Kay Bailey Hutchison, Chairman
Bill Hughes, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

SENATE REPUBLICAN POLICY COMMITTEE

March 27, 2007

More Harm Contained in Union Secret-Ballot Elimination Bill: Binding Arbitration

Executive Summary

- As it passed the House, the so-called Employee Free Choice Act (H.R. 800) would remove a fundamental principle of American democracy – the right of employees to request a secret-ballot election in deciding union representation. Additionally, the legislation would weaken another fundamental principle, this one of U.S. labor law – the voluntary agreement.

- In workplaces with unions newly certified as the worker representative, H.R. 800 could quickly move contract negotiations from collective bargaining to binding arbitration in which a third party decides and imposes an agreement. Under the process, negotiations could end as soon as 90 days after they began.

- Binding arbitration would allow an arbitrator to decide an initial collective bargaining agreement based on his or her own opinions of what is prudent and fair, as opposed to having the employer and union deliberate the contract on their own.

- The parties directly affected by the negotiations – the employees (and their union representative) – would be taken out of the discussions under binding arbitration. This has repercussions: it would limit the say of the two most affected parties; it would impede innovation and competitiveness; and it would deny accountability to the affected parties.

Introduction

While it is widely known that the Employee Free Choice Act (EFCA, H.R. 800) would eliminate the right to a secret-ballot election in deciding union representation, the legislation contains another harmful provision that has garnered less attention. [See RPC paper, "Union Elections by Secret Ballot Protect Workers' Rights," issued February 27, 2007, for details.] The bill would allow an end to the bargaining process between the employer and the union only three months after it began, and instead would require a period of two years or more of a federal arbitrator making and then imposing decisions regarding pay, hours, and working conditions.

This removal of decision-making from the ones most affected by it starkly limits the ability of the employer and union to reach a voluntary agreement. Moreover, it would limit the say of employees and employers, take away resources that could be used to enhance competitiveness, and deny accountability to those who should have it.

Background

H.R. 800, the Employee Free Choice Act of 2007, passed the House on March 1 by a vote of 241 to 185 and is now on the Senate calendar. Senator Kennedy sponsored similar legislation in the 109th and is expected to do so again in the 110th. The Senate Health, Education, Labor and Pensions Committee held a hearing on the issue on March 27, 2007.

H.R. 800 would require that once a union was certified as the worker representative, it and the employer would have 90 days to reach agreement on an initial collective bargaining agreement. If the parties failed to reach an agreement after 90 days, either party may notify the Federal Mediation and Conciliation Service (FMCS) of the dispute and request mediation. If, after 30 days, the FMCS were unable to bring the parties to an agreement, then the FMCS would refer the dispute to arbitration (a third-party) to decide the initial collective bargaining agreement between the union and the employer. Once implemented, the decision made by the arbitrator would be binding for two years.

Binding arbitration allows the arbitrator to decide the initial collective bargaining agreement based on his or her own opinions of what is prudent and fair, as opposed to having the employer and union deliberate the contract on their own. Some observers fear that the arbitration process itself could take a year or more. That, added to the binding two-year period, would impose a long-term process on workers and employers that would have many repercussions.

Effects of Mandatory, Binding Arbitration

While binding arbitration may appear to be beneficial, the reality is that the very existence of a binding, third-party dispute resolution could undermine the bargaining process and prove harmful to employers and employees alike.

Binding Arbitration Would Undermine Fundamental Labor Law

As it passed the House, H.R. 800 would remove a fundamental principle of American democracy – the right of employees to request a secret-ballot election in deciding union representation.[1] Additionally, it would weaken another fundamental principle, this one of U.S. labor law – the voluntary agreement.[2] H.R. 800 would impose a break in the long-standing tradition of leaving negotiations, such as collective bargaining decisions, to the parties themselves.[3] The parties directly affected by the negotiations – the employees (and their union representative) and the employer – would be taken out of the discussions under binding arbitration. This has repercussions: it would limit the say of the two most affected parties; it would impede innovation and competitiveness; and it would deny accountability to the affected parties.

Binding Arbitration Limits Say of Affected Parties

With binding arbitration, workers would lose their say. H.R. 800 would not permit workers to terminate the arbitration no matter how long it took. Workers could not vote down the contract and send the union back to the negotiating table under binding arbitration. Workers themselves, who would live under the arbitrator's decision, could not reject an arbitrator's ruling no matter how unfair they believed it to be. Contrast that scenario with current law, under which workers can vote down a contract and send the union back to the negotiation table. Under the proposed legislation, once an arbitrator is called in, his or her word is final.

Additionally, workers who are dissatisfied with their union would have to wait longer than under current law to start the decertification process, the process to remove a union as the representative of the workers. Under current law, workers who oppose the union can start collecting signatures to decertify the union after one year of the union being certified. Under H.R. 800, workers must wait two years, the length of time the arbitrator's decision is binding. During this time, workers would be obliged to pay union dues.

Not only would workers lose their say under binding arbitration, employers would as well. Binding arbitration puts the arbitrator, not the person who owns the business or runs it on a daily basis, in the position of making decisions on how the business will operate. Clearly, arbitrators would not have the same understanding of a company or its workers as would the company's officers and its employees. Yet, the arbitrator's decisions would come with financial consequences that the company, not the arbitrator, would have to bear.

---

[1] For additional information on the broader concerns of H.R. 800, please refer to the RPC papers, "Union Elections by Secret Ballot Protect Workers' Rights," issued on February 27, 2007, and "Labor Unions Seek to End Secret-Ballot Elections, the Cornerstone of Democracy," issued on February 27, 2006.

[2] Charles Cohen, attorney and former member of the National Labor Relations Board, in testimony before the Subcommittee on Health, Employment, Labor, and Pension of the House Committee on Education and Labor, February 8, 2007.

[3] Daniel V. Yager, "Mistitled 'Employee Free Choice Act' Would Strip Workers of Federally-Supervised Secret Ballot in Union Representation Decisions," February 15, 2007.

Binding Arbitration Impedes Innovation and Competitiveness

Under binding arbitration, the arbitrator would not have the benefit of prior collective bargaining agreements for guidance. A conscientious arbitrator may look to base his or her decision on the practices of a comparable company. However, even this has drawbacks. For example, a company with its own distinctive business model could be forced to adopt the practices of its competitors, causing it to lose its competitive advantage. Similarly, employees may be forced to adopt work practices with which they are not familiar, possibly hampering a company's productivity.

To date, there has been little interest in using binding arbitration outside of government to settle the terms of collective bargaining agreements. Notably, it has been used for over 40 years in Michigan to resolve labor disputes involving police officers and firefighters.[4] But, binding arbitration could present greater problems when applied to the private sector because a business, unlike a government, cannot pass these costs on to taxpayers or a higher level of government.[5] Competition in the free market means that if an arbitrator miscalculates and sets wages too high, the company could not raise its prices to compensate without the risk of losing customers. These factors only increase the chances that an ill-advised arbitrator's ruling would lead to financial difficulty and layoffs.[6]

If the arbitration goes slowly, business owners would be forced to prepare for retroactive back pay awards while they waited for overdue decisions.[7] This would tie up funds that would not be available to invest in new equipment to grow the company. Furthermore, these funds could not be offered as incentives to lure new workers because back pay awards would go exclusively to the existing workforce.[8] Additionally, with a slow arbitration process, workers would be forced to wait for months or years to receive their salary increases.

Binding Arbitration Denies Accountability

As previously noted, binding arbitration results in decisions made by an arbitrator who suffers none of the consequences of his or her decision. For the employees, this affects decisions on wages and working conditions. For example, an overly generous award could have far-reaching effects and could eventually backfire. It could lead to job layoffs or even bankruptcy, harming the same workers that the collective bargaining agreement was intended to benefit.[9]

---

[4] Paul Kersey and James Sherk, "Binding Arbitration for Unions Endangers Competitiveness and Innovation," The Heritage Foundation, March 5, 2007.
[5] Paul Kersey, "Why Businesses Are Leery of Binding Arbitration," Mackinac Center for Public Policy, February 28, 2007.
[6] Kersey and Sherk, "Binding Arbitration for Unions Endangers Competitiveness and Innovation."
[7] Kersey and Sherk, "Binding Arbitration for Unions Endangers Competitiveness and Innovation."
[8] Paul Kersey, "Why Businesses are Leery of Binding Arbitration," Mackinac Center for Public Policy, February 28, 2007.
[9] Paul Kersey, "The Incredible Shrinking Labor Movement," Mackinac Center for Public Policy, February 28, 2007.

And for the union, this legislation would allow it to become less accountable to the workers it represents. This is particularly the case when one considers the effect of binding arbitration in combination with the legislation's card-check authorization. Consider the likelihood of the union, newly certified, coming to the bargaining table with the heavy burden of making good on the promises it made to the employees to gain recognition. When these promises come up against reality at the bargaining table, it may be difficult to reach agreement, particularly when the employer is already offering competitive wages and benefits to its workers. It is likely that the bill could cause the union to position itself for the most favorable arbitration result rather than try to reach an agreement that is mutually acceptable to both parties. [10] This may be especially true since arbitration will result in a contract. And the union need only stall for 90 days for this to happen. Further, recall that once imposed, the decision forged from arbitration is binding for two years – and those are two years in which no union decertification process can begin.

Conclusion

No one is more affected by a collective bargaining agreement than the employee and the employer. According to long-standing labor law, collective bargaining should result in a voluntary agreement under which both parties agree to conduct business. Yet, H.R. 800, the so-called Employee Free Choice Act, takes choices away from both parties and instead gives them to a third party – an arbitrator – who necessarily has less knowledge of the business and its workers and who bears little burden for bad decisions. Yet, under the legislation pending before the Senate, binding arbitration could be imposed on employees and their employers – in lieu of collective bargaining – for two years, even if neither party were satisfied with the decision.

RPC Staff Contact: Dana Barbieri, Labor and Education Policy Analyst, 224-2946

[10] Yager.