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THE EMPLOYEE FREE CHOICE ACT: CONGRESS, WHERE DO WE GO FROM HERE?

By David P. Twomey*

I. Introduction

With the filing of the Employee Free Choice Act of 2009 (EFCA) on March 10, 2009, Congress has addressed a significant policy debate regarding the appropriateness of allowing unions to be certified by the National Labor Relations Board (NLRB) as the representative of employees in an appropriate bargaining unit if a majority of employees sign valid union authorization cards. Under the proposed legislation, unions would also continue to have the right to petition the NLRB for Board-conducted secret ballot elections, after a showing that at least thirty percent of the employees had signed authorization cards. Critics of the legislation allowing Board certification based on a “card-check” majority believe that it is contrary to democratic principles, while proponents believe it remedies employer abuses inherent in the current Board electoral model of determining representation status.

EFCA also provides that when the parties are unable to reach a final contract within 90 days of bargaining, the dispute may be referred to the Federal Mediation and Conciliation Service (FMCS.) If no agreement is reached within the next thirty days, the matter shall be referred to binding arbitration. The arbitration segment of the legislation is intended to cure the current situation where approximately one-third of all newly certified unions fail to obtain a first collective bargaining agreement.

Finally, the proposed legislation provides for triple net back pay for employees unlawfully discharged by an employer while involved in union activities forming a union or negotiating a first contract. EFCA also provides for additional civil penalties and injunctive relief against unlawful employer actions.

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Part II of this paper presents an overview of the current law regarding the determination of employees’ choices on representation status issues. Part III discusses certain deficiencies in the current law regarding protection of employee rights to join unions and to engage in collective bargaining. Part IV of the paper analyzes EFCA proposals and makes recommendations concerning the legislation from the perspective of correcting the deficiencies identified in Part III of the paper. Part V concludes with a recommendation that Congress make the necessary compromises to correct the longstanding deficiencies in the current law and not squander the present political capital and momentum that can bring about limited, but appropriate changes, to the National Labor Relations Act (NLRA).

II. Current Law Regarding Determining Employee Choices on Representation Issues

Section 9(a) of the NLRA provides for union recognition and bargaining rights when questions regarding the majority representation status for an appropriate bargaining unit are resolved in favor of a union.\(^{10}\) The fundamental mandate of the NRLA is found in Section 9(a), which provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees to such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.\(^{11}\)

A. Certification Procedures – Board Elections

The Board election procedures are initiated by the filing of a “representation petition” with the appropriate regional office of the NLRB. This petition may be filed by any individual or labor organization acting on behalf of a substantial number of employees.\(^{12}\) This petition by rule must be supported by a showing that at least 30 percent of the employees involved either want the union to be their bargaining representative, or wish to have an NLRB election to make such a determination.\(^{13}\) This so-called “showing of interest” to the Board may be demonstrated either by signed authorization cards, or a signed petition. Employees in a bargaining unit are limited to one valid election in a 12-month period.\(^{14}\)

Although most representation petitions are filed by unions, an employer may also file a petition when the employer is confronted with a demand that a union be recognized as the exclusive bargaining representative of the employees.\(^{15}\) Thus, where a union asks for a meeting to negotiate an agreement, or sets up a picket line demanding recognition, the employer may file a petition for an election.

After the representation petition is filed at the regional office of the Board, the regional staff determines: (1) whether the Board’s jurisdictional standards have been met, (2) whether the required 30 percent showing of interest by employees has been met, and (3) whether the bargaining unit involved is appropriate. The regional staff then seeks to obtain an agreement of the parties to a “consent election.” The election date is usually within 42 days of the filing of the petition. Employees are eligible to vote if they had employee status on the date of the election and were also employed in the appropriate bargaining unit at the end of the payroll period immediately preceding the date on which an election was directed by the Board or consented to by the parties.\(^{16}\) Economic strikers are allowed to vote in an election conducted within 12 months of the start of a strike.\(^{17}\)

B. Recognition Without a Board Election

An employer may voluntarily recognize a union without a Board election, where the employer has no reasonable doubt as to its employees’ preference for the union in question. The employer must act with due care in ascertaining the majority status of the union, however, for it is an unfair labor practice in violation of Section 8(a)(2) of the NLRA for an employer to recognize a minority by union.\(^{18}\) A card-check majority is a
legitimate means for establishing an employer’s duty to bargain. In recent years, unions have sought to avoid Board-supervised election procedures and may seek to negotiate “card-check agreements” along with “neutrality agreements” with employers to bypass NLRB elections. As an example, the language of a typical authorization card may state in relevant part:

Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you or your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours or any other condition of employment.

A card-check agreement may provide for recognition of a union after a designated neutral third party confirms that the union has obtained authorization cards from an agreed-upon percentage of the bargaining unit, such as a majority of eligible employees. However, most neutrality agreements are obtained by strong unions in highly unionized industries, such as the steel industry, or by unions that deal with employers who deal directly with the public and are susceptible to union pressure from the likes of hotel and restaurant employee unions. Card-check and/or neutrality agreements may be negotiated with companies that have an existing bargaining relationship with a union, with the agreement to apply to new facilities that are opened or acquired in the future. A UAW Neutrality Agreement with ALCOA provides in part:

The company agrees to a position of neutrality in the event that the Union seeks to represent any nonrepresented employees of the Aluminum Company of America. Neutrality means that the Company shall not comment negatively concerning the integrity or character of the Union or its officials. The Company’s commitment to remain neutral shall cease if the Union, its agents, or its supporters comment negatively on the integrity or character of the Aluminum Company of America or its representatives.

C. Decertification Procedures

Decertification proceedings challenge whether a certified or recognized union continues to represent a majority of the employees in the bargaining unit. Section 9(c)(1)(A)(ii) of the NLRA provides that a decertification petition may be filed by employees. This petition, like a representation petition, must be supported by a 30 percent showing of the employees involved, signifying that they do not want the certified or recognized union to be their bargaining representative or want to have a Board election make such a determination. This showing is commonly accomplished by signatures on a petition.

A decertification petition may not be initiated by an employer, a supervisor, or another agent of the employer. Thus, if the regional staff’s investigation of the petition shows that the employer or a supervisor initiated, circulated, or sponsored the employees who filed a decertification petition, the petition will be dismissed. Once the decertification petition has been properly filed with the Board, the regular NLRB election rules apply and management may actively participate in the campaign to decertify the union.

During the year following certification, after a Board secret ballot election, a union has an irrefutable presumption of a continuing majority status in the unit and no petition challenging the majority status of the union will be considered by the Board. This is called the Board’s “certification year bar” doctrine.

D. The BUSH II Board Modified Recognition Bar Doctrine

In the Board’s Keller Plastics Eastern, Inc., an employer’s voluntary recognition of a union, based on a showing of majority status – as opposed to certification after a Board election – barred a decertification petition of a rival union’s petition for “a reasonable period of
time." The Keller Plastics Board reasoned that, when an employer voluntarily recognizes a union in good faith based on a showing of majority support after a check of authorization cards, the parties are permitted a reasonable period to bargain for a first contract without challenge to the union's majority status. In its 2007 Dana Corp. decision, the Board majority modified this "recognition bar doctrine" and held that an employer's voluntary recognition of a union, after a card-check majority was established at the time of recognition, does not bar a decertification petition or rival union petition that is filed within 45 days of the notice of recognition. The Board majority expressed preference for the exercise of employee free choice in Board elections, as opposed to reliance on authorization cards that are inferior to the election process.

The Board majority raised three points in this regard:

1. Unlike votes cast in privacy by Board secret election ballots, card signings are public actions and susceptible to group pressure exerted at the moment of choice. The election is held under the watchful eye of a neutral Board agent and observers from the parties. A card signing has none of these protections. There is good reason to question whether card signings in such circumstances accurately reflect employees' true choices concerning union representation....

2. Union card solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options.

3. Like a political election, a Board election presents a clear picture of employee voter preference at a single moment....

Under the Board's new policy, an employee or a rival union has the right to file a petition during a 45-day period following the posting of an official NLRB notice that a union has been voluntarily recognized. The petition will be processed if it is supported by 30 percent of the bargaining unit. The dissent stated that nothing in the majority's decision justified the radical departure of the well-settled, judicially approved, Keller Plastics precedent and that it relegated voluntary recognition to disfavored status. The dissent stated in part:

An employer has the right to refuse to voluntarily recognize a union and demand an election.... One important reason employers choose voluntary recognition is to avoid the time, expense, and disruption of an election. That rationale, however, is critically undermined by the majority's modifications. An employer has little incentive to recognize a union voluntarily if it knows that its decision is subject to second-guessing through a decertification petition. Furthermore, even if an employer does choose to recognize a union voluntarily, the majority's new window period leaves the parties' bargaining relationship open to attack by a minority of employees at the very outset of the relationship, when it is at its most vulnerable [point].

**III. Legal Deficiencies Regarding Protection of Employees' Rights to Form Unions and Engage in Collective Bargaining**

With the filing of EFCA on March 10, 2009, both supporters and opponents of this legislation have initiated extensive public relations campaigns for and against the bill. Led by the AFL-CIO, proponents include such groups as the American Rights at Work, the National Organization for Women, and the National Association of Consumer Advocates. A report by the Center for Economic and Policy Research (CEPR) was released at the March 4, 2009 winter annual meeting of the AFL-CIO's Executive Council, entitled "Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007," which found that employees were illegally fired in more than one-fourth of all union elections conducted by the NLRB from 2001 through 2007. Opponents of EFCA are
led by the U.S. Chamber of Commerce and include groups such as the National Association of Manufacturers, the National Right to Work Committee and the Center for Union Facts (CUF). The Center for Union Facts also released a report on March 4, 2009 stating that its analysis of NLRB data showed that in 2007 and 2008 the agency received 4,208 petitions seeking secret ballot elections, and that 467 charges of election-related terminations were filed, but only 158 were found to have merit.

A. Ineffective Board Remedies

The NLRA makes it an unfair labor practice for an employer to terminate employees who exercise their right to form, join or assist in the formation of a labor organization. The usual remedy under the NLRA for the unlawful firing of an employee for organizing activities, is a cease-and-desist order and an order reinstating the employee(s) with back pay. There are no civil fines or punitive damages provisions in the NLRA to sanction this employer misconduct, nor are there liquidated damages for employee-victims to reflect in economic terms the very real damage, indignities and individual and family hardships resulting from an employer’s wrongful conduct. Under Board precedent, unlawfully terminated employees have the obligation to mitigate damages by immediately seeking to find comparable employment. In the Board’s 2007 St. George Warehouse decision, the Bush II Board majority departed from more than 45 years of precedent, relieving the employer of the burden to produce all the facts to substantiate its affirmative defense that the employee-victim unreasonably failed to mitigate damages, and now requires the General Counsel to produce facts to negate it. The result of this decision is to make it less costly for an employer to violate the Act.

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The usual remedy for an employer’s failure to engage in good faith bargaining, as required by Section 8(a)(5) of the NLRA, is a bargaining order directing the employer to return to the bargaining process and act in good faith. In the Board’s Ex-Cell-O Corp. decision, the union sought a make-whole remedy for the five-year period of time in which the employer refused to bargain with the union, in violation of the NLRA. That is, the union sought compensation for the wage increases and fringe benefits for all employees in the bargaining unit that the employees would have obtained through collective bargaining had the employer not refused to bargain. The Board majority, relying on the U.S. Supreme Court’s H.K. Porter v. NLRB decision, which held that the Board’s remedial powers were restricted by a caveat in Section 8(d) of the NLRA limiting as the alleged violation of a plant rule that is not enforced, and the evidence shows the real reason for the termination was his or her union activity, the individual must actively seek comparable employment, and, should he or she obtain a job within four weeks at $500 per week, the employer would owe $2,000 in back wages as the cost of getting rid of an employee-leader during an organizing campaign. Additionally, time-consuming Board procedures and case backlogs, coupled with often frivolous legal tactics can keep an employee-leader out of service for a long period of time before a final order of the Board is rendered. Thereafter, further delays can be gained by the employer by seeking court review of the Board order or during enforcement proceedings in the U.S. Court of Appeals. Often the “reinstated” employee-leader will not return to the original workplace, having established a satisfactory work relationship with his or her new employer.

In situations where employees are successful in their organizing drive, approximately one-third of newly certified unions never obtain a first collective bargaining contract.
an employer's good-faith bargaining obligation so that "such obligation does not compel either party to agree to a proposal or require the making of a concession." Two members dissented in the Ex-Cell-O case, asserting that a make-whole remedy would have encouraged the Act's purpose of collective bargaining and would have prevented the employer from profiting from its unlawful refusal to bargain.

B. Limitations and Their Effects on Employees' Right to Strike Under Mackay Radio

Employees have the right to organize and strike guaranteed by Sections 7 and 13 of the NLRA. However, in dicta in Justice Owen Robert's majority decision in NLRB v. Mackay Radio & Telegraph Co., he stated that it was not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business." Additionally, he stated that it was not an unfair labor practice "to reinstate only so many of the strikers as there were vacant places to be filled." While this dicta provided a basis for employers to hire permanent replacements subsequent to the 1938 Mackay Radio decision, it was not until President Reagan discharged some 11,000 striking air traffic controllers in 1981 that momentum for employers to hire permanent replacements for striking workers began.

Today an employer may lawfully refuse to reinstate economic strikers at the conclusion of a strike so long as the positions in question are occupied by permanent replacements. During organizing campaigns employers have the right to point out (and nearly always do so) that if the union should take employees out on strike, the employer has the right to replace strikers with permanent replacements, and when employees want to come back to work, they will no longer have a job.

Should a union win certification and pursue bargaining for a first contract, the employer's right to permanently replace striking employees decreases the union's bargaining leverage to use the threat of a strike in striving to reach a first collective bargaining contract. Should the union actually go out on strike, permanent replacements have the right to later vote in a decertification election, while the voting rights of displaced economic strikers end twelve months after the commencement of the strike.

An employer may rid itself of a union by baiting employees into a strike, and then hiring replacements who, in all likelihood, will vote to decertify the union in an election held soon after the 12-month voting right period for economic strikers expires.

IV. Analysis of EFCA Proposals: Some Recommended Modifications

From the discussion in the previous section of this paper it is clear that the NLRA no longer fulfills its stated policy of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The Commission on the Future of Worker-Management Relations appointed by President Clinton in 1993, (commonly called the Dunlop Commission, so named for its chair, former Secretary of Labor John Dunlop) issued a fact-finding report in 1994. The report identified systematic labor relations law problems that continue to this day. However, with a Republican sweep of Congressional races in 1994, there was no political will to consider the policy recommendations of the Commission. Now, President Obama has stated his support for the EFCA of 2009. It is a foregone conclusion that the House of Representatives will pass this legislation, as it did in a prior consideration in March of 2007. However, 60 votes are needed to limit Senate debate and proceed to final consideration of the legislation. At this writing it appears likely that compromises and adjustments to the Senate bill will need to take place in order for proponents to obtain the 60 votes needed to overcome a Senate filibuster of this bill to amend the NLRA. The recommendations of
this paper set forth certain minimum necessary modifications to the NLRA for it once again to fulfill the law’s underlying policy of protection of unionization and the promotion of collective bargaining.\textsuperscript{64}

A. Board Certification of a Card-check Majority

Section 2 of EFCA, entitled “Streamlining Union Certification,” requires the NLRB to certify a union if a majority of employees sign valid authorization cards.\textsuperscript{65} The bill also leaves in place the existing procedures to obtain a NLRB supervised secret ballot election. However, as a matter of practice, mostly all unions obtain authorization cards in excess of 50 percent of the bargaining unit before they petition the NLRB for a secret ballot election; should EFCA become law, it would be irrational for a union possessing a card majority to seek a secret ballot election. It is highly likely that the proposed “card-check” procedure in EFCA would entirely displace existing Board-conducted secret ballot elections.

In \textit{Gissel Packing Co. Inc. v. NLRB}, the U. S. Supreme Court recognized that “…cards, though admittedly inferior to the election process, can adequately reflect employee sentiments when the process has been impeded…[by the employer].”\textsuperscript{66} In situations where the employer has not impeded the election process, it can well be argued that the secret ballot is the preferred method of determining employee choice.\textsuperscript{67} The election is held under the supervision of a neutral Board agent and in the presence of observers designated by the parties. A card-signing process does not have this protection. Moreover, one study found a 12.5 percent decrease in union support when authorization cards were compared to actual votes in union representation elections.\textsuperscript{68} It may well be that the proponents of EFCA, in order to gain critical support in the Senate, will have to back off EFCA’s goal of certification by the Board through validation of a card-check majority. A card-based majority would continue to be important, however, under the \textit{Gissel} decision, when the Board is considering whether a bargaining order is an appropriate remedy for employer unfair labor practices, where an employer rejects a card majority while at the same time commits unfair labor practices that undermine the union’s majority and make a fair election an unlikely possibility.\textsuperscript{69} The Bush II Board’s \textit{Dana Corp} decision, setting aside 40 years of Board precedent, is clearly erroneous and will surely be overturned by the Obama Board.\textsuperscript{70} Unions and employers may then continue the pre-\textit{Dana Corp} practice of voluntarily utilizing “card-check agreements” providing for recognition of a union after a designated third party confirms that the union has obtained valid authorization cards from an agreed-upon percentage of the bargaining unit. Even without the card-check feature of EFCA, card-check recognition has become an important organizing tool for unions.\textsuperscript{71}

B. Establishing Appropriate Remedies for Unlawful Employer Actions

Section 4 of EFCA, entitled “Strengthening Enforcement,”\textsuperscript{72} provides for the priority handling of unfair labor practices cases occurring during organizing drives and first contract collective bargaining, giving authority to the NLRB to seek injunctive relief in federal court where an employer has threatened to discharge or has discharged or discriminated against any employee exercising rights guaranteed by Section 7 of the NLRA, or has made threats of discharge or interfered with employee rights when negotiating a first contract.\textsuperscript{73}

Section 4(b) of EFCA provides authority for the Board to award back pay to an employee who is unlawfully discharged by an employer during an organizing campaign or the period leading up to a first contract, and, in addition,
two times that amount as liquidated damages. Moreover, the Board is granted authority to assess an additional civil penalty of up to $20,000 for each violation by an employer who is found to have willfully or repeatedly committed any unfair labor practices during the organizing or first contract period.

As set forth in Part III of this paper, a study released at the AFL-CIO’s winter meeting in March 2009 found that employees were unlawfully fired by their employers in more than one-fourth of all union elections decided by the NLRB during the period of 2001 through 2007. The Center for Union Facts, an opponent of EFCA, presented a study that only 158 employers were found to have unlawfully fired employees in 2007 and 2008 during organizing campaigns. Even if “only” 158 companies unlawfully fired employees during organizing campaigns, this is a major problem that should be rectified. Opponents of EFCA cannot reasonably object to appropriate remedial action against employers who have violated United States law. It is clear that reinstatement with backpay, less interim earnings, as discussed previously in Part III of this paper, is not a just compensatory remedy for the harm done to the employee by the employer’s unlawful action. Liquidated damages are appropriate for the economic destruction of individual or family finances with no income to meet daily and monthly bills as they come due and the concomitant loss of dignity and anguish caused the employee and his or her family by the employer. The civil penalty of up to $20,000 per violation will diminish the economic incentive for employers to engage in this unlawful conduct.

Section 4(a) of EFCA requires the Board to give priority to, and conduct forthwith, a preliminary investigation into unfair labor practice charges against employers relating to coercion or discrimination against employees organizing a union or negotiating a first contract. If, after such an investigation, the regional attorney has reasonable cause to believe that the charge is true, appropriate injunctive relief is to be pursued in any district court of the United States under Section 10(l) of the NLRA. This prompt injunctive relief is a vast improvement over the existing Board authority for handling Section 8(a)(1) and Section 8(a)(3) employer unfair labor practices, which may take up to two years for the Board to complete.

Section 4 of EFCA, “Strengthening Enforcement,” provides the NLRB with the proper tools needed to enforce the NLRA.

C. Facilitating Initial Bargaining Agreements

Section 3 of EFCA deals with the situation where one-third of newly certified unions never obtain a first collective bargaining contract. EFCA prescribes that if the parties are unable to agree on a first contract within a 90-day bargaining period, the services of the Federal Mediation and Conciliation Service (FMCS) may be requested and, if unsuccessful after 30 days, the FMCS shall refer the dispute to an arbitration board, whose award shall be binding on the parties for a two-year period. An arbitration board would look to factors such as wage patterns and contract patterns for the geographic area and industry in question, along with the employer’s ability to pay. Section 3 of EFCA would be an absolutely wonderful procedure from the perspective of labor organizations, for it would guarantee a good first contract covering a two-year period. However, the design of the NLRA is based on the fundamental premise that agreements will be the result of private bargaining under governmental supervision of the procedures alone, without any official compulsion over the actual terms of the contract. And, our system under the NLRA recognizes the crucial economic weapons of the strike and primary picketing, as well as the lockout, to ultimately bring about the goal of a first contract and
subsequent contracts. As discussed in Part II(B) of this paper, the Mackay Radio dicta has substantially weakened the strike weapon, and diminished the pressure and effect of the threat to strike as an economic weapon. And, the utilization of permanent replacements by employers under Mackay Radio is often adopted as a near-term employer strategy to lead to the decertification of the union. Congress did not legislate employers the right to hire permanent replacements during a strike. Surely the employer must be allowed to fill places left vacant by strikers. This can be done by hiring temporary replacements, with the employer having the right to convert to permanent replacements in a prolonged lawful strike beyond a six month period. It is recommended that Congress overturn the Mackay Radio dicta, and that Congress adopt a restriction on employers’ right to hire permanent replacements during the first six months of a lawful strike.

Strong political opposition may be expected to the binding arbitration provisions of Section 3 of EFCA, which is applicable to all first contract negotiations. The incentive for bad-faith bargaining tactics by employers negotiating first contracts is great because failure of unions to obtain first agreements almost invariably leads to the disappearance of the union. In the Board’s landmark Ex-Cell-O Corp. decision the Board majority recognized the damage and loss to unions caused by employers who unlawfully delay two or more years in the fulfillment of a statutory bargaining obligation, or who raise “frivolous” issues in order to postpone or avoid lawful obligations to bargain, but the majority concluded that a make-whole remedy to compensate the employees what they would have earned but for the unlawful conduct of the employer is a matter for Congress, not the Board. After some four decades since the Ex-Cell-O decision, with continuing wrongs without remedies, it is now time for Congress to act!

Rather than provide binding arbitration for all first contract negotiations, it is recommended that only in the case of unlawful conduct by an employer in first contract bargaining, where the General Counsel can establish that an employer is not bargaining in good faith, shall the court direct the FMCS to refer the dispute to an arbitration panel, as limited by this recommendation, for binding interest arbitration of the dispute, with the contract to cover a two-year period.

V. Conclusion

This paper identifies deficiencies that exist in the NLRA regarding the protection of employee rights to form unions and to engage in collective bargaining. It was clear to the NLRB, in its 1970 Ex-Cell-O decision, that the remedies available to the Board to cure Section 8(a)(5) refusal-to-bargain employer unfair labor practices were inadequate. The Board majority determined it did not have authority to order a make-whole remedy and it was up to Congress to adopt such a remedy. Congress did not act. The Dunlop Commission issued a fact-finding report identifying the deficiencies discussed in this paper with recommendations in 1994. Congress took no action. A continuous flow of scholarly studies and articles have documented the deficiency patterns and proposed remedies to no avail. For the first time in fifty years there is finally sufficient political momentum to address the well-documented, longstanding, deficiencies in the NLRA. Surely the proposals of EFCA would greatly enhance the labor movement in this country. The recommendations of this paper are more modest. It is likely that compromises will be necessary to be made in the legislative process. It is hoped that the Congress does act to make the modifications to once again fulfill the policy of the NLRA of protecting employee rights to join unions and to engage in collective bargaining.