

Big Labor's Agenda for the 110th Congress Part II: Card Check, Trade Policy & the NLRB

By Ivan Osorio

Summary: Last month, Labor Watch looked at the proposal to raise the federal minimum wage—a key item in the Democrats' agenda for Congress. In this issue, we look at three other items on organized labor's agenda: automatic recognition of card-check organizing, a slowdown of international trade liberalization, and "reform" of the National Labor Relations Board (NLRB).

Organized labor claims the Democrats owe them big time. They say the Democrats would not have their new majority control of Congress were it not for union contributions of foot soldiers and money to party candidates in the November elections. Now labor is demanding its pound of flesh. But many incoming freshman Democratic House members are not so sure. Those who were elected in moderate-to-conservative districts campaigned as centrists, and these "Blue Dog" moderates are looking for new ideas to extend prosperity to all Americans. With the new Congress only one month old, it's not yet clear whose agenda will prevail. The freshmen have enthusi-



Kevin McCoy

asm, but the old-school liberals have seniority. The liberal establishment in Washington enjoys the backing of the labor movement and it is eager to push the unions' demands through Congress.

The unions have had a dozen years to compile a wish list of items that they want Congress to enact into law. Over the next several months, the American public will find out what's on it. Here's a preview.

Card check

Forced to confront a decades-old collapse of union membership in the private sector, organized labor has devised new strategies to recruit employees and orga-

nize workplaces. Unions are targeting immigrants and illegal aliens; they are working with church groups and civic organizations on "corporate campaigns" to pressure employers; and they are promoting collective bargaining in unlikely job categories—among graduate students and health professionals. But despite these new organizing strategies, unions still have to gain the assent of individual workers. Historically, unions have solicited support to unionize a workforce through a secret ballot election. But in recent years unions have devised a new tactic, known as "card check."

Here's how card check works: When an

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employer agrees to a card check procedure, it enters into a “neutrality” agreement with the union—which isn’t neutral at all. Under a neutrality agreement, an employer agrees not to campaign against union representation during a union organizing drive. The union’s communication with employees enjoys an advantage because the employer agrees to remain silent.

Worse, “card check” circumvents a secret ballot election because it requires only that a majority of employees sign cards showing that they support union representation. Employees are often urged to sign cards publicly and in the presence of union organizers, which exposes them to high-pressure tactics that the secret ballot is intended to avoid.

If card check “neutrality” is so lopsided in favor of the union, why would any employer agree to it? The answer is simple: To stave off union attacks. To get employers to agree to a card check procedure, unions often resort to what is known as a “corporate campaign.” Corporate campaigns are elaborate political and public relations campaigns that labor unions use to target a specific employer or group of employers. The union does not simply picket the employer. Its tactics are far more systematic and include feeding allegations of company wrongdoing to the news media, filing complaints with regulatory agencies and enlisting allies, such as liberal church groups or environmental activists, to publicly denounce the company. The message to the employer is simple: *Allow*

us to unionize your workforce or we will destroy your reputation.

AFL-CIO officials put the percentage of workers who are unionized by card check at 70 percent. Two decades ago fewer than 5 percent of workers were organized this way. “Elections just don’t work,” AFL-CIO organizing director Stewart Acuff told *The New York Times*. “The process is too broken,” he said—though “broken” here may mean simply not biased in favor of union organizing.

Current federal law allows employers to insist on a secret ballot election. But the unions support federal legislation to mandate the card-check procedure if a union requests it. During the last days of the 109th Congress, the inaptly named “Employee Free Choice Act” (H.R. 1696, S.842), sponsored by Rep. George Miller (D-Calif.) and Sen. Edward Kennedy (D-Mass.), had 214 co-sponsors in the House and 44 in the Senate. In response, some conservative members of Congress decided to push back. “The Secret Ballot Protection Act” (H.R. 874, S. 1173), sponsored by Rep. Charlie Norwood (R-Ga.) and Sen. Jim DeMint (R-S.C.) had 109 co-sponsors in the House and eight in the Senate.

With Democrats in the majority, expect to see the card-check bill come back in the new Congress. George Miller is now chairman of the newly-renamed House Education and Labor Committee. (Under the Republicans, it was the Committee on Education and the Workforce.) Sen. Kennedy is the chairman of the Senate Committee on Health, Education, Labor, and Pensions.

This union-backed bill, as Heritage Foundation policy analyst James Sherk notes, “would ban secret-ballot elections and require employers to accept a card-check campaign as valid, even when they suspect the results don’t truly reflect their workers’ wishes.” This should be a major concern, since the possibility of union intimidation—for both employers and employees—is very real.

‘The Nightmares Began’

How does card-check work in practice? Consider a union organizing drive at the MGM Grand Hotel in Las Vegas. In testimony before the House Subcommittee on

Workforce Protection in 2002, MGM Grand employee Bruce Esgar described how union organizers intimidated hotel employees.

Few employees had an incentive to join a union, Esgar observed, because the MGM Grand offered “wages, health benefits and a 401k-retirement plan that far exceeded any union contract in the Las Vegas area,” and “the MGM Grand was a very friendly and relaxed place to work.” So MGM management was in a good position to insist that it would only recognize a union if it organized under a secret ballot election.

But when new management announced that it would recognize a union “card count” to call for an election, said Esgar, “At that point the nightmares began” for MGM workers. Esgar notes:

“When the Culinary Union walked through the door they immediately began telling union followers whom they could talk to and whom they could not associate with. The union representatives had soon divided the workers into two groups, union and non-union, which they quickly labeled as ‘anti-union.’ This label was quickly followed by ‘welfare recipients’, ‘freeloaders’ and of course ‘liars’...

“When the employees wanted to ask questions about the pros and cons about unionizing they soon found that they could only ‘hear’ about the pros.”

According to Esgar, union organizers misled and intimidated MGM employees in various ways. Union representatives told employees that if they didn’t sign the cards they would lose their job after the union became recognized, that they would lose their health and retirement benefits, or that signing the card only constituted a request for more information about the union. Some employees reported having union representatives show up at their homes, sometimes repeatedly.

Employers are also subject to strong-arm tactics under card-check. Labor lawyer Clyde Jacob described an aggressive corporate campaign by the Offshore Mariners United (OMU), a local labor federation, which demanded that Houma, Louisiana-based Trico Marine Services accept a neutrality agreement. In 2004 Jacob testified before the House Subcommittee on

Editor: Patrick J. Reilly
Publisher: Terrence Scanlon
Address: 1513 16th Street, NW
Washington, DC 20036-1480
Phone: (202) 483-6900
Email: preilly@capitalresearch.org
Website: www.capitalresearch.org

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Employer-Employee Relations:

“Trico Marine would not sign the neutrality agreement, which relied only on authorization cards for legal recognition. As a consequence, it faced all manner of attacks on the corporation, including the disruption of its annual meetings and the meetings of its customers, veiled threats to customers and suppliers, attempts to hurt the company within the investment community, the disruption of trade shows

cratic takeover of Congress gives unions new hope for this strategy.

Since the 1970s the executive branch has periodically been granted “fast-track” authority to negotiate trade treaties subject only to an up-or-down vote in Congress. Congress cannot delay consideration of a treaty or add amendments to it under “fast-track,” but that authority is set to expire in June. Some Democrats in Congress are inclined to renew fast-track

mulation that could very well extend the program to the entire economy.

Democrats like Charles Rangel, the new House Ways and Means Committee chairman, voted against the Central America Free Trade Agreement, which passed the House by only two votes in 2005. They are prepared to put up roadblocks to fast-track trade deals with Peru, Colombia and Panama. They want provisions against child labor and in favor of union organizing. President Bush has already signed the Peru deal and at this writing is expected to sign the Colombia treaty. Other treaties, including ones with South Korea and Malaysia, are still being negotiated and may become subject to further restrictions.

In addition to blunting the competitive advantage of developing countries by raising the price of imported goods, trade restrictions can also harm U.S. national security. Closer commercial ties with Peru, Colombia and Panama may be hindered by side agreements imposing U.S. standards on these strategic allies in Latin America, a region beset by a wave of far-left, anti-American populism. Likewise, side agreements may harm U.S. relations with Malaysia, a modernizing Muslim country that seeks closer ties with the West, and South Korea, which faces a nuclear-armed Kim Jong-Il.

Vietnam is already feeling the pain. That country is opening its economy and expanding commercial ties with the West. It recently joined the World Trade Organization. Yet on November 13, 2006, the House voted down normal trade relations with Vietnam by a 228-161 vote. “It sends a very bad signal to the business community,” Nicole Venable, director of international trade and global competitiveness at the U.S. Chamber of Commerce, told *The Washington Post*. “This bill should have been a no-brainer.”

So should the Peru and Colombia trade deals. The U.S. market is already relatively open to Peruvian and Colombian imports under the Andean Trade Preferences Act. Under both the Colombia and Peru trade agreements, 80 percent of U.S. exports would be allowed to enter each country duty-free immediately—with different phase-ins for the remaining exports to

In recent years, unions and their allies in Congress have urged the executive branch to require that international trade agreements be accompanied by side agreements that set labor and environmental standards.

and conventions at which the company attended or was featured, and threatened secondary boycotts of the company’s subsidiaries in other parts of the world, including Norway, Nigeria, Brazil and Southeast Asia.”

Trade Policy

Fearful of foreign competition, labor unions have never shown much fondness for liberalizing trade. Union leaders know they cannot stop the expansion of free markets, but they are determined to slow it down and they are quick to denounce “globalization” as though it were a foreign ideology. In recent years, unions and their allies in Congress have urged the executive branch to require that international trade agreements be accompanied by side agreements that set labor and environmental standards. These agreements burden developing countries with regulations similar to those applied to Western industrial nations. Supporters of the side agreements claim the agreements protect overseas workers and the environment, but they are actually a form of U.S. protectionism. By undercutting poor countries’ comparative advantage in lower labor costs, side agreements protect higher-paid and often unionized American workers and their U.S. employers. The Demo-

cratic takeover of Congress gives unions new hope for this strategy. authority but only if labor and environmental provisions are included in trade agreements. In a January 4 Wall Street Journal op ed, Sen. Max Baucus (D-Mont.), chairman of the Senate Finance Committee, said that, “Fast-track authority should be improved as it is renewed, with better trade enforcement capability and better environmental and labor provisions.” (He seems to have meant trade restriction enforcement.)

The existing trade promotion authority (TPA), under the Trade Act of 2002, already includes labor and environmental provisions, but many Democrats want to add new enforcement mechanisms, and possibly sanctions, on nations and employers—and even some corporate welfare. For example, as Sen. Baucus explains in his *Journal* op ed, he would consider “improvement” of TPA to include “beefing up U.S. export promotion programs and dedicating more time and resources to trade enforcement.” He also wants the Trade Adjustment Assistance (TAA) program, which expires in September, “to do what today’s program does not. TAA must be available to the eight of 10 American workers who make their money in services professions; and it must apply to all workers displaced by trade, not just those affected by free-trade agreements”—a for-

each country. But for organized labor, that matters much less than protecting union jobs.

NLRB Control

While card-check will make it easier to unionize workers, organized labor must first expand the number of workers who are potentially eligible for unionization. That's why labor's agenda also includes the overturn of a recent National Labor Relations Board (NLRB) decision that defines who is a supervisor. The so-called "Kentucky River" cases before the Board have generated extraordinarily long and loud protests from unions. (See Paul Kersey's article, "Kentucky River Theater," in *Labor Watch*, September 2006.)

On October 3, 2006, the NLRB ruled that supervisory nurses at Oakwood Heritage Hospital in Taylor, Michigan, were in fact supervisors—and therefore not open to union organizing efforts. The decision affected 127 of 181 nurses who were trying to unionize at the hospital. The Board determined that an employee is a "supervisor" if he or she: 1) performs at least one of 12 supervisory functions, such as hiring, firing, directing or assigning, enumerated in the National Labor Relations Act (NLRA); 2) exercises "independent judgment" in performing those tasks; and 3) acts for the benefit of the employer. (*Oakwood Healthcare, Inc.* 348 NLRB No. 37)

The Board noted that, to "exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data," without needing to follow specific instructions in a company manual, verbal instructions from a supervisor or the requirements of a union contract.

Two dissenting Board members wrote that the decision would be a "rude shock to nurses and other workers who for decades have been effectively protected by the National Labor Relations Act, but who may find themselves treated, for labor-law purposes, as members of management, with no right to pursue collective bargaining or engage in other concerted activity in the workplace."

Organized labor has predicted that the decision will shut down union organizing of nurses, and in speeches and press statements, union leaders have gone overboard in claiming that millions of workers will be barred from union membership. But, as labor attorneys Carla J. Rozycki and David K. Haase note in *Law.com*, "This prediction was not borne out in the NLRB's application of the *Oakwood Healthcare*

Unions have assailed the [*Oakwood Healthcare*] decision. AFL-CIO President John Sweeney called it "outrageous and unjustified."

guidelines to two other cases on the same day." In those two cases, nurses, unlike those at Oakwood, did not qualify as supervisors because they could not require, only request, other employees to perform certain tasks.

Employers have generally welcomed the NLRB decision, since it provides clearer criteria for determining who is a supervisor, thus removing some confusion from labor negotiations. But unions have assailed the decision. AFL-CIO President John Sweeney called it "outrageous and unjustified," and protest rallies denouncing the NLRB for "union-busting" were organized by the Teamsters and the Service Employees International Union (SEIU), unions that have had some success in unionizing nurses. The AFL-CIO has gone so far as to ask the International Labor Organization, a United Nations agency, to "investigate" the NLRB decision.

Why is Big Labor so exercised about this? Quite simply, because it profits from the confusion the NLRB is trying to clear up. As labor lawyer Bill Clifton, writing after the decision in *The Macon Telegraph*, notes, "The [B]oard has not always provided sound guidance regarding what 'responsibly direct,' 'assign' and 'ex-

ercises independent judgment' mean." This is further complicated by "lead" or "charge" employees, who oversee some tasks, but do not have the authority to perform supervisory functions like hire, fire, lay off, or promote. And unions have taken advantage of this gray area.

As Clifton notes, unions are trying to have it both ways. Their organizing campaigns are often led by "lead" or "charge" employees. But when employees of this type oppose union drives, then unions prefer to shut them out of the process by having them classified as supervisors. "The [B]oard has often found that an individual was a 'supervisor' when a union alleged that the individual committed unfair labor practices," notes Clifton. "On the other hand, when a union wanted the individual to be included in a bargaining unit or when an employer disciplined the individual, the [B]oard tended to find that the individual was not a 'supervisor.'" Clearer guidance from the NLRB on who is and who is not a supervisor reduces the union's room to maneuver.

"Time will tell if predicted union efforts to lobby Congress to enact legislation that would overturn the Oakwood Healthcare decision are successful," note Rozycki and Haase. "In the meantime, the decision in Oakwood Healthcare gives employers, employees, and unions greater guidance in determining who is a supervisor under the [NLRA]."

Yet "greater guidance" is still a far from a clear-cut definition. The Oakwood case illustrates a continuing problem with current labor law: its reliance on arbitrary—and often shifting—definitions that have no basis in either economics or law. As NLRB Milwaukee regional director Irving Gottschalk observed shortly after the ruling, "Every case is different."

Other Items on Union Agenda

Of course, unions seek NLRB members who are friendly to their interests. They will be pressing congressional Democrats to make sure of this whenever the Administration nominates new members to the Board. Two board members—Chairman Robert J. Battista and Peter Kirsanow, both Republicans—are up for reappointment this year. President Bush previously

named them to the board in a January 2006 recess appointment. By custom, the five-member Board consists of two Republicans, two Democrats, and a chairman from the President's party.) Battista's term expires on December 16, 2007. If not confirmed, Kirsanow can serve through August 2008. At the time of Kirsanow's appointment, AFL-CIO head John Sweeney accused him of having "a marked hostility to unions." Expect similar rhetoric at the end of the year.

Unions are also likely to seek changes in the new—and already hugely expensive—Medicare prescription drug program to allow the federal government to negotiate with pharmaceutical companies. While proposed as a cost-control measure, it would in effect impose price controls on pharmaceutical companies. But "negotiating" with government is a misnomer; no negotiation is worthy of the name when one of the parties—the pharmaceutical

firms—cannot walk away from the table.

Organized labor is also likely to favor tighter mine safety laws and it will seek changes to bankruptcy laws in order to prevent companies from shedding costly pension and health care commitments.

Organized labor wants to roll back Bush Administration initiatives to contract out federal jobs and to tie employee pay increases more closely to job performance. John Gage, the president of the American Federation of Government Employees, and Colleen Kelley, president of the National Treasury Employees Union, promise to redouble their efforts to oppose contracting at agencies where they have members. Gage and Ron Ault, president of the AFL-CIO's Metal Trades Department, have said that defense unions will lobby Congress to repeal the new National Security Personnel System, which overhauls pay and workplace roles for Defense Department civilians, reports *The Washington Post*.

"We need to kill NSPS once and for all," Ault wrote to other union heads the day after the election.

Conclusion

There is no guarantee that the Democrats will pass the entire labor agenda now that they control Congress. But unions will call in their chits. With private sector union membership in steep decline, politics gives them one last chance to reverse the economic trends working against organized labor. The items on labor's agenda discussed here—card-check, protection against foreign competition, and favorable treatment by the NLRB—can give unions advantages that they would not enjoy in a free labor market. No wonder they are working so hard to get them.

Ivan Osorio is a former editor of Labor Watch and is editorial director at the Competitive Enterprise Institute in Washington, D.C.

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Labor Notes

House Approves Minimum Wage Hike

The U.S. House of Representatives approved an increase in the federal minimum wage from \$5.15 to \$7.25 per hour. The measure, supported by all Democrats and 82 Republicans, was a centerpiece of the Democrats' and labor unions' agenda for the November elections. (See last month's *Labor Watch* at www.capitalresearch.org.) Despite House Speaker Nancy Pelosi's pledges to ensure fairness in the 110th Congress, the minimum wage bill initially exempted the U.S. territory American Samoa for no stated reason. Rep. Charlie Norwood (R-GA) charged Pelosi in a strongly worded letter to House colleagues of catering to DelMonte Inc., a major employer in her San Francisco district. DelMonte owns StarKist, which owns one of two tuna packing plants in American Samoa that employ 75 percent of the workforce there. Belatedly, Pelosi asked the House Education and Labor Committee to close the loophole.

Top Tales of Union Corruption in 2006

The National Legal and Policy Center (NLPC) has announced its picks for worst union scandals and evidence of corruption in 2006. Topping the list is the ongoing union drive for amnesty for illegal Mexican immigrants to the United States. It may seem an odd example of union scandal, but NLPC's Carl Horowitz argues that thwarting true immigration reform boosts "public service dependency, crime, disease and linguistic separatism" while diminishing "rule of law, identity and sovereignty." (See Horowitz's report in the April 2006 issue of *Labor Watch*.) Next on the list are corporate campaigns by the Service Employees International Union and UNITE HERE to force employers to accept card check elections, followed by a New York State out of court settlement for \$30 million with finance giant ING, exposing cozy ties between labor unions and the financial firms offering union leaders large promotional fees for steering often expensive contracts to certain pension fund managers.

DeMint Introduces Federal Paycheck Protection Amendment

Senator Jim DeMint (R- SC) has introduced an amendment to a lobbying reform bill that would enshrine paycheck protection in federal law. The amendment to the "Legislative Transparency and Accountability Act" (S.1) would require unions to obtain written permission from union members before using dues for lobbying Congress. Americans for Tax Reform has announced support for the amendment and will rate Senators' votes.

SEC Weighs Strengthening Shareholder (and Union?) Influence Over Corporate Boards

The Securities and Exchange Commission, led by former Congressman Christopher Cox, is working to clarify its rules for excluding shareholders proposals related to a corporate board election. The review was mandated by a federal appeals court in *American Federation of State, County, and Municipal Employees Pension Plan v AIG*. John Berlau of the Competitive Enterprise Institute and Phil Kerpen of Americans for Prosperity are warning conservatives against a possible SEC rule allowing shareholders to introduce their nominees for corporate boards in company mailings of proxy materials, which typically present only the company's nominees. This helps shareholders avoid separate mailings at their own expense and increases the profile of their nominees. Shareholder activists hail the change as supporting shareholder rights, but Kerpen and Berlau argue that it gives labor unions a way to increase their influence over corporate boards, turning labor relations on its head and giving unions a powerful tool to push for card check elections.

Los Angeles Times Press Operators Unionize

"We finally got 'em. It took 40 years!" was the shout of Marty Keegan, a Teamsters organizer, celebrating the narrow 140-131 vote among *Los Angeles Times* press operators to support union representation. The Times has a long history of independence from unions, but employees may have been spooked by plans by *Times* parent Tribune Company to sell or break up the company and possibly close plants in California.