gov].

Organizing Campaign Rules. Campaign rules differ for employees, union organizers, and employers. Rules also differ for soliciting union support (e.g., expressing support for a union or distributing authorization cards) and for distributing literature. Because of exceptions to the basic rules, the rules that apply to a specific union organizing campaign may differ from the general rules described here.[32]

Employees. During work hours, employees can campaign for union support from their coworkers in both work and nonwork areas (e.g., coffee rooms or the company parking lot). But employees can only solicit support on their own time (e.g., lunchtime or breaks). If an employer does not allow the distribution of literature in work areas, employees may only distribute union literature in nonwork areas. If an employer allows the distribution of other kinds of literature in work areas, employees may also distribute union literature in those areas.

Union Organizers. In general, union organizers cannot conduct an organizing campaign on company property. Organizers may be allowed in the workplace if the site is inaccessible (e.g., a logging camp or remote hotel) or if the employer allows nonemployees to solicit on company property. Organizers may meet with employees on union property. They may also meet with employees and distribute literature in public areas on employer property (e.g., a cafeteria or parking lot) or in public areas (e.g., sidewalks or parking areas). Organizers may also contact

[32] Unless noted otherwise, this section is based on: Schlossberg and Scott, *Organizing and the Law*, pp. 45-55; Feldacker, *Labor Guide to Labor Law*, pp. 74-79; and Brudney, *Neutrality Agreements and Card Check Recognition*, p. 8.

employees at home by phone or mail or may visit employees at home.[33] Under a neutrality agreement, an employer may allow organizers onto company property.

Employers. Employers may campaign on company property. Employers may require employees to attend meetings during work hours where management can give its position on unionization. These meetings are generally called "captive audience" meetings. Employers cannot hold a captive audience meeting during the 24-hour period before an election. Supervisors can give employees written information (including memos and letters) and hold individual meetings with employees.

Corporate Campaigns. To gain an agreement from an employer for a card check campaign — possibly combined with a neutrality agreement — unions sometimes engage in "corporate campaigns." A corporate campaign may include a call for consumers to boycott the employer; rallies and picketing; a public relations campaign (e.g., press releases, Internet postings, news conferences, or newspaper and television ads); legislative initiatives; charges that the employer has violated labor or other laws; public support from political, civic, and religious leaders; and other strategies.[34,35]

Unfair Labor Practices. To protect the rights of both employees and employers, the NLRA defines certain activities as unfair labor practices.

Employers. Employers have the right to campaign against a union. But an employer cannot restrain or coerce employees in their right to form or join a union. An employer cannot threaten employees with the loss of jobs or benefits if they vote for a union or join a union. An employer cannot threaten to close a plant if employees choose to be represented by a union. An employer cannot raise wages to discourage workers from joining or forming a union. An employer cannot discriminate against employees with respect to the conditions of employment (e.g, fire, demote, or give unfavorable work assignments) because of union activities. An

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[33] Under what is known as the "Excelsior" rule, within seven days after the NLRB has directed that a representation election be held or after a union and employer have agreed to hold an election, an employer must provide the regional director of the NLRB a list of the names and addresses of employees eligible to vote in the election. This list is made available to all parties. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedures in Representation Cases*, U.S. Govt. Print. Off., Apr. 2002, p. 251. U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker-Management Relations*, May 1994, p. 68. The latter report is popularly called the "Dunlop report," after former Secretary of Labor John T. Dunlop, who chaired the commission.

[34] A union may engage in a corporate campaign to achieve other objectives, e.g., a contract agreement. Charles R. Perry, *Union Corporate Campaigns* Philadelphia, Industrial Research Unit, Wharton School, University of Pennsylvania, 1987, pp. 1-8, 37-53.

[35] For differing views on corporate campaigns, see U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Compulsory Union Dues and Corporate Campaigns*, hearings, 107th Congress, second session, Serial No. 107-74, Washington, U.S. Govt. Print. Off., July 23, 2002.

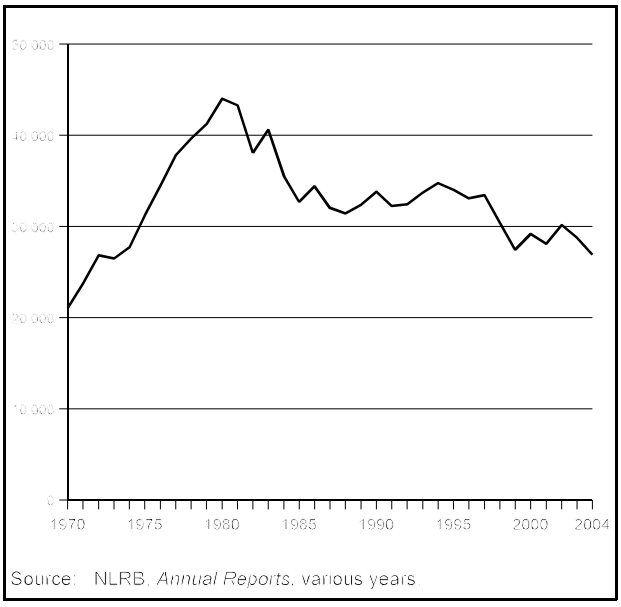
employer must bargain in good faith with respect to wages, hours, and working conditions.[36]

Unions. Employees have the right to organize and bargain collectively. But a union cannot restrain or coerce employees to join or not join a union. A union cannot threaten employees with the loss of jobs if they do not support union activities. A union cannot cause an employer to discriminate against employees with respect to the conditions of employment. A union must bargain in good faith with respect to wages, hours, and working conditions. A union cannot boycott or strike an employer that is a customer of or supplier to an employer that the union is attempting to organize.[37]

An unfair labor practice may be filed by an employee, employer, labor union, or any other person. After an unfair labor practice charge is filed, regional staff of the NLRB investigate to determine whether there is reason to believe that the act has been violated. If no violation is found, the charge is dismissed or withdrawn. If a charge has merit, the regional director first seeks a voluntary settlement. If this effort fails, the case is heard by an NLRB administrative law judge. Decisions by administrative law judges can be appealed to the five-member board.[38]

Figure 1 shows the trend in the number of unfair labor practice charges filed for FY1970 to FY2004. During this period, the number of charges filed peaked at 44,063 in FY1980. The number stood at 26,890 in FY2004. In FY2004, 39.1% of the charges filed were found to have merit.[39] In FY2004, 74.3% of charges were filed against employers (by unions or individuals) and 25.7% were filed against unions (by employers or individuals).[40]

Figure 1. Unfair Labor Practice Charges, Fiscal Years 1970-2004



Source: NLRB, *Annual Reports*, various years

[36] NLRB, *Basic Guide to the NLRA*, pp. 14-22.

[37] Ibid, pp. 23-32.

[38] NLRB, *Annual Report, Fiscal Year 2004*, p. 6. NLRB, *Basic Guide to the NLRA*, p. 36.

[39] From FY1970 to FY2004, the percent of unfair labor practice charges found to have merit ranged from about 30% to 40%. NLRB, *Annual Report*, various years.

[40] The percentage calculations do not include 29 alleged "hot cargo" agreements. Under the (continued...)

Remedies. The NLRA attempts to prevent and remedy unfair labor practices. The purpose of the act is not to punish employers, unions, or individuals who commit unfair labor practices. The act allows the NLRB to issue cease-and-desist orders to stop unfair labor practices and to order remedies for violations of unfair labor practices. If an employer improperly fires an employee for engaging in union activities, the employer may be required to reinstate the employee (to their prior or equivalent job) with back pay. If a union causes a worker to be fired, the union may be responsible for the worker's back pay.[41,42]

Impact of Changes in Recognition Procedures

Changes in union recognition procedures may affect the level of unionization in the United States.[43] This section summarizes the most common arguments made in favor of requiring secret ballot elections and the arguments made in support of universal card check recognition. The section also reviews research on the effect of different union recognition procedures on union success rates.

The most common arguments made by the proponents of universal card check recognition and the proponents of mandatory secret ballot elections are summarized in **Table 3**.[44] In general, proponents of secret ballot elections argue that, unlike signing an authorization card, casting a secret ballot is private and confidential. Unions argue that, during a secret ballot campaign, employers have greater access to employees (e.g., captive audience meetings and access to employees on company property). Employers argue that, under card check recognition, employees may only hear the union's point of view. Employers argue that employees may be misled or pressured into signing authorization cards. Unions argue that, during a secret ballot campaign, employer threats or intimidation may cause some employees to vote against a union. Unions argue that card check recognition is less costly than a secret ballot election. Employers argue that, in the long run, unionization may be more

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[40] (...continued)
NLRA, it is an unfair labor practice for an employer and union to agree that the employer will not do business with another employer. NLRB, *Annual Report, Fiscal Year 2004*, p. 3, Table 2. NLRB, *Basic Guide to the NLRA*, p. 21.

[41] 29 U.S.C. § 160(c). NLRB, *Basic Guide to the NLRA*, p. 38.

[42] The amount of back pay awarded is "net back pay," which is the amount of compensation that a worker would have received if he or she had not been unlawfully fired less the amount of compensation received (less the expenses from looking for work) from other work during the back pay period. If a discharged employee is able to work but does not look for work, compensation that he or she could have received from work may be deducted from gross back pay. National Labor Relations Board, *NLRB Casehandling Manual*, available at [http://.www.nlrb.gov/nlrb/legal/manuals], §§ 10530.1 and 10530.2.

[43] For a discussion of union membership trends in the United States, see CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.

[44] The arguments for and against card check and mandatory secret ballots are covered in House, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations *H.R. 4343, Secret Ballot Protection Act of 2004*.

costly to employees: Union members pay dues and higher union wages may result in fewer union jobs.

Table 3. Common Arguments Made by Proponents of Card Check Recognition and Mandatory Secret Ballots

Proponents of Card Check Recognition	Proponents of Mandatory Secret Ballots
Card check recognition requires signatures from over 50% of bargaining unit employees. A secret ballot election is decided by a majority of workers voting.	Casting a secret ballot is private and confidential. A secret ballot election is conducted by the NLRB. Under card check recognition, authorization cards are controlled by the union.
During a secret ballot campaign, the employer has greater access to employees.	Under card check recognition, employees may only hear the union's point of view.
Because of potential employer pressure or intimidation during a secret ballot election, some workers may feel coerced into voting against a union.	Because of potential union pressure or intimidation, some workers may feel coerced into signing authorization cards.
Employer objections can delay a secret ballot election.	Most secret ballot elections are held within two months after a petition is filed.
Allegations against a union for unfair labor practices can be addressed under existing law. Existing remedies do not deter employer violations of unfair labor practices.	Allegations against an employer for unfair labor practices can be addressed under existing law. Existing remedies do not deter union violations of unfair labor practices.
Card check recognition is less costly for both the union and employer. If secret ballot elections were required, the NLRB would have to devote more resources to conducting elections.	Unionization may cost workers union dues; higher union wages may result in fewer union jobs.
Card check and neutrality agreements may lead to more cooperative labor-management relations.	An employer may be pressured by a corporate campaign into accepting a card check or neutrality agreement. If an employer accepts a neutrality agreement, employees who do not want a union may hesitate to speak out.

Research Findings

Little research has been done comparing the impact of universal card check recognition versus mandatory secret ballot elections. The research that exists, however, suggests that changes in union recognition procedures could affect the level of unionization in the United States. Research suggests that the union success rate is greater with card check recognition than with secret ballots. Unions also undertake more unionization drives under card check recognition. The union success rate under card check recognition is greater when a card check campaign is combined with a neutrality agreement.

Evidence from Canada suggests that the union success rate is higher under card check recognition than under secret ballots. In Canada, each of the 10 provinces has

laws governing union recognition.[45] In 1976, all ten provinces used card check recognition. Beginning with Nova Scotia in 1977, five provinces have adopted mandatory voting.[46] Under mandatory voting a union must receive a majority of votes in a secret ballot to be recognized as the bargaining agent. Under card check recognition, a union is recognized if the number of employees signing authorization cards meets a minimum threshold. In general, the union is recognized if more than 50% to 55% of employees, depending on the province, sign authorization cards.[47]

A study of the union success rate under mandatory voting and card check recognition concluded that the union success rate in Canada is 9 percentage points higher under card check recognition than under mandatory voting. The study examined 171 union organizing campaigns between 1978 and 1996 in nine provinces.[48]

In the province of British Columbia, union recognition based on card checks was allowed until 1984. From 1984 through 1992, union certification required a secret ballot election. Card checks were again allowed after 1992. During an 11-year period when card checks were allowed, the union success rate was 91%. During the period when voting was mandatory, the union success rate was 73%. In addition, while card checks were allowed, there were more attempts to organize workers: an average of 531 organizing drives a year when card checks were in effect versus an average of 242 a year when mandatory voting was in effect.[49]

Evidence also suggests that card check recognition may be more successful under a neutrality agreement. A study of union organizing drives in the United States concluded that union success rates are higher when a card check agreement is combined with a neutrality agreement. The study examined 57 card check

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[45] Gary N. Chaison and Joseph B. Rose, "The Canadian Perspective on Workers' Rights to Form a Union and Bargain Collectively," Edition by Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald L. Seeber, in *Restoring the Promise of American Labor Law*, (Ithaca, N.Y., ILR Press, 1994), p. 244.

[46] The five Canadian provinces that currently require secret ballots are: Nova Scotia, Alberta, Newfoundland, Ontario, and Manitoba. British Columbia adopted mandatary voting in 1983 and reversed itself in 1993. Susan Johnson, "The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note," *Industrial Relations*, vol. 43, Apr. 2004, p. 357. (Hereafter cited as Johnson, *The Impact of Mandatory Votes*.) Chris Riddell, "Union Suppression and Certification Success," *Canadian Journal of Economics*, vol. 34, May 2001, p. 397. (Hereafter cited as Riddell, *Union Suppression and Certification Process*.)

[47] Johnson, *The Impact of Mandatory Votes*, pp. 356-357.

[48] Susan Johnson, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success," *Economic Journal*, vol. 112, pp. 355-359.

[49] The data are for union drives in the private sector. The calculation of the union success rate under card checks is for the five years before and the six years after voting was mandatory. The calculations of the union success rate and the average annual number of unionizing drives exclude 1984, when card checks were allowed for part of the year. Because of incomplete data, the calculation of the average annual number of unionizing drives also excludes 1998. Riddell, *Union Suppression and Certification Success*, p. 400.

agreements involving 294 organizing drives. Unions had a success rate of 78.2% in drives where there was both a card check and neutrality agreement and a 62.5% success rate in cases where there was only a card check agreement.[50]

The union success rate may be higher under card check recognition because, in part, employers have less of an opportunity to campaign against unionization. Unions may initiate more organizing drives under card check recognition because a card check campaign costs less than a secret ballot election. A secret ballot election may take longer than a card check campaign and employer opposition may be greater (requiring a union to expend more resources).[51] Unions may have a higher success rate when card check recognition is combined with a neutrality agreement because there may be less employer opposition to unionization under a neutrality agreement. (Some research has concluded that management opposition is a key factor affecting union success rates in NLRB conducted elections.)[52]

Requiring card check recognition may increase the union success rate, but it may not reverse the decline in private sector unionization in the United States. Shrinking employment in unionized firms and decertifications may offset any increase in union membership due to universal card check recognition. In addition, universal card check recognition may increase employer opposition during the collection of authorization cards.

Is There an Economic Rationale for Giving Workers the Right to Organize and Bargain Collectively?

The NLRA gives private sector employees the right to organize and bargain collectively over wages, hours, and working conditions. This section considers whether there is an economic rationale for granting workers the right to organize and bargain collectively.

Government Intervention in Labor Markets

Governments may intervene in labor markets for a number of reasons. One of these reasons is to improve competition.[53] According to economic theory,

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[50] The success rate was measured as the percentage of organizing campaigns that resulted in union recognition. The results include some agreements in the public sector. Some of the agreements were with employers where a union represented other workers. Some of the agreements were with employers with whom the union had no existing bargaining relationship. Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, pp. 45-48, 51-52.

[51] Robert J. Flanagan, "Has Management Strangled U.S. Unions?," *Journal of Labor Research*, vol. 26, winter 2005, p. 51.

[52] Richard B. Freeman and Morris M. Kleiner, "Employer Behavior in the Face of Union Organizing Drives," *Industrial and Labor Relations Review*, vol. 43, Apr. 1990, p. 351.

[53] The following conditions are the general characteristics of a competitive labor market:
(continued...)

competitive markets generally result in a more efficient allocation of resources, where resources consist of individuals with different skills, capital goods (e.g., computers, machinery, and buildings), and natural resources. A more efficient allocation of resources generally results in greater total output and consumer satisfaction.

In competitive labor markets workers are paid according to the value of their contribution to output. Under perfect competition, wages include compensation for unfavorable working conditions. The latter theory, called the "theory of compensating wage differentials," recognizes that individuals differ in their preferences or tolerance for different working conditions — such as health and safety conditions, hours worked, holidays and annual leave, and job security.[54]

If labor markets do not fit the model of perfect competition, increasing the bargaining power of workers may raise wages and improve working conditions to levels that would exist under competitive conditions. In labor markets where a firm is the only employer (called a monopsony) unions could, within limits, increase both wages and employment.[55]

In competitive labor markets, however, increasing the bargaining power of employees may result in a misallocation of resources, and reduce total economic output and consumer satisfaction. In competitive labor markets, higher union wages may reduce employment for union workers below the levels that would exist in the absence of unionization.[56] If unions lower employment in the unionized sector, they

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[53] (...continued)
(1) There are many employers and many workers. Each employer is small relative to the size of the market. (2) Employers and workers are free to enter or leave a labor market and can move freely from one market to another. (3) Employers do not organize to lower wages and workers do not organize to raise wages. Governments do not intervene in labor markets to regulate wages. (4) Employers and workers have equal access to labor market information. (5) Employers do not prefer one worker over another equally qualified worker. Workers do not prefer one employer over another employer who pays the same wage for the same kind of work. (6) Employers seek to maximize profits; workers seek to maximize satisfaction. Lloyd G. Reynolds, Stanley H. Masters, and Colletta H. Moser, *Labor Economics and Labor Relations*, 11th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1998), pp. 16-21.

[54] Randall K. Filer, Daniel S. Hamermesh, and Albert E. Rees, *The Economics of Work and Pay*, 6th ed., (New York: Harper Collins, 1996), pp. 376-390. Ronald G. Ehrenberg and Robert S. Smith, *Modern Labor Economics: Theory and Public Policy*, 7th ed. (Reading, Mass.: Addison-Wesley, 2000), pp. 251-259. (Hereafter cited as Ehrenberg and Smith, *Modern Labor Economics*.)

[55] Bruce E. Kaufman, *The Economics of Labor Markets*, 4th ed. (Fort Worth: Dryden Press, 1994), pp. 277-280. (Hereafter cited as Kaufman, *The Economics of Labor Markets*.)

[56] In competitive labor markets, unions can offset the employment effect of higher wages by trying to persuade consumers to buy union-made goods (e.g., campaigns to "look for the union label"), limiting competition from foreign made goods (e.g., though tariffs or import quotas), or negotiating contracts that require more workers than would otherwise be needed. Kaufman, *The Economics of Labor Markets*, pp. 276-277. Ehrenberg and Smith, *Modern* (continued...)

may increase the supply of workers to employers in the nonunion sector, lowering the wages of nonunion workers.[57]

It is difficult, however, to determine the competitiveness of labor markets. First, identifying the appropriate labor market may be difficult. Labor markets can be local (e.g., for unskilled labor), regional, national, or international (e.g., for managerial and professional workers). Second, labor market competitiveness is difficult to measure. Finally, labor markets may change over time because of economic, technological, or policy changes.[58]

Distribution of Earnings

Competitive labor markets may allocate resources efficiently, but they may result in a distribution of earnings that some policymakers find unacceptable. Thus, governments may intervene in labor markets to reduce earnings inequality.[59] Some economists argue that during a recession, greater equality may increase aggregate demand and, therefore, reduce unemployment. Unionization may be a means of reducing earnings inequality.

Collective Voice

Finally, an argument made by some economists is that unions give workers a "voice" in the workplace. According to this argument, unions provide workers an additional way to communicate with management. For instance, instead of expressing their dissatisfaction with an employer by quitting, workers can use dispute

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[56] (...continued)
Labor Economics, p. 493. Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington: The World Bank, 2002), p. 27.

[57] If unions raise the wages of union workers and lower employment in the union sector, the supply of workers available to nonunion employers may increase, resulting in greater competition for jobs and lower wages for nonunion workers (the "spillover" effect). On the other hand, nonunion employers, in order to discourage workers from unionizing, may pay higher wages (the "threat" effect). Ehrenberg and Smith, *Modern Labor Economics*, pp. 504-508.

[58] Kaufman argues that labor markets in the U.S. have become more competitive since World War II. Bruce E. Kaufman, "Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy," *Journal of Labor Research*, vol. 10, summer 1989, pp. 292-293.

[59] Governments may also intervene in private markets to produce "public" goods (e.g., national defense) or correct instances where the market price of a good does not fully reflect its social costs or benefits — called, respectively, negative and positive "externalities." Air and water pollution are frequently cited as examples of negative externalities; home maintenance and improvements are often cited as examples of positive externalities.

resolution or formal grievance procedures to resolve issues relating to pay, working conditions, or other matters.[60]

Discussion

The economic impact of universal card recognition or mandatory secret ballot elections may rest on the desired objectives of policymakers and the competitiveness of labor markets.

By bargaining collectively, instead of individually, unionized workers may obtain higher wages and better working conditions than if each worker bargained individually.[61] But, depending on how well labor markets fit the model of perfect competition, collective bargaining may equalize bargaining power between employers and employees or it may give unequal power to unionized workers. If labor markets are competitive, increasing the bargaining power of workers may reduce economic output and consumer satisfaction (economic efficiency), but may increase equality. On the other hand, if labor markets do not fit the model of perfect competition, increasing the bargaining power of workers may improve economic efficiency as well as increase equality.[62]

Universal card check recognition may increase the number of organizing campaigns and increase union success rates. Conversely, mandatory secret ballot elections may reduce the number of organizing drives and reduce union success rates. Thus, compared to existing recognition procedures, mandatory secret ballots may lower the level of unionization, while universal card check recognition may raise it. Accordingly, depending on the competitiveness of labor markets, universal card check recognition may either improve or harm economic efficiency. Similarly, mandatory secret ballots may either improve or harm efficiency. If either change were enacted, it may be difficult, however, to predict or measure the size of the effects.

Regardless of the competitiveness of labor markets, mandatory secret ballot elections may increase earnings inequality — if fewer workers are unionized. Universal card check recognition may decrease inequality — if more workers are unionized. Again, the size of the effects may be difficult to predict or measure.

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[60] Richard B. Freeman and James L. Medoff, "The Two Faces of Unionism," *Public Interest*, no. 57, fall 1979, pp. 70-73. Richard B. Freeman, "The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations," *Quarterly Journal of Economics*, vol. 94, June 1980, pp. 644-645.

[61] Bargaining between employers and workers includes the right of workers to strike (in the private sector) and the right of employers to lock out employees.

[62] The results of research on the wage differential between union and nonunion workers vary. But, in general, most studies find that, after controlling for individual, job, and labor market characteristics, the wages of union workers are in the range of 10% to 30% higher than the wages of nonunion workers. Although the evidence is not conclusive, some studies have concluded that unions reduce earnings inequality in the overall economy. CRS Report RL32553, *Union Membership Trends in the United States*, by Gerald Mayer.

In sum, if the policy objective is to increase total economic output and consumer satisfaction, mandatory secret ballots or universal card check recognition may either improve or harm economic efficiency, depending on the competitiveness of labor markets. Universal card check recognition may reduce earnings inequality; mandatory secret ballot elections may increase it.