

Card Check Recognition: the Ongoing Legal and Legislative Battle

By Michael Aleo and Michelle Fenster

I.	Introduction.....	2
II.	Background.....	5
III.	Legal Analysis.....	10
	A. Card Check Recognition's Foundation.....	11
	B. Dana Corporation and Metaldyne: Election Bar Quality?	14
	C. Shaw's Supermarkets.....	19
IV.	The Legislative Battle.....	23
	A. The Secret Ballot Protection Act.....	24
	B. The Employee Free Choice Act	33
V.	Conclusion.....	35

I. Introduction

A great debate has been brewing for years over whether unions should be able to organize employees outside of the traditional election procedures provided by the National Labor Relations Act ("NLRA" or "the Act").¹ Typically, in an organizing drive, a union solicits support from employees to indicate a desire to run a National Labor Relations Board ("NLRB" or "Board") election.² The union does this by collecting cards from employees affirming the employees' desire to have a representation election.³ If the union collects valid cards from at least one-third of eligible employees in the appropriate bargaining unit,⁴ the union may then petition for a Board election.⁵ If the majority of employees support the union in the election, then the employer must recognize the union and bargain in good faith with the union for an initial labor contract.⁶ During the period between the representation election and the completion of the first collective bargaining agreement, the NLRA bars the employer, the employees, and competing labor unions from challenging the representative union's majority status for a reasonable period of time.⁷

Board elections have long been the preferred method of obtaining union recognition.⁸ Recently, however, many unions have begun focusing on another organizing strategy known as card check recognition.⁹ In card check recognition campaigns, a union

demonstrates majority support of the employees in a bargaining unit by collecting cards from a majority of employees that express the employees' desire to have the union represent them and gaining the consent of the employer to recognize the union as the representative of the employees without the formality of a Board election.¹⁰ Unions generally negotiate neutrality agreements with employers prior to launching a card check campaign to ensure the employer will not oppose the union during the organizing drive.¹¹ If the employer refuses to recognize the union, then the union may petition the Board for an election.¹²

Though the NLRB and courts prefer Board elections,¹³ unions generally prefer card check campaigns because they are vastly more likely to result in a successful unionization drive than Board elections.¹⁴ However, anti-union groups criticize this approach as an unfair coercion of employees to join unions.¹⁵

In 2004, the NLRB granted review of several cases that called into question the underlying principles of card check recognition. In Dana Corporation and Metaldyne, the Board, reversing a Regional Director's dismissal of the complaints, decided to hear cases where the dispute concerned whether or not voluntary employer recognition of a union based on a card check campaign should be given "election bar quality."¹⁶ An election bar is the period of time during which a union's right to represent the bargaining unit cannot be challenged by an

employer, employees, or another union.¹⁷ The Board took the cases to determine whether unions certified as a result of a card check campaign should be granted the same amount of protection as unions certified through a Board election. In Shaw's Supermarkets, the Board reversed the Regional Director's dismissal of a case where employees' attempted to decertify the union, which the employer voluntarily recognized based on the union's presentation of signed cards supporting unionization.¹⁸ Again, the Board's decision to hear such a case indicated its willingness to consider treating union recognition based on card check as inferior to recognition based on Board elections.

While awaiting the Board's verdict, a rich legislative debate over card check recognition has been renewed. This year, Republicans and Democrats introduced opposing legislation specifically related to card check recognition. Republicans introduced the Secret Ballot Protection Act¹⁹ ("SBPA"), which would make NLRB elections the exclusive method for union recognition, prohibiting employers from voluntarily recognizing a union based on a demonstration of majority support. Across the aisle, Democrats introduced the Employee Free Choice Act²⁰ ("EFCA"), which would mandate that an employer recognize a union upon demonstration of majority support by submission of employee-signed union authorization cards to the NLRB.²¹

This article argues: (1) that the NLRB should define the “reasonable period of time” for a certification bar following union recognition based on a card check campaign to be commensurate with election bar quality; (2) that the NLRB should not narrow the availability of card check recognition as an organizing tool in its resolution of Shaw’s Supermarkets; (3) that Congress should reject the Secret Ballot Protection Act’s effort to prohibit card check recognition campaigns; and finally, (4) that Congress should, perhaps with some minor amendments, pass the Employee Free Choice Act. Section II of this article provides contextual background surrounding the issue of card check recognition. Section III provides legal analysis of Dana Corporation and Shaw’s Supermarkets, including legal history supporting card-check recognition as a legitimate organizing tool. Section IV analyzes the legislative efforts to prohibit and to codify card check recognition.

II. Background

The purpose behind the National Labor Relations Act was to ensure peaceful industrial relations between business and labor, and to provide employees the right to choose whether or not to organize.²² When drafting the NLRA, Congress left open the opportunity for employers to recognize employees’ decision to organize through means outside of the context of NLRB supervised elections.²³ Years later, when Congress made the last major

changes to the NLRA, legislators proposed amendments to make NLRB elections the only method to gain employer recognition of a union, and to explicitly prohibit the use of cards to gain recognition of majority status.²⁴ Congress rejected these amendments in favor of maintaining the tradition of card check recognition.²⁵

Over the course of the past several decades, union membership in the United States has been on the decline.²⁶ This trend is attributable, in part, to a shift in the concentration of the United States economy from manufacturing to services.²⁷ Additionally, increased global competition in manufacturing has put pressure on employers to resist union drives.²⁸ This competition has also narrowed the union premium²⁹ that employees in union shops enjoy.³⁰ While encouraging anti-union campaigns and narrowing the gap in wages between union and non-union workers, the shift from manufacturing to services that global competition has caused has also resulted in smaller sized firms. Unions' success rates in NLRB elections has remained constant throughout the past several decades,³¹ but the size of the firms that unions organize has decreased, resulting in unions organizing fewer employees per NLRB election.³² Changing demographics in the workplace are an additional factor affecting unionization rates.³³

Employment legislation may also have, in part, supplanted the perceived need for labor unions. Employment legislation allows employees to “challenge unsafe working conditions, job discrimination, workplace harassment, and unjust dismissals.”³⁴ Also, “federal deregulation and the 1948 Taft-Hartley right-to-work provisions have transformed the organizational climate facing unions.”³⁵

In the past fifteen years, organized labor has responded to the decline in union membership by focusing on new organizing tactics.³⁶ Between 1998 and 2003, the AFL-CIO organized less than one-fifth of the nearly three million workers it added to its membership through NLRB elections.³⁷

Adrienne E. Eaton and Jill Kriesky found a much higher success rate in organizing and in bargaining first contracts with card check recognition than with NLRB elections.³⁸ This study found that nearly 80 percent of the organizing drives featuring neutrality and card-check agreements were successful in gaining employer recognition, and that approximately 95 percent of those drives resulted in the negotiation of first contracts.³⁹ In contrast, the study found that the success rate for unions in Board elections is markedly less, with win rates between 40 and 45 percent.⁴⁰

Of the card check recognition campaigns studied, the overwhelming majority of them, 92.9 percent, featured agreements

between the union and the employer stipulating that the employer would remain neutral during the organizing drive.⁴¹ Neutrality stipulations generally require the employer to either remain neutral or, at least, to not actively oppose the union.⁴² In some instances, the employer may communicate facts to the employees, but the spirit behind the agreement is that the employer will not attempt to dissuade employees from joining the union.⁴³

In 73 percent of the agreements studied, labor and management included language stipulating that if the union collected signed cards of support from a majority of employees, the employer would recognize the union without going through a NLRB election.⁴⁴ Nearly all of the organizing agreements included language providing for some form of dispute resolution.⁴⁵

When comparing instances of alleged employer unfair labor practice violations, the study found significantly higher rates of violations where the agreement strictly stipulated neutrality, as opposed to both neutrality and card-check.⁴⁶ Labor alleged violations in 90 percent of cases where labor and management contracted a neutrality agreement without a card-check agreement.⁴⁷ Where card-check was part of the agreement, the study found alleged violations in only 42.9 percent of the cases.⁴⁸ Similarly, where the agreement stipulated neutrality

alone, the study found that the employer fired employees who supported the union in one third of the cases. Meanwhile, only 8.7 percent of the cases resulted in employee firings in situations where the agreement provided for card check.⁴⁹

Nearly *all* organizing drives without a neutrality or card-check agreement featured some form of alleged anti-union campaign.⁵⁰ The presence of card-check agreements in organizing campaigns is a strong assurance to the union, and the union-supporting employees, that management will not commit unfair labor practices.⁵¹

A study of unionization in British Columbia suggests that laws prohibiting card-check recognition have a negative impact on union organizing.⁵² The study analyzed the effect of British Columbia's enactment of mandatory certification election laws on union organizing success rates.⁵³ Prior to the mandatory certification election law, if a union demonstrated 55 percent support through signed cards, the union gained recognition without an election.⁵⁴ Following enactment of the mandatory certification election laws, union success rates in organizing drives fell by nearly 20 percent.⁵⁵ Following the rollback of the mandatory election laws, union organizing success rates recovered to their pre-enforcement levels.⁵⁶

While there is ample statistical evidence of the benefits of card check campaigns in terms of successfully organizing

workers, there is a notable absence of data supporting allegations of union coercion of employees during card check campaigns. During legislative hearings in the 108th Congress concerning the Secret Ballot Protection Act, two employees spoke against card check campaigns and in favor of the legislation.⁵⁷ While some of their complaints may warrant concern, the complaints were anecdotal and often off-point. Similarly, the leading non-profit organizations which oppose card check recognition use anecdotal stories to demonstrate the grounds for their criticism of card check without much in the way of statistical assertions that card check recognition systematically promotes union abuses of employees.⁵⁸ Many of the concerns raised to a union's approach to organizing employees through card check recognition are legitimate, particularly when in the context of a union-employer neutrality agreement. However, Congress has equipped the NLRB with the tools necessary to handle situations when a union abuses its power by coercing employees to join.⁵⁹

III. Legal Analysis

The Supreme Court long ago held that unions may gain recognition as the collective bargaining representative of an employee unit through means other than Board elections.⁶⁰ However, the parameters of union recognition by means other than Board elections are not entirely clear. This section presents

an overview of card check recognition's evolution, and highlights areas where the Board has indicated it may narrow protection for unions that gained recognition through card check campaigns.

A. Card Check Recognition's Foundation

Section seven of the National Labor Relations Act guarantees workers the right to choose whether or not to join a labor organization.⁶¹ Section eight of the Act prohibits both employers and labor unions from coercing employees in such a way as to violate employees' right to freely choose whether to organize or not.⁶² Such interference with the right to organize by either side would constitute an unfair labor practice.⁶³

Section nine of the Act states:

Representatives *designated* or *selected* for the purposes of collective bargaining *by the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .⁶⁴

The Court has interpreted Congress's failure to specify exactly how employees must choose a labor representative to mean that Congress never intended recognition through Board elections to be the only option.⁶⁵ If section nine of the Act is read to permit recognition through card check campaigns, then it follows that section eight of the Act, mandating collective bargaining with the labor representative chosen by a majority of employees,

requires an employer to bargain with a union approved by a majority of employees through card check recognition.⁶⁶

Though the Supreme Court has read the NLRA to allow union recognition through card check campaigns, the Court has interpreted section nine of the Act to only allow recognition of labor unions outside of the scope of Board elections in two circumstances.⁶⁷ In the first, the Board will recognize a union as the employee unit's official representative through card check recognition when the employer voluntarily recognizes the union after the union demonstrates majority support through presentation of validly signed employee authorization cards.⁶⁸ In the second, the Board will recognize the union where the Board held an election but discarded the results due to unfair labor practices by the employer.⁶⁹

In Gissel, the Supreme Court held that NLRB elections were not always necessary for employees to obtain majority status recognition,⁷⁰ finding that authorization cards were an adequate measure of employee support for a labor union.⁷¹ However, the Court limited its holding to circumstances where "a fair election probably could not have been held, or where an election that was held was in fact set aside" due to a Board finding of unfair labor practices by the employer.⁷²

In Linden Lumber Div., Summer & Co. v. NLRB, the Supreme Court clarified when an employer may disregard a demonstration

of majority status through a card check drive.⁷³ The Court held that

unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure.⁷⁴

The Court found that while an employer's avowed distrust may "mask his opposition to unions," the employer may also have "rational, good-faith grounds for distrusting authorization cards in a given situation."⁷⁵ If the employer refuses to bargain with the union on the basis of the collection of a majority of signed cards, then the union has only two options: file for an election, or make a claim to the NLRB that the employer engaged in unfair labor practices as expressed in Gissel.⁷⁶ In Linden Lumber, the Court did not decide whether an employer commits an unfair labor practice by demanding an official Board election when it breaches an agreement to recognize a union upon presentation of validly signed authorization cards from a majority of the employees in the unit.⁷⁷

In Snow and Sons, the employer had agreed to recognize the union if employees produced signed cards from a majority of employees.⁷⁸ Upon producing a majority of cards, the employer refused to recognize the union, instead insisting upon a Board

certified election.⁷⁹ The NLRB found the employer refusal to be an unfair labor practice by the employer.⁸⁰ As a remedy for the employer's unfair labor practice, the Board ordered the employer to bargain collectively with the union as the official representative of the employee unit.⁸¹

Precedent clearly establishes that an employer may voluntarily recognize a union upon demonstration of majority support through employee signed authorization cards.⁸² It is less clear under what circumstances an employer may refuse recognition upon demonstration of majority status. Gissel, Linden Lumber, and Snow and Sons established that when an employer has agreed to recognize a union upon presentation and verification of a majority of signed cards, refusal to recognize may constitute an unfair labor practice and warrant an NLRB bargaining order.⁸³ The Board explained in Julian, Inc. that "a union can establish voluntary recognition by showing its express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit."⁸⁴

B. Dana Corporation and Metaldyne: Election Bar Quality?

The issue before the Board in Dana Corporation and Metaldyne is whether "the employer's voluntary recognition of the union bars a decertification petition for a reasonable

period of time.”⁸⁵ More particularly, should voluntary employer recognition of a union based on a card check campaign be given election “bar quality”?⁸⁶ The Board seemed to resolve this issue in Keller Plastics Eastern, Inc., where it held that, when an employer voluntarily recognizes a union subsequent to a demonstration of majority support, “like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.”⁸⁷ However, the Board has recently demonstrated a willingness to revisit the issue of election bar quality in instances where a union gained recognition through a card check campaign.

The employers in both Dana Corporation and Metaldyne recognized the union after the union presented cards signed by a majority of employees and checked by a neutral third party for validity.⁸⁸ Soon after recognition, employees at each company challenged the union’s certification. If voluntary recognition is given bar quality, then employees would not be able to challenge the union as their labor representative for a reasonable period of time after initial recognition. The Board’s majority raised two factors that distinguish these cases from precedent, justifying its decision to reverse the Regional Directors’ dismissal of each case.⁸⁹ First, in each of these cases, the employers agreed to recognize the unions via a

neutrality and card check agreement *prior* to the unions' organizing drives.⁹⁰ Second, the Board indicated that *changing conditions* in the labor relations environment warranted heightened scrutiny of card check doctrine.⁹¹ These two factors, the majority concluded, warrant consideration of whether the union's recognition should enjoy election bar quality.⁹² The Board will likely review the Keller Plastics doctrine, deciding whether "a reasonable period of time" in instances where the employer voluntarily recognizes a union in the context of a card check campaign should be shorter than instances where recognition was based on a NLRB election.⁹³

In *NLRB v. Montgomery Ward & Co.*, after employer recognition of majority status, a majority of employees signed a decertification petition.⁹⁴ Affirming the Board's decision, the Court held recognition barred a decertification petition despite the fact that the employer based recognition on card check rather than an election.⁹⁵ The Court explained:

Ward argues that it should not be required to bargain with the Union because the Union was recognized on the basis of a card check rather than an election, and it is unfair to bind employees for a lengthy period on the basis of such an informal and uncertain method of selection. Sec. 9 authorizes both methods of selection, and we see no reason to set aside the Board's decision to ignore this distinction in this case. Both employers and employees have adequate methods of challenging the existence of majority support for a union at the time it was recognized by an employer on the basis of a card check.⁹⁶

But the Court gave much deference to the Board when reaching its decision, stating, “[w]e believe that in this situation the Board should be left free to utilize its administrative expertise in striking the proper balance.”⁹⁷ The Court’s deference in Montgomery Ward to the Board and the fact that it did not address whether a reasonable period of time for a certification bar could differ in the case of card check as compared to Board elections implies that the Board in Dana Corporation and Metaldyne will have substantial leverage with which to define a reasonable period of time.⁹⁸

In NLRB v. Cayuga Crushed Stone, Inc., the Court, acknowledging that the Board “has not fixed any period of mandated collective bargaining where uncertified unions are involved,”⁹⁹ emphasized that a demonstration of a loss of majority status does not preclude the reasonable period of time requirement, even in card check recognition cases.¹⁰⁰ Cayuga held that Brooks v. Nat’l Labor Relations Bd.¹⁰¹ “compel[s] the conclusion that the Unions’ status must be recognized for a reasonable period despite the loss of majority employee support.”¹⁰² Therefore, while the Board will have much leverage to determine a “reasonable period of time” for certification bars in card check recognition cases, the Board will not be able to eliminate the certification bar all together.¹⁰³

In Brooks, the Court explained that the NLRA provides employees with the opportunity to petition the Board for a decertification election¹⁰⁴ and that an employer similarly may petition the Board for such an election.¹⁰⁵ Further, under the NLRA, after either a certification or decertification election, the Board could not hold another election for a period of one year.¹⁰⁶ This rule clearly applied to a union certified by a Board election,¹⁰⁷ but the court indicated that "an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority."¹⁰⁸ In terms of defining what a reasonable period of time should be, the Court observed that the Board established that one year after certification the employer can ask for an election.¹⁰⁹ Most importantly, the Court stated that this determination was "a matter appropriately determined by the Board's administrative authority."¹¹⁰

The Board may succeed in limiting the definition of a reasonable period of time for a certification bar in the context of union recognition based on card check. Keller Plastics stands for the Board's traditional approach that card check recognition creates a certification bar for a reasonable period of time.¹¹¹ But Keller Plastics did not address the issue of whether a reasonable period of time for a certification bar where recognition was based on card check should be commensurate

with the period of time provided where recognition was based on a Board election.¹¹² However, that the Board may succeed in such endeavor does not mean that it should do so. Providing a shorter period of time for the election bar where recognition resulted from a card check campaign puts a stamp of illegitimacy on the union's efforts. This undermines the intent of the Act to afford recognition to a union where a majority of employees express a desire for the union to represent them.¹¹³ Since the legitimacy of card check recognition under the NLRA is well-established, the Board should afford unions that win recognition through card check the same protection as unions that win recognition through Board elections.

C. Shaw's Supermarkets

Shaw's Supermarkets involves the interpretation of a contractual agreement between the Shaw's Supermarkets and the United Food and Commercial Workers Union.¹¹⁴ The Board raised two issues when reversing the Regional Directors dismissal of the case: first, whether Shaw's waived its right contractually to a Board election; and second, whether "public policy reasons outweigh the Employer's private agreement not to have an election."¹¹⁵ Here, the Board's intent to scrutinize and narrow the availability of traditional protections for unions recognized through card check seems more apparent.

The Board questioned whether Shaw's actually waived its rights to a Board election.¹¹⁶ The Board recognized that the contract states the employer will recognize the union upon a demonstration of majority status, but the contract does not explicitly state that the union may demonstrate majority status by the collection of signed cards.¹¹⁷ Beyond not explicitly acknowledging card check, the Board argued that even if the parties intended for cards to be a legitimate medium for demonstrating majority status, the contract does not preclude other methods as well - including Board elections.¹¹⁸ The majority does not explain why the parties would bother to contract for the employer to recognize the union upon a showing of majority status based on a Board election since the employer would be bound by the NLRA to recognize the union in such a situation anyway.¹¹⁹ Implicitly, the majority status clause should imply a contractual obligation of the employer to recognize the union based on non-Board election demonstration of majority support, including demonstration through validly signed cards.¹²⁰

In addition to doubting whether the terms of the contract in Shaw's Supermarkets demonstrate intent by the parties to afford recognition based on a card check campaign, the Board suggested that such an agreement may not constitute a legitimate contract.¹²¹ As a contractual matter, the Board claimed, "there

is a serious question of mutuality and consideration.”¹²² The Dissent disagreed, citing Retail Clerks for the proposition that a union can offer consideration through waiver of its right to a Board election.¹²³ In Retail Clerks, the Court stressed that the NLRB must not interpret a contract clause “to render the contract promise illusory or meaningless.”¹²⁴ The majority appears to be stabbing at contractual issues inherent to card check recognition agreements to fundamentally undermine the organizing approach.

The Board’s most poignant reasoning justifying the reversal of the Regional Director’s dismissal of the case was its suggestion that the determination of whether the union used coercion when collecting cards from employees should be the responsibility of the Board, not of a third party arbitrator.¹²⁵ Though deference is generally given to the arbitration process in labor disputes,¹²⁶ reviewing claims of unfair labor practices is certainly within the purview of the Board.¹²⁷ If the Board believes, on the basis of the complaint, that an arbitrator failed to handle claims of union coercion in a card check campaign, then Board review is appropriate.¹²⁸ Indeed, the strongest argument that opponents of card check recognition put forward is that the process breeds union coercion of employees.¹²⁹ However, that the Board may review claims of unfair labor practices in card check campaigns is further proof

that card check recognition does not jeopardize the rights of employees by subjecting them to union coercion.¹³⁰ Where unions coerce employees to sign cards, employees and employers have a legitimate and accessible venue to hold unions accountable for their abuses.

The contractual issues that the majority raised in Shaw's Supermarkets seem to be a smokescreen for their intent to fundamentally change public policy concerning card check campaigns. The majority plainly stated, "[w]e have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a board election."¹³¹ The majority continued,

[w]e recognize that, under current law, an employer can voluntarily recognize a union based on a card-majority, and that such recognition can operate to preclude employee resort to election machinery for a reasonable period of time. However, in Dana Corporation and Metaldyne Corporation, we have granted review to consider inter alia, that issue. We can do no less here.¹³²

Clearly, the majority does not intend to do less here. In Shaw's Supermarkets, the Board's majority appears intent on expanding the inquiry into whether or not card check is a legitimate organizing tool.¹³³ The Board narrowly reads the employees' fundamental right to choose whether or not to "select or designate" a union to represent them as their collective bargaining representative to mean that employees should choose

whether to organize exclusively through Board elections.¹³⁴ This issue has been resolved, as the Board concedes, in favor of allowing, not only Board elections, but alternatives to Board elections.¹³⁵ As the statistics demonstrate, employees face fewer obstacles to organizing when alternatives to Board elections are available.¹³⁶

The Bush-appointed NLRB majority may try to achieve through the Board what Republicans are attempting to do through the legislature - eliminate card check recognition as a viable organizing tool. However, this is a clear case of judicial activism whether the Board itself recognizes that the law, established by statute and interpreted consistently by the Supreme Court, provides protection for unions recognized through card check campaigns. The NLRB should not act in the capacity of the legislative branch by rewriting policy. The Board should leave the task of drastically changing public policy to the legislature.

IV. The Legislative Battle

Two issues should permeate the legislative discussion concerning card check recognition: first, is union coercion of employees rampant in the card check process; and second, is the NLRB ill-equipped to handle such coercion. A survey of NLRB decisions demonstrates that coercion is not rampant, and that the NLRB is well equipped to determine whether unions used

coercion in the process of convincing employees to sign recognition cards and to provide a remedy in instances where such coercion occurred. This section explores these issues through a discussion of opposing legislative proposals designed to amend the NLRA with regards to card check recognition.

A. The Secret Ballot Protection Act

The legislative battle over card check recognition is largely a battle to either defend or put an end to unionism in the United States. United States Representative Charles Norwood (Republican, Georgia) launched the campaign to support the Secret Ballot Protection Act (SBPA) in February 2005.¹³⁷ Writing in the Washington Times, Representative Norwood lambasted labor unions for organizing workers via union card-signing campaigns instead of through the more traditional method of NLRB elections.¹³⁸ He likened the practice of employees electing to choose a union through card-check recognition to the sham elections held for years in Iraq by Saddam Hussein.¹³⁹ In his own words:

[u]nder Saddam, there was no such thing as secret ballots, so of course Saddam won 99 percent of the vote in his elections. With a reputation as a ruthless torturer and killer of anyone even remotely suspected of opposition, who would dare stand in front of his fedayeen henchmen and publicly declare they were voting against him? Yet that is precisely what John Sweeney and his henchmen at the AFL-CIO demand of American workers.¹⁴⁰

Norwood continued to highlight what is at stake for American workers:

[u]nder this scheme, union thugs are allowed to confront individual workers on the job and at their homes, and demand the worker sign a card giving the union exclusive rights to representation. Workers who refuse are subject to intimidation, threats and even physical violence for not agreeing.¹⁴¹

As a solution, Norwood proposes that Congress amend the National Labor Relations Act to forbid an employer from recognizing a union unless the union has won majority support from employees through a Board certified, "secret ballot" election.¹⁴²

Sponsors of Norwood's bill propose inserting language into the NLRA mandating that all newly organized private sector employees utilize the secret ballot process.¹⁴³ Specifically, the SBPA would amend section 9(a)¹⁴⁴ so that a union shall only be the exclusive bargaining representative when "designated or selected by a secret ballot election conducted by the National Labor Relations Board."¹⁴⁵ This language would preclude union recognition on the basis of voluntary card check agreements.¹⁴⁶ If successful, the SBPA would reverse a long tradition of promoting peaceful relations between employers and labor unions through employers' voluntary recognition of labor unions.¹⁴⁷

However distasteful and sophomoric Norwood's analogizing of AFL-CIO union organizers to Saddam Hussein's fedayeen might be, flatly dismissing the Secret Ballot Protection Act would be a

mistake. A strong movement of anti-union legislators, businesses, and non-profit organizations is waging a concerted effort to bring an end to card check recognition.

Charles Cohen, a former Board member, issued a statement to the House Subcommittee on Employer-Employee Relations on behalf of the United States Chamber of Commerce condemning card check recognition and supporting the SBPA.¹⁴⁸ His statements focused on the effectiveness of the NLRB election process, and his distaste for card check recognition.¹⁴⁹ In terms of the NLRB process, Cohen took issue with labor union accusations that Board elections are slow and ineffective, citing that in 2003 over 90 percent of representation elections occurred within 56 days of a union filing the election petition.¹⁵⁰ Additionally, Cohen points to the fact that unions currently win more than 50 percent of NLRB elections.¹⁵¹ Though Cohen points legitimately to the effectiveness of NLRB elections,¹⁵² this does not detract from unions' legitimate interest in organizing workers and workers interest in being organized. Card check campaigns have a success rate that is 60 percent higher than the NLRB election process.¹⁵³ Fifty-six days and a 50 percent win rate are not impressive when compared to an 80 percent win rate with card check recognition.

It is Cohen's second criticism that resonates more with the anti-card check movement. Cohen claims that voluntary employer

recognition and card check campaigns do not focus on organizing workers, but instead target employers through "political, regulatory, public relations and other forms of non-conventional pressure has become known as a 'corporate campaign.'"¹⁵⁴ He concludes that "[the] use of corporate campaigns and neutrality/card check agreements over the last decade . . . has eroded employee free choice and reflects a shift in focus from organizing employees to organizing employers."¹⁵⁵ Here, contrary to the view of the Supreme Court, Cohen assumes that the collection of signed cards is inherently coercive - contrary to the free choice of employees and contrary to the free choice of employers.¹⁵⁶ However, Cohen never reconciles why unions and employees file so many unfair labor practice charges in the course of Board election campaigns, and yet so few are filed by employers and employees in card check campaigns.

While Cohen's argument is better reasoned than Representative Norwood's wild claims, like Norwood, he fails to explain statistically how this alleged coercion manifests itself. The NLRA indeed protects the free choice of workers.¹⁵⁷ But the NLRA does not protect employee free choice by exclusively providing a right to vote.¹⁵⁸ The NLRA, as interpreted for years by the Supreme Court, also allows employees to express their choice to organize through means other than the NLRB election¹⁵⁹ - presumably to insure their

right to freely select a bargaining representative. There is ample evidence that in virtually all NLRB elections, management commits some act of coercion against its employees.¹⁶⁰ But that evidence is utterly lacking in terms of demonstrating union coercion of employees in non-NLRB elections. If card check campaigns are in fact less coercive than Board elections, as statistics demonstrate, then such campaigns serve to better honor employees' desires to organize or not. If, on the other hand, coercion during card check campaigns was as much of a threat as advocates of the SBPA have suggested, then the witch hunt by groups such as National Right to Work Legal Defense would have produced a substantial number of employee suits challenging union recognition based on card check. In the absence of such suits or statistics demonstrating systematic coercion in card check campaigns, claims of coercion seem shallow.

NLRB Regional Director Gerald Kobell dismissed one of the few complaints filed alleging union coercion in a card campaign.¹⁶¹ Kobell explained that the complaint, filed by William Messenger of the National Right to Work Legal Defense (NRWLD) on behalf of employees of the Metaldyne Corporation,¹⁶² was based on "an affidavit from an employee, who is not in the bargaining unit, in which she states her belief that other employees signed authorization cards because of coercion and/or

misrepresentation.”¹⁶³ Kobell found the complaint so lacking in merit as to not warrant trial on the merits. Though this dismissal is anecdotal, it perhaps reflects the dearth of reasonable grounds for opposition to card check campaigns. Employees and employers rarely file complaints with the Board claiming coercion, and when such complaints are filed, they are often filed with the encouragement of anti-union groups. While that encouragement does not in itself delegitimize the complaints, complaints based on belief or conjecture do not warrant much merit.

In Playskool, Inc.,¹⁶⁴ the NLRB heard a complaint alleging employer and union coercion where the employer voluntarily recognized the union on the basis of card check recognition.¹⁶⁵ The Board did not find that initial recognition of the union was the product of coercion, but did find that the union unlawfully coerced new employees into joining the union immediately upon hire.¹⁶⁶ Card check recognition, as used here, was deemed not coercive.¹⁶⁷ But the fact that the Board analyzed allegations of union coercion with respect to several employees, finding coercion in certain circumstances and not in others,¹⁶⁸ demonstrates the Board’s ability to decide such matters.

More recently, in Duane Reade, Inc., the Board heard allegations of union and employer coercion of employees in a card check campaign.¹⁶⁹ The Board found that the employer’s

assistance to one labor union by "directing employees to a meeting . . . for the purpose of signing up with that particular Union" constituted coercion where the manager of the plant "remained present at the meeting while 17 employees, a majority, signed union cards" in support of recognition of that union over the petitioner union.¹⁷⁰ In Tecumseh Corrugated Box Company, the Board heard and analyzed a complaint alleging union and employer coercion in a card check campaign and found no coercion.¹⁷¹

The Board hears and decides issues of union coercion infrequently, but routinely. Union coercion is the exception, not the rule in card check campaigns. When coercion occurs, the Board is well equipped to detect it and to prevent recognition of the union when appropriate. Since coercion is not rampant and the Board is quite able to address coercion when it does occur, the threat of coercion should not be grounds for the legislature to amend the NLRA to eliminate the most effective method of organizing employees.

Cohen's claim regarding union coercion raises issues of secondary boycotts in corporate campaigns.¹⁷² Cohen claims that when unions pressure other members of the community, including consumers who frequent other businesses, to support union recognition at a particular site, the union engages in secondary boycotts.¹⁷³ NLRA provision § 8(a)(1), creates a right for employees to not only organize and bargain collectively, but

also to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁷⁴ However, it is an unfair labor practice under NLRA §§ 8(b)(4)(i) and (ii) for a union to engage in coercive acts that have a secondary purpose of causing third parties to terminate relations with a targeted employer.¹⁷⁵ But § 8(b)(4)(d) stresses that unions and employees retain the right to make public their dispute with the employer.¹⁷⁶ In construing the NLRA, the Supreme Court in *Edward J. Debartolo Corp. v. Florida Gulf Coast* stated that "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii): that section requires a showing of threats, coercion, or restraints."¹⁷⁷ The Court stressed that the prohibition should not be given a "broad sweep."¹⁷⁸ The Court concluded that the union activity of passing out informational hand bills at a targeted shopping mall did not rise to an unfair labor practice as it did not have a "coercive effect on customers of the mall."¹⁷⁹ The union members merely tried to "persuade customers not to shop in the mall."¹⁸⁰

Cohen cites to no cases or theories suggesting that the NLRB has found or should find corporate campaigns to be unfair labor practices based on a theory of secondary boycotts. Under the current interpretation of section 8 of the NLRA, the NLRB could find that such campaigns, under certain circumstances, rise above the level of persuasion to meet the unfair labor

practice level of coercion. However, the Board is already well equipped to make such a determination and does not need the Secret Ballot Protection Act to aid it in its judgment.

Over the course of the past decade, relatively few cases have been brought before the NLRB alleging union coercion of employees in card check campaigns, and fewer findings of coercion have been made by the Board. When these cases have come before the Board, the Board has been able to evaluate the claims and make decisions accordingly. This obviates the need for legislative interference. The fact that the Board is currently well equipped to deal with allegations of coercion in card check campaigns suggests an ulterior motive for advocates of the SBPA, which Representative Norwood was rather open about: destroying the labor movement all together.¹⁸¹ In fact, Representative Norwood rather candidly explained his view of the nature of the threat that unions pose to the United States. In his kick off to reintroduce the SBPA, to demonstrate why amending the NLRA to prohibit card check was so important, he wrote in the Washington Times that the behavior of the AFL-CIO in its card check campaigns

is precisely the kind of tyranny that Americans are fighting and dying to defeat in Iraq and Afghanistan. It is the kind of *despotism* that we have fought against since *Bunker Hill*. It is a key 21st-century justification for why we still need the *2nd Amendment*.¹⁸²

Representative Norwood, likening the AFL-CIO to Saddam Hussein, Al-Qaeda, and our former colonizers, insists that the United States must defend against the threat posed to this nation by organized labor - apparently not only by amending the NLRA, but also by arming ourselves.¹⁸³ Apparently, if the despotic AFL-CIO gets too out of control, Americans may be pushed to form a "well regulated militia" for the sake of preserving the security of our free state.¹⁸⁴

B. The Employee Free Choice Act

Democrats, Representative George Miller (California) and Senator Edward Kennedy (Massachusetts), have reintroduced the Employee Free Choice Act (EFCA).¹⁸⁵ The EFCA, if passed, would amend the NLRA to provide employees the opportunity to file a petition with the NLRB alleging majority support for a union.¹⁸⁶ Employees could demonstrate this support with signed cards. The Board would then investigate the petition and determine whether recognition was appropriate. If appropriate, the Board would not order an election, but would instead certify the union as the exclusive representative of the employee unit.¹⁸⁷

When initially introducing the EFCA in July 2004, Miller said, "[u]nions make good economic sense. They help workers secure better wages, benefits and workplace conditions for themselves. Unions also help non-union workers by setting standards for other workplaces, bringing broad gains to all

workers.”¹⁸⁸ He also claimed that, “[a]mid continuing changes in the global economy, there is a deeply troubling pattern of employers suppressing workers’ organizing rights. This assault on workers’ rights is the leading cause of the decline in union membership, which in turn is shrinking the middle class’ share of America’s economic growth.”¹⁸⁹ Miller’s solution was to codify a union’s right to organize outside of the mechanism of the certified NLRB election.¹⁹⁰ This would fundamentally alter card check recognition drives, ending the tradition of voluntary employer recognition and forcing the employer to recognize a union upon NLRB determination that a majority of employees in an employee unit expressed support for a union through validly signed authorization cards.¹⁹¹

The Employee Free Choice Act better promotes the aims of the NLRA than the Secret Ballot Protection Act. The NLRA preserves an employee’s right to choose whether or not to organize by mandating that if a majority of employees in a unit express a desire to organize, their employer must recognize and bargain with their chosen representative.¹⁹²

Without substantial support demonstrating the threat to the employee’s right to choose, the SBPA attempts to cut one of two viable approaches for employees to choose a labor representative.¹⁹³ At this moment in history, the approach that the SBPA would eliminate is the most effective organizing tool

employees wishing to organize have at their disposal. Absent evidence of coercion, this effort to limit how employees choose a labor representative seems contrary to the spirit of the NLRA.¹⁹⁴

The Employee Free Choice Act seeks to preserve an employee's right to choose a labor representative outside of the NLRB election process.¹⁹⁵ The EFCA provides for NLRB oversight of this process.¹⁹⁶ The Board is experienced in making determinations of whether signed cards are valid or not, and would have little difficulty in adapting to the new requirements imposed by the Employee Free Choice Act.

A possible amendment to the Employee Free Choice Act would be to include a slightly higher threshold requirement for mandatory employer recognition. This would likely reduce the number of disputes between employers and petitioning unions while at the same time reduce opposition to the EFCA itself, making its passage more likely. A signed card threshold of 55 percent, rather than a simple majority, would reduce the likelihood of challenges and perhaps allay some fears of legislators in considering the legislation.

V. Conclusion

The NLRB should find that the period of time for a certification bar in circumstances where an employer recognized a union on the basis of card check recognition should be

commensurate with that provided when recognition was based on a Board election. Though the Board would be within its statutory authority to find that a reasonable period of time for a certification bar should be less than that provided in the case of a Board election, such a determination would undermine the ability of a union to effectively bargain with an employer for an initial contract. That could have the dual effect of encouraging an employer to resist bargaining in good faith with the union with the hope of undermining the union's certification. Beyond the issue of the certification bar period, the Board should not attempt to aggrandize its power at the expense of the legislative branches by either ruling that union recognition through card check is not a legitimate organizing tool or by rolling back protections for unions recognized through card check campaigns.

Congress should reject attempts to amend the NLRA so as to prohibit card check recognition. This would limit the original intent of the NLRA to preserve peaceful industrial relations and protect an employee's right to choose whether or not to form a labor organization. This would also have a devastating impact on the labor movement in the United States. Rather, Congress should adopt the Employee Free Choice Act to ensure employees are able to organize when they are able to gain majority support. Supporters of the Employee Free Choice Act should

consider amending the proposed legislation to require a threshold greater than a simple majority - perhaps 55 percent - so as to reduce resistance to the legislation and to reduce the number of challenges to majority status after Congress passes the legislation.

¹ 29 **U.S.C.S.** § 151 (2005).

² 29 **U.S.C.S.** §§ 158-59 (2005).

³ Id.

⁴ While "bargaining unit" is not specifically defined by the NLRA, the term is generally laid out in section 9(a) of the Act and provides that a representative chosen by "the majority of the employees in a unit appropriate for such purposes" is to be the "exclusive" representative of all employees in that unit. Essentially, the Board determines which group of jobs shall serve as the election constituency and then that group of jobs is deemed the "bargaining unit." 29 **U.S.C.S.** § 159(b) 2005, **Archibald Cox et. al., Labor Law** 270-71 (Robert C. Clark ed., Foundation Press 2001) (1948).

⁵ 29 **U.S.C.S.** §§ 158-59 (2005).

⁶ 29 **U.S.C.S.** §§ 158-59 (2005).

⁷ Id.

⁸ See National Labor Relations Board v. Gissel Packing, 395 U.S. 575, 596 (June 16, 1969) ("The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9 (c) of the Act; it is also, from the Board's point of view, the preferred route.").

⁹ See Union Organizing under Neutrality and Card Check Agreements, Adrienne E. Eaton and Jill Kriesky, 55 **Ind. & Lab. Rel. Rev.** 42, 43 (October, 2001) (hereinafter Eaton article); NLRB Election Statistics Suggest New Organizing Strategies Paying Off for Unions, News Release, (June 28, 2004), available at <http://www.bna.com/press/2004/nlrb04.htm> (citing UNITE and HERE's shift away from elections and towards card check).

¹⁰ See Gissel, 395 U.S. at 596-97 (stating "that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8 (a) (5) - by showing convincing support, for instance, by . . . possession of cards signed by a majority of the employees

authorizing the union to represent them for collective bargaining purposes.”).

¹¹ See Eaton, supra note 9 at 47 (explaining that some neutrality agreements merely stipulate that the employer remain neutral, while others explicitly state that the employer will not oppose the union). The union will often seek a neutrality agreement with the employer prior to, or simultaneous with, soliciting support from workers.

¹² Americans at Work - Easy Card Check overview, September 27, 2004, <http://www.americanrightsatwork.org/resources/facts/cardvsnlrb.cfm>. The U.S. Supreme Court enforced the legitimacy of card check procedures, finding that “card checks were a permissible alternative to a secret ballot election because of the available checks and balances.”

¹³ “The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9 (c) of the Act (29 U. S. C. § 159 (c)); it is also, from the Board's point of view, the preferred route.” NLRB v. Gissel Packing Co., 395 U.S. 575, 595-596 (1969).

¹⁴ See Eaton, supra note 9 at 51 (“[T]he success rate overall was 67.7 percent. But the neutrality only success rate was 45.6 percent - the same as the overall NLRB election win rate.”).

¹⁵ U.S. Chamber of Commerce, Union Recognition - Secret Ballot Elections and Card Check Coercion, at <http://www.uschamber.com/issues/index/labor/cardchecksecrbal.htm> (last visited Feb. 3, 2006); Union Free America, Bill Protects Employees' Right to Secret Ballot Vote, at <http://www.unionfreeamerica.com/secretballotbill.htm> (last visited Feb. 3, 2006). See also Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. (Feb. 17, 2005); S. 1173, 109th Cong. (June 7, 2005) (pending legislation to amend the National Labor Relations Act to ban employer recognition of unions without having first conducted a Board certified election); **Archibald Cox et. al., Labor Law** 270-71 (Robert C. Clark ed., Foundation Press 2001) (1948).

¹⁶ See Dana Corporation, 341 NLRB No. 150 (2004) (explaining that “changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine.”) The changing conditions the majority in Dana Corporation referred to was “that the use of voluntary recognition has grown in recent years.” Id.

¹⁷ In an effort to impart stability to a collective bargaining relationship, the Board has had a long standing rule that the

certification of a collective bargaining representative is a bar to another investigation for a year. This principle applies to any case in which there has been a prior election, regardless of the outcome. **Archibald Cox et. al., Labor Law** 265 (Robert C. Clark ed., Foundation Press 2001) (1948).

¹⁸ Shaw's Supermarkets and United Food and Commercial Workers Union Local 791, 343 NLRB No. 105 (2004) ("We recognize that, under current law, an employer can voluntarily recognize a union based on a card-majority, and that such recognition can operate to preclude employee resort to election machinery for a reasonable period of time. However, in Dana Corporation and Metaldyne Corporation, we have granted review to consider inter alia, that issue. We can do no less here.").

¹⁹ Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. (Feb. 17, 2005); S. 1173 109th Cong. (Jun. 7, 2005).

²⁰ The Employee Free Choice Act, S. 842, H.R. 1696 109th Cong. (Apr. 19, 2005). Employee Free Choice Act: Protecting Workers' Freedom to Choose, AFL-CIO Press Release, April 19, 2005, available at <http://www.aflcio.org/aboutunions/voiceatwork/efca.cfm>.

²¹ Summary of the Employee Free Choice Act, AFL-CIO Fact Sheet, (last visited May 12, 2005) available at <http://www.aflcio.org/aboutunions/voiceatwork/upload/summary.pdf>.

²² See Dana Corporation, 341 NLRB No. 150, June 7, 2004 (citing Fall River Dyeing Corp. v. NLRB, 482 U.S. 27, 38 (1987) and Brooks v. NLRB, 348 U.S. 96, 103 (1954)); Cingular Wireless, CWA Announce Expanded Card Check, Neutrality Agreement, available at <http://www.cwa-union.org/news/PressReleaseDisplay.asp?ID=254> (August 9, 2001) (citing one of the purposes of the neutrality and card check agreement as making "available an orderly organizing campaign that will minimize disruption to the business for approximately 10,000 employees").

²³ 29 U.S.C. § 159 (a).

²⁴ See Gissel, 395 U.S. at 598 (quoting Howard Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 **Mich. L. Rev.** 851, 861-862, "Cards have been used under the act for thirty years; [this] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley Bill to amend section 8 (a) (5) . . . was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history.").

²⁵ Gissel, 395 U.S. at 598.

²⁶ See Employment Policy Foundation, Fact and Fallacy: Updating the reasons for Union Decline, (reporting that the decline in

union density began as early as the 1950s, and in absolute terms has declined since the 1980s) available at <http://www.epf.org/pubs/newsletters/1998/ff4-5.asp>. This report demonstrates that the percent of the total work force that is unionized has decreased from a high of about 35 percent in the mid 1940s, to a low of between 14 and 15 percent in the 1990s. Id. See also The Labor Research Association Online, Stats and Data, available at <http://www.lraonline.org/charts.php?id=29> (providing a chart detailing percent of unionized workforce and total number of unionized workforce, demonstrating that in 2004 the union workforce percentage reached a new low of 12.5 percent).

²⁷ See Employment Policy Foundation, Fact and Fallacy: Updating the reasons for Union Decline, available at <http://www.epf.org/pubs/newsletters/1998/ff4-5.asp>.

²⁸ Union Network International In-Depth, ICFTU Survey 2003: A Stain of Anti-Union Repression is Spreading Across the Map of the World, available at <http://www.union-network.org/uniindep.nsf> (last modified Oct. 6, 2003).

²⁹ A union premium is the benefit that union workers enjoy compared to their non-union counterparts. So if a non-union employee earns \$8.00 per hour, and a union employee earns \$14.00 per hour, then the premium would be \$6.00 per hour. Much of the premium employees gain from unionization comes from benefits such as health care and pension funds. See generally Bernt Bratsberg and James F. Ragan, Jr., Changes in the Union Wage Premium by Industry, 56 **Ind. & Lab. Rel. Rev.** 65 (2002) (explaining the history of union premiums and modern trends).

³⁰ See Union Network International In-Depth, ICFTU Survey 2003: A Stain of Anti-Union Repression is Spreading Across the Map of the World, available at <http://www.union-network.org/uniindep.nsf> (last modified Oct. 6, 2003) (reporting that the wage surplus that union shops receive over non-union shops has "declined from 40 percent in 1983 to 28 percent in 1996"). But see The Union Advantage by the Numbers, AFL-CIO Fact Sheet, available at <http://www.aflcio.org/aboutunions/joinunions/whyjoin/uniondifference/upload/advantage.pdf> (showing that the overall union wage advantage is 27 percent, and is considerably higher for women and minorities, and including union advantages in non-wage categories such as pension and health care benefits). The AFL-CIO based its statistics on the U.S. Department of Labor, Employment and Earnings, January 2004; Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in Private Industry, March 2004. Id.

³¹ See Labor Research Association Online, Stats and Data, available at <http://www.lraonline.org/charts.php?id=14> (citing

an increase in union victories in NLRB elections of more than five percent). But during that same time, in absolute terms, union membership decreased. See id., available at <http://www.lraonline.org/charts.php?id=29>.

³² See Employment Policy Foundation, Fact and Fallacy: Updating the reasons for Union Decline, available at <http://www.epf.org/pubs/newsletters/1998/ff4-5.asp>.

³³ See id. (citing the higher percentage of women in the work force and the trend of women working intermittently or in part time positions less likely to be open to unionization; and suggesting that the larger share of young people in the work force disfavors unionization).

³⁴ See Employment Policy Foundation, Fact and Fallacy: Updating the reasons for Union Decline, available at <http://www.epf.org/pubs/newsletters/1998/ff4-5.asp>.

³⁵ See id.

³⁶ See Sleeker And Smarter Union Organization Strategies Are Proving More Successful, Blank Rome LLP, August 2004, vol. 6, available at www.blankrome.com (citing that UNITE and HERE organized 85 percent of their new members in 2003 through card check recognition and warning employers that unionization rates are on the rise); James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms 2, available at <http://law.bepress.com/osulwps/moritzlaw/art2>, ("Neutrality agreements combined with card check recognition provide a distinct mechanism enabling employees to select representatives for purposes of collective bargaining. This approach to union organizing has partially displaced Board-supervised elections, and has become the principal strategy pursued by many labor organizations."). Though the statistics indicate that significant numbers of employees have organized their shops through card check agreements, at least one study suggests that card check recognition is not the preferred method of unionization for employees. Checking the Premises of "Card Check": A Nationwide Survey of Union Members and Their Views on Labor Unions, Mackinac Center for Public Policy, July 20, 2004 available at <https://secure.mackinac.org/print.asp?ID=6704>.

³⁷ James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms 9, available at <http://law.bepress.com/osulwps/moritzlaw/art2> ("[N]eutrality combined with card check has become a major weapon in the arsenal of organized labor. The Service Employees, Needle Trades Workers, Hotel and Restaurant Workers, and Autoworkers report that a plurality or majority of newly organized members have come in through contractual arrangements rather than traditional Labor Board supervised election campaigns.").

³⁸ Eaton article at 52, 53.

³⁹ Id. at 52.

⁴⁰ Id. at 55-56.

⁴¹ Id. at 47.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 47-48. Agreements generally provided for a neutral third party to certify signed authorization cards to ensure against union or employer fraud. The range of threshold percentages varied in terms of determining whether the employer would recognize the union. The study found that generally, if more than sixty-five percent of employees signed cards, the employer would recognize the union without an election. In some agreements, if only fifty to sixty percent of employees signed cards, then the parties would hold a non-NLRB election to determine whether or not employees supported the union. And if only thirty-three to fifty percent of employees signed cards, then the parties would file with the NLRB for an official Board election.

⁴⁵ Id. at 47-48.

⁴⁶ Id. at 56.

⁴⁷ Id. at 54.

⁴⁸ Id.

⁴⁹ Id. at 49.

⁵⁰ Id. at 53.

⁵¹ Id. at 50.

⁵² See Chris Riddell, Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998, 57 **Ind. & Lab. Rel. Rev.** 493, 496 (July 2004) (citing the detrimental impact mandatory certification laws had on union density in Canada).

⁵³ Id. at 495-96.

⁵⁴ Id. at 496.

⁵⁵ Id.

⁵⁶ Id. at 496, 504.

⁵⁷ Legislative Hearing on H.R. 4343, The "Secret Ballot Protection Act of 2004," Testimony of Mr. Richard Hermanson, September 30, 2004, available at http://www.house.gov/ed_workforce/hearings/108th/eer/union093004/hermanson.htm, and the Testimony of Tom Riley, September 30, 2004 available at http://www.house.gov/ed_workforce/hearings/108th/eer/union093004/riley.htm. The complaints listed by Richard Hermanson included SEIU's practice of using food, "Pizza, chocolate, chicken and burritos," to induce employees into signing petitions.

On one occasion, an organizer dangling a lunch cooler in front of me to capture my attention approached me. I looked at him and he asked me if I've signed the petition. I was on the clock but I lost my cool anyway. It was an insult to have merchandise used as an enticement for a representation petition.

He also detailed instances of organizers harassing employees by calling their homes repeatedly, and by overstaying their welcome in employees' homes to the point that employees threatened to call the police if the organizers did not leave. He testified that he knew of some employees who signed union cards "to get the organizer or coworker off their back, that they were made uncomfortable by the peer pressure to sign a card."

Tom Riley, a second worker arguing before the House Committee, went on a tirade about the union that attempted to organize his workforce, but shared nothing particularly pertinent to the card check debate. There are likely other employees who have testified against card check recognition, but the complaints do not seem well substantiated.

⁵⁸ See New Bill Would Ban 'Card Check' Forced Unionism, National Right to Work Committee (April 2005) (alleging fraud by the Offshore Mariners United union in its bid to organize employees of Trico Marine Services) available at <http://www.nrtwc.org/nl/nl200504p6.pdf>; Johnson Controls and UAW Hit With Federal Charges for Collusion in Coercing Workers to Join Union, The National Right to Work Foundation, January 23, 2003, (criticizing the UAW's efforts to organize worker of Johnson Controls, Inc.) available at <http://www.nrtw.org/b/nr.php?id=225>; National Agreement Between Teamsters Union and UPS Illegally Undermines Right to Work Laws: Company agrees to coerce UPS workers to join the union despite law, The National Right to Work Foundation, January 28, 2003 available at <http://www.nrtw.org/b/nr.php?id=183> (criticizing the neutrality and card check agreement between the Teamsters and United Parcel Services). The Foundation is known for "providing free legal aid to employees whose human or civil rights have been violated by compulsory unionism abuses." In the case of Johnson Controls, the Foundation's chief complaint was that the company gave the union captive audience speeches that were misleading to the employees. There were no threats of particularly coercive measures alleged. The Foundation has a public-interest minded approach to eradicating the compulsory unionism, seeking out test cases to challenge union tactics such as card check recognition. The passion of the Foundation is apparent on its

"Why We Fight" page, available at <http://www.right-to-work.org/whywefight.php3>.

⁵⁹ 29 U.S.C. §158 (b)(1) (prohibiting unions from restraining or coercing employees in exercising their rights under section 7 of the Act). Section seven provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . of their own choosing . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization." Id. While the concerns raised by opponents of card-check recognition are valid, absent the demonstration of a systemic and regular inducement of coercion through the practice, the NLRB seems well equipped to regulate instances where the union actually coerces employees into joining a union in violation of the NLRA.

⁶⁰ Nat'l Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575, 595-96 (1969) (finding situations where a card check campaign was enough to recognize the union without the need for a Board election).

⁶¹ 29 U.S.C. § 157 reads

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

This right is subject to the limitation that if a valid collectively bargained agreement is negotiated at the work site, the employee may be subject to that agreement, depending on state law.

⁶² 29 U.S.C. § 158 (b)(1); Gissel, 395 U.S. at 605 (finding the "Board's present rules for controlling card solicitation . . . adequate to the task where the cards involved state their purpose clearly and unambiguously on their face.").

⁶³ 29 U.S.C. §§ 158(a), (b).

⁶⁴ 29 U.S.C. § 159(a).

⁶⁵ Gissel, 395 U.S. at 596-97, 602 ("The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the

election process, cards may be the most effective - perhaps the only - way of assuring employee choice.").

⁶⁶ 29 U.S.C. §§ 158(a)(1), (c), and (d). See generally Gissel, 395 U.S. 575 (finding situations where a union must be recognized as the bargaining agent of employees without the formal process of a NLRB election).

⁶⁷ Gissel, 395 U.S. at 597.

⁶⁸ Id. at 597, 602.

⁶⁹ Id. The Board will also recognize the union where no election was held due to the employer's continuing unfair labor practices, causing any election to be tainted by the employer's labor law violations. Id.

⁷⁰ 395 U.S. at 595.

⁷¹ 395 U.S. at 601-10.

⁷² Gissel, 395 U.S. at 601, n. 18.

⁷³ 419 U.S. 301, 304-05 (1974).

⁷⁴ Linden Lumber, 419 U.S. at 310.

⁷⁵ Id. at 306.

⁷⁶ Id.

⁷⁷ Id. at 306, n. 10.

⁷⁸ 134 N.L.R.B. 709 (1961), enforced by 308 F.2d 687 (1962) and cited in Gissel, 395 U.S. at 593 and Linden Lumber, 419 U.S. at 310.

⁷⁹ Snow and Sons, 134 N.L.R.B. at 710, enf'd by Snow v. NLRB, 308 F.2d 687 (1962).

⁸⁰ Id. at 710-11.

⁸¹ Id. at 712.

⁸² Gissel, 395 U.S. at 597 ("a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status.'") (quoting United Mine Workers v. Ark. Flooring Co., 351 U.S. 62, 72 n. 8 (1956)).

⁸³ Gissel, 395 U.S. 575; Linden Lumber, 419 U.S. 301; 134 N.L.R.B. 709.

⁸⁴ 310 N.L.R.B. 1247, 1252 (NLRB 1993) (holding that the union's demand for recognition, as well as the employer's acceptance of recognition, must be unequivocal).

⁸⁵ Dana Corporation, 341 NLRB No. 150, June 7, 2004.

⁸⁶ Id.

⁸⁷ 157 NLRB 583, 587 (NLRB, 1966).

⁸⁸ 341 NLRB No. 150 (2004).

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² The dissent argued that this issue has been settled by well established law. Id. (Members Liebman and Walsh, dissenting).

⁹³ Id., citing Keller Plastics, 157 N.L.R.B. 583 (1966).

⁹⁴ 399 F.2d 409, 411-412 (1968).

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id. at 412.

⁹⁸ See id. at 412 ("The present case presents an apparent conflict between two important goals of the National Labor Relations Act: preserving a free employee choice of bargaining representatives, and encouraging the collective bargaining process."). The court continued:

We believe that in this situation the Board should be left free to utilize its administrative expertise in striking the proper balance. The Board here had ample reason for refusing to allow the employees' decertification petition and for requiring the employer to bargain. Under these circumstances we should not interfere with the Board's determination.

Id.

⁹⁹ 474 F.2d 1380, 1383 (1973).

¹⁰⁰ Id.

¹⁰¹ 348 U.S. 96 (1954).

¹⁰² 474 F.2d at 1383.

¹⁰³ See Id. ("There is no doubt that if the bargaining relationship between the employer and the Unions had been established by Board certification after an election, the representative status of the Unions absent unusual circumstances would be irrebuttably presumed to continue for one year and after that time the presumption could be rebutted."). The court continued:

The Board has not fixed any period of mandated collective bargaining where uncertified unions are involved but has maintained that the employer must bargain for a reasonable time. Here the Board found that the three bargaining meetings lasting not more than ten hours, in a one month period, were not adequate.

Id.

¹⁰⁴ 29 U. S. C. § 159 (c) (1) (A) (ii); Brooks, 348 U.S. at 104.

¹⁰⁵ 29 U. S. C. § 159 (c) (1) (B); Brooks, 348 U.S. at 104.

¹⁰⁶ 29 U. S. C. § 159 (c) (3); Brooks, 348 U.S. at 104.

¹⁰⁷ 29 U. S. C. § 159 (c) (1); Brooks, 348 U.S. at 104.

¹⁰⁸ Brooks, 348 U.S. at 104.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Keller Plastics, 157 N.L.R.B. 583 (1966).

¹¹² Id.

¹¹³ See 29 U.S.C. § 157 ("Employees shall have the right . . . to bargain collectively through representatives of their own choosing.").

¹¹⁴ Shaw's Supermarkets and United Food and Commercial Workers Union Local 791, 343 NLRB No. 105, December 8, 2004.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ See id. ("The [National Labor Relations Act] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.' Consistent with this fundamental purpose, it is beyond dispute that a union need not be certified as the winner of a Board election in order to become the exclusive bargaining representative.") (quoting Nat'l Labor Relations Bd. v. Am. Nat'l Ins. Co., 343 U.S. 395, 401 (1952)).

¹²¹ Id. ("The fact that the court and Board construed the language in Kroger as clear does not mean that *all* such clauses are clear. Agreements between parties are fact specific, and the mere fact that a clause in a given case is deemed to be clear and unequivocal does not mean that a clause (even a similarly worded clause) in another case is clear and unequivocal.").

¹²² Id.

¹²³ Id. (Member Walsh, Dissenting) (citing to Retail Clerks International Asso. v. NLRB, 510 F.2d 802, 805-06 (1975)).

¹²⁴ 510 F.2d at 806 n. 15.

¹²⁵ Shaw's Supermarkets, 343 NLRB No. 105, December 8, 2004.

¹²⁶ See E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000) (quoting Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987), "as long as . . . [an] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision"); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.").

¹²⁷ United Food and Commercial Workers Local Union 540 and Pilgrim's Pride Corporation, 334 N.L.R.B. 852, 854 (2001) (reviewing an arbitral decision to determine whether a union violated the NLRA by filing a grievance against an employer). The Board stated, "national labor policy encourages resort to the grievance-arbitration procedure as the preferred method of resolving labor-management disputes." Id. at 855 (quoting Local

Union No. 7, International Longshoremen's and Georgia-Pacific Corp., 291 N.L.R.B. 89 (1988)).

¹²⁸ United Food and Commercial Workers, 334 N.L.R.B. 852 at 857 (holding that the union did not violate the NLRA).

¹²⁹ U.S. Chamber of Commerce, The Secret Ballot Protection Act Reduce Coercion in Union Organizing; Protects Employee Privacy, available at <http://www.uschamber.com/NR/rdonlyres/enio7vmjn6soib43gcm7pm7mk2p2q3rfy3atv7l6hep24w3zzmb4dhzclsglpjz6frb5oc72mzqgb7m7lwvpoa26wyc/SecretBallotProtectionActPolicyPaperPDF.pdf> (last visited Feb. 7, 2005).

¹³⁰ If there were some sort of unfair labor practice alleged, the Board review would neutralize and attempt to amend the problem.

¹³¹ Shaw's Supermarkets and United Food and Commercial Workers Union Local 791, 343 NLRB No. 105, December 8, 2004.

¹³² Id.

¹³³ Id. ("We recognize that, under current law, an employer can voluntarily recognize a union based on a card-majority, and that such recognition can operate to preclude employee resort to election machinery for a reasonable period of time.").

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Eaton, supra note 9 at 47.

¹³⁷ The Secret Ballot Protection Act of 2005, H.R.874 109th Cong. (Feb. 17, 2005) ("To amend the National Labor Relations Act to ensure the right of employees to a secret-ballot election conducted by the National Labor Relations Board.").

Representative Norwood introduced the bill in the House of Representatives and Senator DeMint (Republican, South Carolina) introduced the bill (S. 1173) in the Senate.

¹³⁸ United States Representative Charles Norwood, Secrecy in the Voting Booth, **The Washington Times**, February 24, 2005, available at <http://www.freerepublic.com/focus/f-news/1350620/posts>.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. § (a) (1) (Feb. 17, 2005).

¹⁴³ Id.

¹⁴⁴ 29 U.S.C. 159(a)

¹⁴⁵ Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. § (a) (1) (Feb. 17, 2005).

¹⁴⁶ Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. (Feb. 17, 2005).

¹⁴⁷ See NLRB v. American National Insurance Co., 343 U.S. 395, 401-02 (1952) ("The National Labor Relations Act is designed to

promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.”).

¹⁴⁸ Charles I. Cohen, Statement to the Labor-HHS Subcommittee Field Hearing on the Employee Free Choice Act -- Union Certification, Senate Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations, July 16, 2004 [hereinafter Cohen], available at <http://appropriations.senate.gov/text/subcommittees/record.cfm?id=224896>.

¹⁴⁹ Id.

¹⁵⁰ Id. (citing Memorandum GC-04-01, Summary of Operations (Fiscal Year 2003), at p. 5 (December 5, 2003), available at http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc04-01.pdf?useShared=/nlrb/about/reports/gcmemo/default.asp).

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Eaton, supra note 9 at 52.

¹⁵⁴ Cohen, supra note 148.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ See 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities.”).

¹⁵⁸ 29 U.S.C. § 158; Gissel, 395 U.S. at 597, 603.

¹⁵⁹ Gissel, 395 U.S. at 597, 603.

¹⁶⁰ Eaton, supra note 9 at 49.

¹⁶¹ Metaldyne Corp., 6-RD-1518, 01/29/04, available at [http://www.nlr.gov/nlr/shared_files/decisions/dde/2004/6-RD-1518\(1-29-04\).pdf](http://www.nlr.gov/nlr/shared_files/decisions/dde/2004/6-RD-1518(1-29-04).pdf).

¹⁶² Id.

¹⁶³ Id. at 2 n. 2.

¹⁶⁴ 195 N.L.R.B. 560 (1972).

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Duane Reade, Inc. and Allied Trades Council and Local 340-A, UNITE, AFL-CIO, 2002 NLRB LEXIS 189, May 17, 2002.

¹⁷⁰ 2002 NLRB LEXIS 189, 22.

¹⁷¹ 333 N.L.R.B. 1, 8 (Jan. 12, 2001).

¹⁷² Cohen, supra note 149.

¹⁷³ Id.

¹⁷⁴ 29 U.S.C. § 158(a)(1).

¹⁷⁵ 29 U.S.C.S. § 158(b)(4); NLRB v. Servette, Inc., 377 U.S. 46, 52-53 (1964).

¹⁷⁶ 29 U.S.C.S. § 158(b)(4)(d).

¹⁷⁷ 485 U.S. 568, 578 (1988).

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Norwood, supra note 138.

¹⁸² United States Representative Charles Norwood, Secrecy in the Voting Booth, Washington Times Editorial Page, February 24, 2005, available at <http://www.washingtontimes.com/functions/print.php?StoryID=20050223-082151-4651r>.

¹⁸³ Id.

¹⁸⁴ U.S. CONST. amend II.

¹⁸⁵ Employee Free Choice Act, S. 842, H.R. 1696, 109th Cong. (Apr. 19, 2005).

¹⁸⁶ Id.

¹⁸⁷ See id. § 2(a):

whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative.

¹⁸⁸ George Miller, Workplace Reform; Make it easier to form unions, **Milwaukee Journal Sentinel** (Wisconsin) July 25, 2004, at 5J.

¹⁸⁹ Id.

¹⁹⁰ Id. See also Employee Free Choice Act, H.R. 1696, 109th Cong. (Apr. 19, 2005).

¹⁹¹ Employee Free Choice Act, H.R. 1696, 109th Cong. (Apr. 19, 2005).

¹⁹² Id.

¹⁹³ Secret Ballot Protection Act of 2005, H.R. 874, 109th Cong. (Feb. 17, 2005); S. 1173, 109th Cong. (June 7, 2005) (attempting to ban an employer's voluntary recognition of a union that claims majority support by the employees).

¹⁹⁴ See Gissel, 395 U.S. at 597.

¹⁹⁵ Employee Free Choice Act, H.R. 1696, 109th Cong. (Apr. 19, 2005).

¹⁹⁶ Id.