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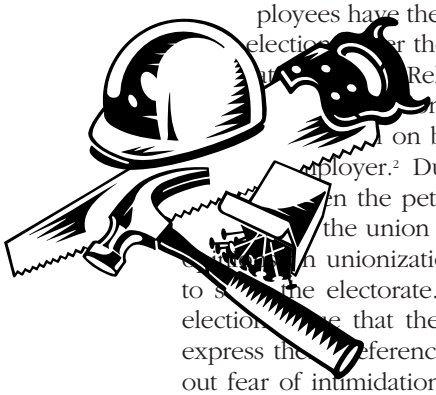
The Future of Secret-Ballot Elections Under the National Labor Relations Act

Recently, both Congress and the National Labor Relations Board (NLRB) have undertaken a close examination of the National Labor Relations Act and its impact on current labor relations. While the National Labor Relations Act has been in existence for more than 70 years, the secret-ballot election, by which unions may become certified as bargaining representatives of employees, has been the subject of debate on both the congressional floor and within the NLRB. Central to this debate is whether the secret-ballot election should be relegated to the history books of labor law or if it should be protected as a hallmark of employees' fundamental rights.



Employee Free Choice Act

On March 1, 2007, the House approved the Employee Free Choice Act by a vote of 241-185.[1] If enacted, this legislation would amend the National Labor Relations Act and change the process by which unions are certified as employees' bargaining representatives. Under the terms of the Employee Free Choice Act, once a majority of employees sign authorization cards designating a union as their bargaining representative, the NLRB will recognize that union as the exclusive bargaining representative for that particular bargaining unit. Under current law, employees have the ability to vote in a secret-ballot election under the supervision of the NLRB. The National Labor Relations Act provides for such an election when a petition is filed by either an employee, a union on behalf of the employees, or the employer.[2] During the intervening time between the petition and the election, typically weeks, the union and the employer express their opinions on unionization to employees in an attempt to sway the electorate. Advocates of the secret-ballot election argue that the election allows employees to express their preferences regarding unionization without fear of intimidation.[3] However, proponents of the Employee Free Choice Act argue that the supervision of these elections by the NLRB does not negate the pressure-filled campaigns leading up to the election.[4]

In addition to the provisions affecting secret-ballot elections, the Employee Free Choice Act authorizes the government to implement the terms of collective bargaining agreements, enforce them through injunctions, and levy treble damage awards against employers.[5] The Employee Free Choice Act imposes steeper penalties for violations of the National Labor Relations Act, including employee back pay, liquidated damages, and civil penalties.

The Employee Free Choice Act is expected to be introduced in the Senate soon.[6] On Feb. 28, 2007, the White House issued a statement opposing the bill, because it "would strip workers of the fundamental democratic right to a supervised private ballot election, interfere with the ability of workers and employers to bargain freely and come to agreement over working terms and conditions, and impose penalties for unfair labor practices only upon employers—and not on union organizers—who intimidate workers."[7] The White House has stated that the President is prepared to veto the Employee Free Choice Act if it is passed by the Senate.[8] Regardless of whether the Employee Free Choice Act is enacted, its passage in the House has stirred an ongoing debate regarding the current labor relations environment in this country.

Issues Before the National Labor Relations Board

Similarly, the NLRB has shown an increased interest in the status of secret-ballot elections, given the rise in the use of neutrality agreements and voluntary recognition of unions by employers. The NLRB has granted review of a handful of NLRB decisions involving neutrality agreements. Neutrality agreements can cover a variety of agreements between an employer and a union—ranging from an employer's promise to remain neutral during an organizational campaign, an employer's agreement to recognize the union upon the presentation of signed authorization cards, or an agreement to submit to arbitration an initial bargaining contract.[9]

One common type of neutrality agreement is one in which the employer and the union, which is already recognized as the exclusive bargaining representative, agree that the employer will also recognize the union as the representative of employees at "after-acquired" facilities. In a case involving Pall Biomedical Products Corporation, the NLRB held that such an agreement is a mandatory subject of bargaining.[10] In that case, the union and the employer had a letter of agreement

that provided that, if the employer had any employees performing bargaining unit work at another specified facility, the employer would recognize the union and bargain accordingly. Subsequently, the employer hired employees at this facility and the union requested more information to determine whether the agreement had been invoked, but the employer refused to provide the union with access to the facility and unilaterally revoked the agreement. In making its decision, the NLRB examined its precedent, including *Kroger Company*,[11] and the treatment of after-acquired clauses under the National Labor Relations Act.[12] *Kroger Company* interpreted a similar clause as "waiving the employer's right to a Board-conducted election and requiring the employer to recognize the union upon proof of majority status."[13] By holding that such a clause was a mandatory subject of bargaining, the NLRB concluded that the employer's unilateral revocation of the agreement had violated §§ 8(a)(5) and (1) of the National Labor Relations Act.

More recently, in the 2004 NLRB decision reached in *Shaw's Supermarkets*, the NLRB examined an after-acquired clause and used a more cautious approach to its impact on the employer's ability to demand an election.[14] This case was brought to the NLRB after the acting regional director for Region 1 had held that the employer did not have the right to demand an election when the union demanded recognition based on an after-acquired clause, which in this case stated the following in regard to new stores: "When the Employer opens new stores within the geographic area described in Article 1, the Employer will allow access within the store prior to opening during the hiring process, will remain neutral, and will recognize the Union and apply the contract when a majority of Employees have authorized the Union to represent them."[15]

The NLRB granted a review on two issues: "(1) [w]hether the Employer clearly and unmistakably waived the right to a Board election; (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election."[16] The NLRB's grant of a review highlighted the board's potential concerns. First, such a clause is unclear as to which employees at the new store are subject to union representation. Second, the NLRB questioned whether the clause revealed a clear and definite waiver by the employer of a board-supervised secret-ballot election. The NLRB found that the clause did not define how the union would show authorization by a majority of employees, whether by signed authorization cards or board processes such as a supervised election. The NLRB's hesitation to deny the employer's request for election without granting a review and a hearing was explained in its opinion:

> [W]e have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election. It is clear that the Board's election machinery is the preferred way to resolve the question of whether employees desire union representation. That method, as compared to a card-check, offers a secret ballot choice under the watchful supervision of a Board agent. 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.[17]

Given these concerns, the NLRB granted a review and a hearing to resolve these issues. The NLRB's decision received a vigorous dissent from Dennis P. Walsh, a member of the board, who outlined the long-held precedent holding that after-acquired clauses waive an employer's right to a supervised election.[18]

On a related issue, the NLRB has also granted review to examine "whether the Employers' voluntary recognition of the Union bars a decertification petition for a reasonable period of time."[19] In *Dana Corp.* and *Metaldyne*, the board opened the door to examining the effect of an employer's voluntary recognition of a union on the subsequent right to bring a decertification petition. In both of these cases, consolidated by the NLRB, the employer and the union had agreed to a neutrality and card-check agreement. The employer voluntarily recognized the union as the exclusive bargaining representative upon a showing of signed authorization cards. However, within a few weeks after voluntary recognition, employees filed a petition for a decertification election. The regional director dismissed the petition, based on the recognition bar doctrine, which prevents such a petition for a reasonable period of time after an employer voluntarily recognizes the union as the bargaining representative. The purpose of the recognition bar doctrine is to allow the union to negotiate its first agreement with the employer effectively without concern over an imminent decertification petition.

In the order granting a review, the three NLRB members supporting the review acknowledged that current NLRB precedent allows for voluntary recognition and its subsequent recognition bar to a decertification petition. However, the NLRB's order indicated that this case offered a timely opportunity to reconsider this doctrine:

> [W]e believe that changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine. As our colleagues acknowledge, the change here is that the use of voluntary recognition has grown in recent years. Although no party here challenges the legality of voluntary recognition, the fact remains that the secret-ballot election re-

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state registration is inexpensive: the application fee is nominal and maintaining the registration costs less than it does for federally registered marks.

Trademark law protects the goodwill that trademark owners develop in their goods and services. It is important to note that all trademark rights are based on use, so it is Peppy's use of the mark Peppy Roni's that gives him these rights. If he stops using the name as a trademark, he can lose his rights to the mark. The federal system does allow a user to file an application before actual use of the mark if the user has a bona fide intent to use the mark, but even this type of application is contingent upon the registrant's eventual use of the mark. Although Peppy cannot stop Ann Chovie from opening her pizzeria, he can use trademark law to stop Ann from using the name Spicy Roni's, a confusingly similar name. Now both you and Peppy can enjoy a slice of his pizza! **TFL**

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> mains the best method for determining whether employees desire union representation. In such an election employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast, the card-signing guarantees none of these protections. The issues raised herein is the extent to which, if any, a voluntary recognition should be given election "bar quality." The issue is significant because "bar quality" means that, for some period, the employees will not be able to exercise their Section 7 right to reject the union and/or choose a different one.[20]

Given the NLRB's grant of a review of *Shaw's Supermarket*, *Dana Corp.*, and *Metaldyne*, the interplay between an employer's voluntary recognition of a union and the employees' right to a secret-ballot election to determine the recognition of a bargaining representative role promises to be a focal point of future discussions. **TFL**

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Endnotes

[1]H.R. 800, 110th Cong. (2007).

[2]29 U.S.C. § 159(c).

[3]*See*, e.g., *Hearing Highlights Diverging Views on Ballot Process, Need for Card Check Bill*, Daily Labor Report, no. 59, A-10 (Mar. 28, 2007).

[4]*Id.*

[5]If the employer and union fail to reach an agreement during negotiations for a first contract, the bill provides for mediation. If the mediation is unsuccessful, after 30 days, the parties enter into binding arbitration. This binding arbitration can impose a two-year contract and compel these contractual obligations by a federal court injunction. This provision in the Employee Free Choice Act differs vastly from what is provided under current law, under which parties must negotiate in good faith until they reach an agreement. However, the obligation to bargain in good faith does not, in fact, compel the employer to agree or concede to the union's demands.

[6]*Hearing Highlights Diverging Views on Ballot Process*.

[7]*Panel Allows Secret Ballot Amendment in House Floor Debate on Card Check Bill*, Daily Labor Report, no. 40, A-11 (Mar. 1, 2007).

[8]*Hearing Highlights Diverging Views on Ballot Process*.

[9]National Labor Relations Board Representation Outline, chapter 9-620, available at www.nlrb.gov/nlrb/legal/manuals/outline_chap9.html.

[10]*Pall Biomedical Products Corp.*, 331 NLRB, no. 192, at 1677 (Aug. 31, 2000).

[11]*Kroger Co.*, 219 NLRB 388 (1975).

[12]*Pall Biomedical Products Corp.*, at 1675.

[13]*Id.*

[14]*Shaw's Supermarket*, 343 NLRB, no. 105, at 963 (Dec. 8, 2004).

[15]*Id.* at 964.

[16]*Id.*

[17]*Id.* at 964 (citations omitted).

[18]*Id.* Walsh cited NLRB decisions extending back 30 years, including *Kroger Co.*, 219 NLRB 388 (1975); *Raley's*, 336 NLRB 374 (2001); *Alpha Beta Co.*, 294 NLRB 228 (1989); *Jerry's United Super*, 289 NLRB 125 (1988); and *Central Parking System*, 335 NLRB 390 (2001).

[19]*Dana Corporation* and *Metaldyne Corporation*, 341 NLRB, no. 150 (June 7, 2004).

[20]*Id.*