

## **Ambush Elections Under Consideration As Alternative to Card Check**

*Proposals to Shorten Election Time Frame Overlook Unions' 67 Percent Win Rate in Current System, In Which Vast Majority of Elections Occur within Six to Eight Weeks*

On the premise that delays in the NLRB election process are common and used by employers to frustrate employees' desires to form a union,<sup>1</sup> supporters of the Employee Free Choice Act (H.R. 1409 / S. 560) are reportedly considering replacing the bill's card check provisions with "quickie" or "ambush" elections.<sup>2</sup> Senator Arlen Specter (D-PA), who supports labor law reform, but not card checks, has proposed that union elections be held within 21 days after the union files an election petition with the National Labor Relations Board (NLRB).<sup>3</sup> To build the case for these changes, proponents point to examples of situations where the Boards procedures have dragged out for several years. No one disputes that such instances take place, though more often than not they are the result of very difficult and unique factual and legal issues involving critical issues. In fact, as is shown below, the vast majority of elections take place within a six to eight week period with the union winning most of the time. To completely revamp the rules to address a small minority of instances would threaten to disrupt the strong majority where the system is working in a prompt manner. One can only conclude that the real purpose in shortening the election period is the same as card check; namely, to provide unions an effective monopoly over information and messaging during a campaign period.

**NLRB Currently Targets Elections Within 42 Days** Under the current process, a union representation election is triggered when the union files a petition supported by union authorization cards signed by at least 30 percent of the employees in the unit the union seeks to represent. (Typically, the union files the petition with a supermajority knowing that, once the employees hear all sides of the issue, support for the union will decline.) Once the petition is filed, the NLRB regional office conducting the election sets a goal of conducting the election within 42 days.<sup>4</sup> This period of time gives employees an opportunity to hear from and discuss all sides of the unionization issue with the union, fellow employees and the employer. When this target is not met, it is typically because of disagreement between the union and the employer over which employees should vote and be included in the unit represented by the union if it wins. A small minority of elections are also delayed by unfair labor practice charges filed against either the union or employer. These so-called "blocking charges"—filed by unions and employers alike—delay the election pending adjudication by the NLRB. It is worth noting that the filing of such charges is a common tactic used by unions to delay elections held to determine whether a union should be decertified, even though such elections are triggered by a petition filed by the represented employees.

**Vast Majority of Elections Run Quickly and Smoothly** Despite claims that the NLRB-conducted election system is broken, the following NLRB data shows that the vast majority of elections do not incur delays or abuses by either the employer or the union:

- In fiscal year 2008, almost 92 percent of all elections were held pursuant to an agreement between the employer and the union on the unit and other issues pertaining to how the election will be held;<sup>5</sup>

- The median time in which elections are held after the filing of the petition is 38 days, well within the 42-day target;<sup>6</sup>
- Ninety-five percent of all elections are conducted within 56 days of the filing of a petition by the union;<sup>7</sup>
- Over the years these numbers have improved significantly. In 1980, only 87.5 percent of elections were held within 57 days;<sup>8</sup>
- Allegations of improper conduct by either the employer, the union or both are made in less than five percent of elections conducted and in only 1.4 percent of elections does one of the parties seek to overturn the election results based on those objections.<sup>9</sup>

Thus, despite the examples frequently offered seeking to prove that the NLRB election process is fraught with delays of “months and years” with employer abuses being the norm, the data above paints a picture of a much more orderly, prompt process in the vast majority of instances.

**Unions Win Two-Thirds of Elections Under the Current System** According to the most recent election data, in that vast majority of circumstances where the election is both timely and orderly, unions are faring very well. A report by the Bureau of National Affairs (BNA) shows that, in 2008 unions, prevailed in 66.8 percent of NLRB-conducted representation.<sup>10</sup> This is a substantial increase from 60.4 percent 2007 and it is the highest union win rate since 1955. Moreover, according to the NLRB, unions have won more than half of all representation elections in each of the past 12 years.<sup>11</sup> The number of voters eligible to participate in the elections also increased from 102,494 in 2007 to 108,587 in 2008. In 2008, unions organized 70,511 workers through NLRB elections, up from 58,260 the year before.<sup>12</sup>

**Employees Need Time to Hear All Sides** Shortening the election period from the targeted six weeks to less than 21 days would severely undermine the ability of employees to benefit from a healthy debate on the merits of union representation. Up to the point of an election petition being filed, the employees have heard primarily a one-sided sales pitch by the union for several weeks or longer. Often employers and even many employees are not even aware of the union’s campaign and, therefore, cannot respond to the union’s rhetoric and promises. Once the petition is filed, the election campaign is underway and all interested parties can participate. The purpose of ambush elections (and the card check procedure) is not to level the playing field or eliminate delays but to curtail such debate. It also deprives employees of the ability to carefully weigh what they are hearing from both sides, get questions answered, digest that information and thoroughly discuss the matter with both supporters and opponents of the union among the workforce as well as those who are uncommitted. If the union is elected, it will be in place for at least one year and very difficult to displace thereafter. The decision should not be a hasty one that may ultimately lead to “buyer’s remorse.”

**Proposed Changes Fail to Address Decertification Elections** As introduced, the Employee Free Choice Act applies its card check provisions to union certification elections only and not decertification elections where a majority of the employees may vote to no longer be represented. Yet, the current law consistently applies the same rules to both kinds of elections. Indeed, complaints of lengthy delays in decertification elections are frequent, as unions often file unfair labor practice charges with the deliberate intent of delaying with so-called “blocking

charges” the election from occurring.<sup>13</sup> It is not yet clear whether quick election variations being considered would apply the same timetables to decertification elections but it would be difficult to justify any such variation as taking a “balanced approach” if it failed to do so.

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<sup>1</sup> “Under the NLRB election process, delays of months and even years are common, during which management uses every imaginable procedural option to stretch out the process and frustrate the desire of employees to form unions.” American Rights at Work, *Employee Free Choice Act: A Resource Guide for Responsible Employers*.

<sup>2</sup> Alec MacGillis, Stern Considers Alternatives to EFCA, *The Washington Post*, (April, 21, 2009).

<sup>3</sup> Cong. Rec. S3636 (daily ed. March 24, 2009) (statement of Sen. Specter).

<sup>4</sup> Office of General Counsel, Summary of Operations (Fiscal Year 2008) at 6 (available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2008/R-2675.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2008/R-2675.pdf)).

<sup>5</sup> Office of General Counsel, Summary of Operations (Fiscal Year 2008) at 6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Seventy-second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2007.

<sup>9</sup> Seventy-third Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2008, Table 11B at 106.

<sup>10</sup> Michelle Amber, 2008 Union Win Rate Rises to 66.8 Percent, As Number of NLRB Elections Also Increases, *Daily Labor Report* (BNA), 84 DLR B-1 (The full report may be purchased from BNA Plus at [bnaplus@bna.com](mailto:bnaplus@bna.com) or 800-372-1033, Option 5, then Option 2).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See e.g., *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428 (10th Cir. 1990) (blocking charges delay decertification election 9 years); *Templeton v. Dixie Color Printing Co., Inc.*, 444 F.2d 1064 (5th Cir. 1970) (blocking charges result in 3 year delay).