Competitive Enterprise Institute
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Advancing Liberty – From the Economy to Ecology

June 25, 2009 **No. 157**

A Primer on the Employee Free Choice Act's Arbitration Provision

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In the ongoing debate over the Employee Free Choice Act (EFCA, H.R. 1409, S 560),[1] the Act's card check provision has received a great deal of attention. This provision would effectively eliminate the secret ballot in union certification elections in favor of the card check process, in which union organizers ask workers to sign union cards out in the open. This exposes workers to high-pressure tactics that the secret ballot is designed to avoid. By focusing on its undemocratic nature, EFCA opponents have helped muster popular opposition to card check, and the bill has failed to move forward in Congress. However, EFCA supporters are now looking to craft a "compromise," which would retain other harmful provisions in EFCA.

The Employee Free Choice Act's Section 3, "Facilitating Initial Collective Bargaining Agreements," has not received nearly as much attention as card check, but its implications could be enormous. If enacted as part of an EFCA "compromise," it could fundamentally change the way businesses deal with their employees. Section 3 of EFCA empowers the federal government to impose mandatory binding compulsory interest arbitration, whereby government representatives are enjoined to create a fresh contract from scratch. It would allow the government to write "first contracts" between employers and unions even if one party objects.

The process under EFCA. EFCA supporters sell this provision as a "guarantee" of reaching a first contract. In fact, it could bind employers and employees into contracts they do not want. Section 3 of EFCA, "Facilitating Initial Collective Bargaining Agreements," would allow an arbitration panel appointed by a government agency, the Federal Mediation and Conciliation Service (FMCS), to create the original collective bargaining agreement—known as the first contract—between a private business and a union newly certified as bargaining representative for its employees. Here is how the process would work:

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Step 1–After a union is certified as bargaining agent for employees at a particular workplace, an employer would have 10 days to meet with union representatives to start negotiating a collective bargaining agreement.[2]

Step 2–If there is not an agreement after 90 days, either party can contact FMCS to request mediation.[3]

Step 3–If after another 30 days no agreement has been reached, the Federal Mediation and Conciliation Service "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."[4]

The entire process allows 120 days for both parties to agree to possibly hundreds of pages of detailed contractual language. The contract may specify nearly all terms and conditions of employment, making the process difficult and time consuming. Furthermore, both the employer and the union may have to appoint representatives to negotiate on behalf of each of their sides. Both sides will have great difficulty completing this process and coming to an agreement within 120 days. Historically, in fact, very few first-time contracts have been negotiated in 120 days.[5]

If the parties cannot agree on new contractual terms within the 120-day deadline, one party may request FMCS bring the matter to arbitration. The arbitrator, not the parties, will then decide the terms of the contract, which can cover: wages, paid holidays, vacation time, health benefits, sick leave, personal leave, pensions, retirement benefits, life insurance, early retirement, clothing and equipment allowances, lunch or meal breaks, work schedules, overtime, job classifications, length of the workday or work week, merit pay increases, reimbursement of expenses, promotions, severance pay, management rights, discipline procedures and policies, use of binding grievance arbitration, and myriad other provisions too numerous to list.[6]

Unless both parties agree to change the contract, they are both required to abide by the terms for two years. Future contracts will likely be based on the original contact created by the arbitrator. EFCA does not specify how the arbitrator is required to reach these terms, but there are current examples of two different approaches to interest arbitration.

Current Labor Law. The National Labor Relations Act (NLRA) governs the mechanism whereby workers may organize and bargain collectively.[7] Section 8 of the NLRA provides the framework for what both employers and unions may and may not do in collective bargaining negotiations.[8] Section 8 Part D creates the obligation to collectively bargain, but "such obligation does not compel either party to agree to a proposal or require the making of a concession."[9] The obligation was further limited by the Supreme Court in 1970. The Court's decision stated:

> The object of [the NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions…But it was recognized from the beginning that agreement might in some cases be impossible, and it was never

> intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[10]

The court also echoed the legislative record during the 1935 NLRA debate, when the Senate Committee on Education and Labor stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.[11]

Currently, the National Labor Relations Board (NLRB), the agency which supervises collective bargaining, does not have the authority to mandate a contract. There is also no guarantee of a quick collective bargaining process so long as both parties negotiate in good faith.

Not Your Father's Arbitration. Compulsory interest arbitration as prescribed in EFCA differs greatly from grievance arbitration, which is used commonly in the private sector. The term "grievance arbitration" is traditionally used to describe the process by which an arbitrator interprets contractual language already agreed to by the parties in a dispute.[12] Generally, both parties will voluntarily stipulate in the original contract that they will use arbitration instead of going through the costly and time consuming process of litigation. Voluntary grievance arbitration benefits both parties by saving time and money. During grievance arbitration an arbitrator will look to existing laws and the language of the contract, and can take into account the company's longstanding customs and traditions.[13] The Supreme Court set the framework for grievance arbitration in 1960 when it said:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is … confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[14]

Unlike grievance arbitration, interest arbitration is not used to interpret existing contracts, but to create a new contracts out of whole cloth. Interest arbitration can be thought of as a legislative rather than a judicial process because the arbitrator does not base his decision on any current law or contractual terms.[15]

The term "compulsory arbitration" can apply to both grievance and interest arbitration.[16] In some cases, even if both parties do not agree to go to arbitration, the law may compel them to do so.[17] Its use is commonly limited to the public sector in exchange for workers giving up the right to strike,[18] particularly in areas, such as police and firefighters, where a strike could have a detrimental impact on public safety.[19] EFCA would not mandate compulsory interest arbitration

if both parties resisted, but it would force one party into the process regardless of circumstances if the opposing side demanded arbitration after a 120-day impasse in negotiating a first contract.[20]

Types of Interest Arbitration. Traditionally, an arbitrator has two options for interest arbitration when creating a first contract. The first is "winner takes all" or "final offer" arbitration, wherein each party submits a proposal and the arbitrator chooses one of the two proposals and creates a binding contract using all the terms of the winning side's proposal.[21] This process can yield proposals from each party that are relatively fair and realistic. If one party's proposal is too lopsided, then that party greatly increases the risk that its proposal will not be chosen (assuming the arbitrator is truly neutral).

The other type is "conventional interest arbitration," whereby the arbitrator hears evidence from both parties and uses his own judgment to create a contract.[22] Parties in this type of arbitration will ask for far more than they would in typical negations in the hope that the arbitrator will try to find a middle ground and use a "split the baby" approach. In some jurisdictions, an arbitrator can use a hybrid approach similar to final offer arbitration but in which he cherry picks the parties' proposals and creates a contract that sides alternately with the parties on different provisions.[23] EFCA does not stipulate the method by which the arbitrator is to create the first contract, only that FMCS "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by [FMCS]."[24]

What is the Federal Mediation and Conciliation Service? The Employee Free Choice Act would give the power for the mediation and eventual compulsory interest arbitration of first contracts to the Federal Mediation and Conciliation Service. Established by the 1947 Labor-Management Relations Act—better known as the Taft-Hartley Act[25]—FMCS is an independent agency tasked to prevent or settle disputes between labor unions and management that affect interstate commerce.[26] It is managed by a director appointed by the president and confirmed by the Senate.[27] Currently, FMCS provides dispute resolution services such as mediation and conflict management whereby a neutral third party facilitates discussion between labor and employers and provides non-binding suggestions.[28]

FMCS also operates an arbitration referral service. Currently FMCS's Office of Arbitration Service provides lists of qualified arbitrators as well as training and development courses.[29] It allows an arbitrator to be "voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection. The parties agree in advance that the arbitrator's decision—based on the merits of the case—will be final and binding."[30]

EFCA would create a major shift in the authority of FMCS. As noted above—and in the Taft-Hartley Act and on the FMCS website—the FMCS does not currently have the authority to *bind* any party to an agreement if it did not first voluntarily agree to arbitration.[31] The Taft-Hartley Act limits the authority of FMCS. It states: "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act."[32] Further, the regulations governing FMCS expand on Taft-Hartley's

prohibition on forcing parties into a contract against their will. The regulation promulgated by the FMCS specifies:

> FMCS has no power to:
> (1) Compel parties to appear before an arbitrator;
> (2) Enforce an agreement to arbitrate;
> (3) Compel parties to arbitrate any issue;
> (4) Influence, alter, or set aside decisions of arbitrators on the Roster;
> (5) Compel, deny, or modify payment of compensation to an arbitrator.[33]

Currently, the use of arbitration binding both parties to a decision by an arbitrator selected by FMCS is only valid when both parties have previously agreed to abide by such a decision.

FMCS provides valuable services in dispute resolution and providing resources to those in need of voluntary arbitration. EFCA would greatly enhance the powers of the FMCS in a way unimaginable to those who created the agency. It would transform an agency that has always dealt with voluntary dispute resolution into one empowered to create first contracts out of whole cloth, and impose them on parties that never agreed to such a process in the first place.

The Case against Government-Imposed First Contracts. If passed, Section 3 of EFCA will create government-imposed contracts if one side asks the government to intervene. Unlike current law, both sides will not need to agree to arbitration. No matter what the arbitrator decides the party who wanted to negotiate without outside interference will still be forced to accept a government imposed contract. The consequence of a government official mandating the contractual terms to private parties are numerous:

1. An arbitrator will not know the details of a company's operations or the needs of its workers. Unlike grievance arbitration, he is not interpreting the terms of an existing contract but *writing a new contract out of whole cloth*. A mistake in this process could have disastrous effects on the company or the workers. Unless both sides agree to eliminate the mistake in the contract, the distressed party will be bound for two years. And the problem may not end after the two-year period, because most subsequent agreements are based on previous contacts.

2. Both the employer and the union may not negotiate effectively. Each party may start negotiations assuming that an arbitrator will eventually step in to create the contract. EFCA does not describe the type of interest arbitration to be used, but both sides will probably negotiate for the benefit of the arbitrator, not for what is best for the company or the employees. This type of negotiation will encourage both parties to go to the extremes in the expectation that the arbitrator will settle on a middle ground or split-the-baby approach to try and satisfy both sides to the extent possible. The parties may also spend more time trying to sell the arbitrator on their side rather than trying to reach compromise with each other.

3. The arbitrator may base a new first contract—fully or partially—on the contracts of similar outside companies. However, what works for one company may not work for another. Worse what has *not* worked for one company—but remains stuck in that company's collective bargaining agreement—may be imposed on other companies, which are then saddled with new burdens and liabilities. One such liability can entail a company suddenly having to pay into union pension fund, many of which are severely underfunded.[34]

4. The Federal Mediation and Conciliation Service has not achieved a high success rate in its mediation of first contracts, and there is no reason to believe they will have great success in compulsory interest arbitration. Between 2000 and 2004, FMCS has barely had a 50-percent success rate in reaching an agreement in first contact mediation.[35] Since 2004, FMCS has stopped reporting the success rate of first contact mediation.

5. FMCS is headed by a political appointee. Politics may play a role in which arbitrators are selected and how they create contracts. Depending on the party in power, these contracts may disproportionately favor the side that supported the current administration.

6. Employees would lose the ability to vote on the terms of a contact. EFCA does not describe how terms will be proposed to the arbitrator. Union representatives may create a proposed contact and submit it on behalf of the employees. Regardless of which method of interest arbitration the arbitrator uses, the employees may have little to no say in their first contract.

7. Interest arbitration is time consuming and may take longer than regular negotiations.

Conclusion. The Employee Free Choice Act's compulsory interest arbitration provision would create a major departure from the traditional role of arbitration in the private sector. Perhaps its most fundamental problem is the fact that it would impose government-mandated contracts and remove the right of one party to negotiate if the other demands the government to intercede. EFCA's language is vague on what form compulsory interest arbitration should take. This raises more questions than answers—to be resolved by regulations created by unelected bureaucrats.

No one is better suited to run a business than the owners and workers who have dedicated countless hours of their lives toward making it a success. Allowing a government-appointed arbitrator—who does not fully understand the intricacies of a company that will be required to abide by his decision for years—to create a binding contract would have devastating results not just for individual companies, but for the economy at large.

Notes

[1] Introduced by Rep. George Miller (D-Calif.) and Sen. Tom Harkin (D-IA) on March 10, 2009.
[2] Ibid.
[3] Ibid.
[4] Ibid.

[5] James Stone, "Mandatory First Contract Interest Arbitration," *Jackson Lewis Legal Update*, September 30, 2008, http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1511.
[6] Alan Miles Ruben, Frank Elkouri, and Edna Elkouri, *Elkouri & Elkouri, How Arbitration Works*, ABA/BNA Sixth ed. 2003, p. 1354.
[7] 29 USC 151-169.
[8] 29 USC 158.
[9] Ibid. Collective bargaining is defined in this section as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."
[10] *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 104 (1970).
[11] Ibid. See also S. Rep. No. 573, 74th Congress, 1st Session, 12 (1935).
[12] David Broderdorf, "Mandatory Interest Arbitration in the Private Sector," *The Labor Lawyer, Winter/Spring 2008*, March 2008 p. 232.
[13] Richard Epstein, "The Case against the Employee Free Choice Act," *John M. Olin Law & Economics Working Paper No. 452* (2nd Series.), January 2009, http://www.rer.org/atf/cf/%7B42ee8980-837f-4af0-a738-d43f0925666b%7D/EESA_STUDY_EPSTEIN.PDF. See also "Steelworkers' Trilogy," *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
[14] *United Steelworkers v. Enterprise Wheel & Car Corp.*
[15] Arvid Anderson, "Presenting an Interest Arbitration Case: An Arbitrator's View," *The Labor Lawyer*,. p 745 (1987).
[16] Ruben, p. 20. Binding arbitration is a "process of settlement of employer-labor disputes by a government agency (or other means provided by the government) which has the power to investigate and make an award which *must* be accepted by all parties concerned."
[17] Ibid.
[18] Broderdof, p. 234.
[19] Ruben, pp. 20-21.
[20] The Employee Free Choice Act Sec. 3.
[21] Andrew Lee Younkins, "Judicial Review Standards for Interest Arbitration Awards Under the Employee Free Choice Act," *University of San Francisco Law Review, Vol. 43, No. 2, 2009*, January 19, 2009 pp. 452-453.
[22] Ibid.
[23] Ibid.
[24] The Employee Free Choice Act Sec. 3.
[25] 29 U.S.C.A. § 172.
[26] 29 USC 172; 29 USCS 173; Garner, Bryan; *Black's Law Dictionary* 7th ed. (West Group, 1999).
[27] 29 USC 172.
[28] "What We Do > Dispute Resolution and Conflict Management" *Federal Mediation and Conciliation Website* http://www.fmcs.gov/internet/categoryList.asp?categoryID=16.
[29] 29 CFR 1404.3 Administrative Responsibilities.
[30] "What We Do > Arbitration" *Federal Mediation and Conciliation Website* http://www.fmcs.gov/internet/categoryList.asp?categoryID=24.
[31] "What We Do > Arbitration > Arbitration Policies and Procedures" *Federal Mediation and Conciliation Website* http://www.fmcs.gov/internet/itemDetail.asp?categoryID=197&itemID=16959; 29 USCS 173.
[32] 29 USCS 173.
[33] 29 CFR 1404.4 (d) Role of FMCS.
[34] Diana Furchtgott-Roth, "Union vs. Private Pension Plans: How Secure Are Union Members' Retirements?" Hudson Institute, Summer 2008.
[35] *Federal Mediation and Conciliation Service, 57th Annual Report* (2004) p. 18. http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc; FMCS percentage of Mediated Cases successfully reaching an agreement: 2000—52.9%; 2001—55.1%; 2002—50.3%; 2003—47.4%; 2004—45.4%; see also Younkins, p. 458.