WebMemo

No. 1359
February 13, 2007
Revised and updated March 6, 2009

Published by The Heritage Foundation

NLRB Union Elections Safeguard Workers' Rights

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Since the passage of the National Labor Relations Act in 1935, the government has protected the privacy of workers considering joining a union through secret-ballot elections. Labor unions now allege that secret-ballot elections are so inherently unfair that they do not reflect workers' true choices. They want Congress to require companies to recognize a union when a majority of their workers publicly sign cards stating their desire to organize. This is known as card-check organizing. But secret-ballot elections do not stack the deck against union organizing, and Congress should not take away workers' fundamental right to a private ballot because of unions' anecdotal claims to the contrary.

The facts show that current National Labor Relations Board (NLRB) election procedures are fair and do protect workers' free choice. The system carefully balances the rights of union organizers and employers and ensures that workers can express their choice in a neutral environment. The NLRB investigates and processes alleged violations of the law in a timely manner, and there is little evidence that the NLRB is failing to enforce the law. Over 97 percent of elections took place without any illegal employer activities, and unions won 60 percent of organizing elections held in 2007.

Alleged Election Abuses. A private choice expressed through a secret ballot is a fundamental part of American democracy, but many labor activists now allege that, despite the privacy of the voting booth, organizing elections are coercive and unfair and should be replaced with publicly signed cards to protect worker's "free choice."

Union activists argue that companies have complete access to workers during the day, when unions do not.[1] They also say that it takes so long for the NLRB to investigate violations that employers routinely ignore laws protecting workers.[2] Supporters of card-check allege that many companies illegally threaten or fire workers who support unionizing.[3] Private balloting thus takes place in "an inherently and intensely coercive environment."[4]

Wholly aside from the bizarre nature of the argument that making the choice of whether or not to join a union public will prevent companies from intimidating workers, the facts show that government-supervised organizing elections carefully balance the interests of unions and employers while protecting employees from retaliation by either side.

Employers May Not Threaten Workers. Under the First Amendment of the U.S. Constitution, employers have the right to communicate their views to their employees and may express their opposition to a union. A supervisor may remind workers that many union negotiation demands would be set by union bosses who know little about the company's day-to-day operations or that union dues are expensive and fund those bosses' six-figure salaries. Every story has two sides, and employers

This paper, in its entirety, can be found at:
www.heritage.org/Research/Labor/wm1359.cfm

Produced by the Center for Data Analysis

Published by The Heritage Foundation
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have the right to point out to their employees the drawbacks to union membership that unions train organizers to deflect.

Employers may not, however, threaten their workers. They may not threaten to fire individual workers for joining a union, much less actually do so, or "predict" that unionizing would lead to strikes that would bankrupt the company and force it to undertake mass layoffs.[5] If the government finds that a company did threaten workers, it discards the election results and holds a new election. In cases of extreme abuses, the government orders the company to recognize the union without holding another election. A company that illegally fires workers for joining a union must also reinstate them and provide them with back pay.

Unions Free to Make Their Case. The First Amendment similarly guarantees union activists the right to express their views to potential recruits, but not to recruit new dues-paying members while workers are on company time. Union organizers may speak to workers during lunch breaks and other unpaid time at work, unless the company has a policy prohibiting solicitation by anyone—not just unions—on its premises. The law does not guarantee union organizers a special exemption to policies designed to avoid disruption at work.

To ensure that unions have an equal chance to make their case, the law requires that companies provide union organizers with a complete and accurate list of all employees' names and addresses within seven days of the NLRB order to conduct an election. If a company fails to do so or provides an inaccurate list, the NLRB will set the election aside and order a re-vote.[6] Union organizers are free to contact employees at home or by phone to make their case; employers are not. It is actually an unfair labor practice (ULP) for a work supervisor to visit workers in their homes to discuss the election.[7] The law strikes a balance between the legitimate needs of both employers and union organizers, allowing both to make their case while protecting workers from intimidation.

Timely Investigation. Union activists agree that workers' legal protections look good on paper, but they claim that it takes so long for the government to investigate violations that these protections are meaningless in practice.[8] The AFL-CIO argues that "in 50 percent of the decisions issued by the NLRB in 2002 in unfair labor practice charge cases, workers waited more than 889 days for the NLRB to reach a decision."[9]

This claim is misleading. The National Labor Relations Board is the labor law equivalent of the Supreme Court. Only 3.7 percent of cases make it to the NLRB, and many of those embody novel legal issues, not the routine enforcement of the law.[10] Most cases are either settled by the parties or han-

1. AFL-CIO, "The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States," *Issue Brief*, September 2005, pp. 4–5, at *www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf*.
2. *Ibid.*, p. 4.
3. *Ibid.*, pp. 4–6.
4. Testimony of Nancy Schiffer, AFL-CIO Associate General Counsel, before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *www.aflcio.org/joinaunion/voiceatwork/efca/upload/EFCA_Schiffer_20070208.pdf*.
5. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, July 2005, Chapter 24, Sections 200–230, at *www.nlrb.gov/nlrb/legal/manuals/outline_chap24.html*.
6. *Ibid.*, Section 324.
7. *Ibid.*, Section 321.
8. AFL-CIO, "The Silent War," p. 4.
9. *Ibid.*
10. National Labor Relations Board, *Seventy-Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30 2007*, October 16, 2008, Table 8: CA Cases, at *www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2007Annual.pdf* (March 6, 2009). Just 3.7 percent of all cases were closed after a board decision, not counting the 0.9 percent of cases in which the board ordered the adoption of an administrative law judge's decision.

dled by lower levels of the NLRB bureaucracy, typically by administrative law judges.

It takes an NLRB regional director a median of only 96 days—three months—to investigate an unfair labor practice charge, determine whether it has merit, and file a formal "complaint."[11] Only 13 percent of all cases reach that stage.[12] Fully 87 percent are closed before the complaint stage, either dismissed or withdrawn for lack of merit or the subjects of settlements in which the company makes restitution. It takes a median of six more months from the filing of a complaint to an administrative law judge's decision. Only 5 percent of cases, overall, get to that stage.[13]

Ninety-five percent of all alleged violations of worker rights are settled through procedures that typically take three to nine months. That is no reason to take away workers' right to a private vote.

Most Allegations Dismissed. Unions allege that employers systematically violate the law, but these allegations are only one side of the story. Government investigations usually result in the dismissal of these allegations. The majority of unfair labor practice charges filed against employers in 2007 were either withdrawn or dismissed.[14]

Almost All Employers Obey the Law. The argument by labor activists that corporations systematically violate workers' rights and fire workers who want to organize is seriously undermined by the fact that government investigations show otherwise. Firing a worker because he or she wants to organize is an unfair labor practice that the government investigates. Companies who break the law must rehire their workers with full back pay. NLRB records show that companies rarely fire workers for trying to join a union. Only 2.7 percent of organizing campaigns between 2003 and 2005 involved illegal firings.[15] Organized labor's claims are more anecdotal than real. It is true that a small minority of employers do violate the law. Companies did fire workers in 2.7 percent of organizing campaigns in 2005. But these bad apples are the exception, not the rule.

Unions often claim that 30,000 workers are fired or discriminated against each year for trying to join a union. This is not true. The figure comes from the NRLB annual reports and reflects the number of workers who receive NRLB-ordered back pay awards.[16] Most back pay awards have nothing to do with restitution for workers laid off in election campaigns. Back pay awards typically come after an employer illegally making changes to working conditions without first negotiating with the union. For example, an employer might reduce the hours in employees' schedules when demand drops. The government orders the employer to make his or her employees whole by providing them with the pay they would have earned had their hours not been cut. This has nothing to do with firing or intimidating workers for supporting a union, but with requiring employers to bargain before altering working conditions. Claims of widespread union intimidation are not supported by the facts. By the numbers, the vast majority of employers follow the law.

Unions Usually Win. Labor activists argue that NLRB elections "look more like the discredited practices of rogue regimes abroad than like anything we would call American."[17] If, contrary to

11. *Ibid.*, Table 23.
12. *Ibid.*, Table 8, looking at CA cases.
13. *Ibid.*, Tables 8 and 23, and looking at CA cases.
14. *Ibid.*, Table 7. The NLRB closed 16,983 ULP cases against employers in 2007. Of those, 5,438 were withdrawn by the charging party, and 3,791 were dismissed by the government. This accounts for 54 percent of all cases closed. Note that these are all ULP cases brought against employers, not just those brought during election campaigns.
15. J. Justin Wilson, "Union Math, Union Myths," Center for Union Facts, 2008, p. 7, at *www.unionfacts.com/downloads/Union_Math_Union_Myths.pdf*.
16. *Seventy-Second Annual Report of the National Labor Relations Board*, Table 4.
17. Testimony of Dr. Gordon Lafer before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, February 8, 2007, at *www.aflcio.org/joinaunion/voiceatwork/efca/upload/EFCA_Lafer_20070208.pdf* (February 13, 2007).

NLRB investigations, employers systematically violated the law and intimidated workers, unions would lose most elections, but unions actually win 59.9 percent of all organizing elections.[18] This is strong evidence that employers are not tilting the playing field against union organizers.

Conclusion. NLRB organizing elections are free and fair. They balance the legitimate rights and interests of both union organizers and employers while preserving workers' privacy and protecting them from coercion and intimidation. Unions win most organizing elections. The government also investigates and resolves most cases of employer misconduct in a matter of months, and the majority of those allegations have no merit. Investigators found that employers intimidated or coerced workers in just 2.7 percent of organizing election campaigns between 2003 and 2005.

The vast majority of employers follow the law. They respect their employees' right to decide whether or not to join a union without fear of intimidation or coercion. Congress should do the same by allowing workers to vote their conscience in the privacy of the voting booth.

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18. *Seventy-Second Annual Report of the National Labor Relations Board*, Table 13, total RC elections.

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