

THE FACTS

Union Representation and the NLRA

THE NATIONAL LABOR RELATIONS ACT (NLRA) was enacted to protect the rights of workers to join together to form unions to bargain with their employers for better wages and benefits.

It is the policy of the United States to...“**encourag[e] the practice and procedure of collective bargaining**” and “**protect 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.**” Labor Management Relations Act, 29 U.S.C. §151

Over the years, the law has been perverted, and these goals have been seriously undermined. The National Labor Relations Board (NLRB) representation process has become a virtually insurmountable series of practical, procedural and legal obstacles. Instead of a protective shield, the NLRA now acts as a sword that is used by corporations to frustrate employees’ freedom of choice and deny their right to collective bargaining. The proposed Employee Free Choice Act aims to restore the promise of the NLRA by removing obstacles workers face when they want to bargain with their employers for a better life.

In a recently published white paper on the NLRA, the U.S. Chamber of Commerce attacks this reform effort and defends the failed status quo.¹ Remarkably, the Chamber refuses to even acknowledge the goals enshrined in the National Labor Relations Act. In spite of quoting almost the entire preamble of the act, it shockingly omits the very language by which the act establishes the labor relations policy of our nation. As much as the Chamber would like our nation’s policy to be *neutrality*, the twin goals set forth above—to **protect** worker organizing and **encourage** collective bargaining—remain our official and principal labor relations policy.

The Chamber ignores the reality of what workers face when they want to form a union. There is a world of difference between the rights guaranteed in the NLRA, which the Chamber describes, and the reality of what happens to workers when they

want to achieve collective bargaining, which the Chamber disregards. It also ignores the explosion of discrimination cases filed with the NLRB over the past several decades. Significantly, the Chamber does not cite even one study or academic report in support of its claims.

The NLRA's path to union representation and collective bargaining no longer works for workers. One of the most respected human rights organizations in the world, Human Rights Watch, studied the NLRA process in the United States and concluded that it is hopelessly broken:

In a system replete with all the appearance of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States has been frustrated by many employers who realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.²

The numbers paint a stark and compelling picture. A study by the Center for Economic and Policy Research (CEPR) found that one in five active union supporters is fired during workers' campaigns for collective bargaining—just because they want a union to bargain for a better life.³ When a worker who has supported the union is fired, fear is instantly and inevitably injected into the workplace. Other workers are afraid the same thing will happen to them if they support the union. This fear devastates the organizing campaign. And the fear persists because fired workers rarely are returned to their jobs, as lengthy legal delays are common.

The NLRB's representation process foments divisiveness, coercion and fear. During organizing campaigns, more than half of companies threaten a full or partial shutdown of the workplace and job loss if the union effort succeeds; almost all companies force workers into mandatory propaganda meetings; and between 15 and 40 percent make illegal changes to wages, benefits and working conditions, give bribes to those who oppose the union or use electronic surveillance to spy on union supporters.⁴ This adds up to an inherently and intensely coercive environment. Before the NLRB agent ever arrives with the voting booth, workers have been harassed, intimidated, spied on, threatened and fired. The NLRB's portable voting booth cannot take away the impact of this prolonged climate of fear.

Another major failure of the NLRA is a remedial scheme that is poorly equipped to deter unlawful conduct of this scale and scope. According to NLRB statistics, in 1969, the number of workers who suffered illegal retaliation for exercising their federal labor law rights was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination. In 2007, according to the NLRB's Annual Report, 29,559 workers received back pay because of illegal employer discrimination.⁵

Human Rights Watch has concluded that “many employers have come to view remedies [under the NLRA]...as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers’ organizing efforts.”⁶ This pessimistic view has been echoed by Prof. Cynthia Estlund, who observed that the act is “widely flouted by employers who perceive” the discharge of union adherents as an “easy and cheap response” to an organizing campaign.⁷

An employer that has engaged in misconduct during a union organizing campaign, such as threatening and spying on workers, is merely required to post an NLRB *Notice to Employees* promising not to do it again. Workers who are illegally discharged are entitled to reinstatement and back pay, but no other form of damages. Most fired employees never return to their jobs and none receives compensation for the economic and psychological devastation they and their families have had to endure.⁸ A company that refuses to bargain is simply ordered to bargain some more. And delays make these remedies wholly ineffectual, as the remedy typically comes so long after the workers initiated their organizing efforts that irreversible damage has been done to their rights.

Contrary to the Chamber’s assertions, the NLRB election process bears no resemblance to political elections. It is company-controlled and, by every measure, undemocratic. University of Oregon political scientist Gordon Lafer evaluated the current union representation process involving secret ballots against American democratic election standards used to elect public officials. He found the NLRB’s election process falls alarmingly short of the democratic standards relied on for our public elections and concluded that the presence of the secret ballot could not overcome the undemocratic nature of the current process.⁹ In a second study, Lafer examined how the law is applied in the context of organizing campaigns and concluded that the NLRA also fails to safeguard the privacy of the ballot because it allows employees to be forced to reveal their preferences to their employer long before they step into the NLRB’s voting booth.¹⁰

Such a system would not be tolerated if used for public elections. If political elections were run like NLRB elections, only the incumbent office holder, and not the challenger, would have access to a list of voters and their home addresses. The challenger would not get these until just before the election. Only the incumbent, not the challenger, would be able to talk to voters, in person, every single day, all day long. In fact, the incumbent, but never the challenger, could legally require voters to listen to his or her message under threat of losing their jobs. The incumbent could pull voters off their jobs and make them attend one-sided electioneering meetings whenever he or she wanted and for however long. Many voters never would talk to or get information from the challenger—ever—and the challenger could never, ever make voters come to a meeting, anywhere or anyplace. In fact, the challenger

would have to remain outside the boundaries of the state or district involved and try to meet voters by flagging them down as they drove past. The election itself would always be conducted in the incumbent candidate's party offices. And even if the challenger won, the incumbent would remain in office for years while manipulating the legal process to delay the voters' choice, frustrate their efforts and discourage them until they gave up.

This is exactly how the NLRB election process is conducted, with a concentrated collection of powerful, one-sided privileges favoring the company. And there is one other compelling difference. In a political election, voters are provided, but never required to accept, information to make an informed decision. In an NLRB representation process, where voters are required under pain of termination to listen to one side's propaganda, they are relentlessly intimidated into believing that unionization is at best futile and at worst dangerous.¹¹ This is the system the Chamber clings to so desperately.

Delay is another powerful weapon used by companies to sabotage the NLRB's representation process and deny workers their rights. The Chamber is wrong to claim the relevant measure is the number of days workers have to endure a virulent, aggressive anti-union campaign before they can select their union. And it is misleading to cite the union election win rate as proof that the NLRB process produces a fair and free result. A more meaningful measure is whether workers achieve a collective bargaining agreement.

As the NLRB general counsel has recognized, protecting employee free choice is not just a matter of conducting an election; it necessarily includes protecting bargaining relationships, especially newly created ones.¹² After all, a contract—not an election—is the ultimate goal of workers when they choose union representation. Yet out of 1,586 initial contract bargaining cases closed during 2004 by the Federal Mediation and Conciliation Service, 710 (45 percent of the total) were closed without a contract being reached.¹³ Even more telling, a study based on data obtained from the NLRB and Federal Mediation and Conciliation found that of the cases where a substantial likelihood of majority support for unionization was demonstrated and an election petition was filed, only 20 percent actually resulted in a contract between the union and employer.¹⁴

Recent surveys show that 60 million nonunion workers would like to have a union for collective bargaining in their workplaces. They recognize that unions are the best route to the middle class. Collective bargaining gives working people the tools they need to win fair wages and fair treatment in corporate America.

More and more, unions and workers are turning away from the NLRB's process because it does not protect their right to bargain. Many are gaining representation

rights through voluntary recognition by the employer when a majority signs union authorization cards indicating their choice for union representation. Voluntary recognition has been a lawful method of achieving union representation since the act was passed and is how most workers form unions today. In the early days of the NLRA, representation was determined almost exclusively through a demonstration of majority support that did not involve balloting. Over the years, majority sign-up has been uniformly endorsed by the NLRB, the Supreme Court and Congress. It is protected by law and currently used by public workers in many states. Highly successful employers such as AT&T and Harley-Davidson have accepted their workers' freedom to choose unions as an important element of their corporations' successful high-road business plans and have honored their workers' choice for union representation through voluntary recognition based on a demonstration of majority support.

In many ways, the majority sign-up process is superior to the current NLRB representation process. The NLRB process determines representation based on a majority of workers who vote in an election; majority sign-up requires that a majority of all employees in the workplace designate the union as their representative before union representation is achieved. Workers must select a union twice under the NLRB process, once when they sign cards supporting union representation and again when the NLRB conducts an election. Majority sign-up eliminates the second step by honoring the workers' choice when they first authorize the union to represent them.

The majority sign-up process avoids the confrontational, divisive behavior that the current NLRB process encourages. As part of the current NLRB process, anti-union consultants train supervisors to treat pro-union workers as traitorous troublemakers whose union support is anti-company and disloyal.¹⁵ In contrast, majority sign-up campaigns are associated with significantly less coercion by either companies or unions than under the NLRB representation process.¹⁶

In its parting shot, the Chamber suggests that the Employee Free Choice Act will lead to union coercion, a claim based on sheer speculation. The evidence is to the contrary. A review of 113 cases cited by the HR Policy Association as involving fraud and coercion revealed only 42 decisions since the act's inception that actually found misconduct in the signing of union authorization forms. That's less than one case every two years. Compare that with the 29,559 instances in 2007 alone of illegal firings and other discrimination against workers for exercising their federally protected labor law rights. That's a ratio of almost 50,000 to one. Contrary to the suppositions of the Chamber, there is no evidence that the Employee Free Choice Act will generate union coercion. And there certainly is no evidence that it will engender the kind of endemic, proven coercion that companies routinely inflict on workers in the NLRB representation process.

Conclusion

The Employee Free Choice Act would reform the NLRA so workers can choose union representation and collective bargaining without fear and intimidation. When a majority of workers demonstrates their choice to form a union, their representative could be certified by the NLRB without the need for the delay-ridden, coercive and divisive NLRB election process. Federal labor law finally would guarantee workers their right to bargain for a better life.

Endnotes

¹Responding to Union Rhetoric: The Reality of the American Workplace, a U.S. Chamber of Commerce White Paper, *The Union Representation Process Under the National Labor Relations Act: Maintaining Employee Free Choice for over 70 Years*, 2008.

²Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Columbia L. Rev. at 1588 (citing Compa, UNFAIR ADVANTAGE, at 16).

³John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research, January 2007.

⁴Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobilization on Workers, Wages and Union Organizing*, Cornell University (2000).

⁵NLRB Annual Report, FY 2007; available at: http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2007Annual.pdf

⁶Compa, L. A., and Human Rights Watch, 2000, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, New York: Human Rights Watch, p. 10.

⁷Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Columbia L. Rev. at 23, 24 (2002).

⁸Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, 51 Labor L.J. 76 (2000).

⁹Gordon Lafer, *Free and Fair? How Labor Law Fails U.S. Democratic Election Standards* (2005).

¹⁰Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections* (2007).

¹¹Gordon Lafer, Working USA: The Journal of Labor and Society 1089-7011—Volume 11, March 2008, p. 90.

¹²Memorandum GC 06-05, *First Contract Bargaining Cases*, April 19, 2006; available at: http://www.nlr.gov/shared_files/GC%20Memo/2006/GC%2006-05%20First%20Contract%20Bargaining%20Cases.pdf

¹³http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc.

¹⁴John Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, MIT Institute for Work and Employment Research, March 15, 2008, p 23; Paul Ferguson & Thomas A. Kochan, *Sequential Failures in Workers' Rights to Organize*, MIT Institute for Work and Employment Research, March 2007.

¹⁵Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections* (2007), p. 18.

¹⁶Adrienne E. Eaton and Jill Kriesky, "No More Stacked Deck: Evaluating the Case Against Card Check," Perspectives on Work, Volume 7, No. 1, June 2003.