

NLRB's "Quickie Election" Scheme

By Hannah Bowen

Summary: On June 21 the National Labor Relations Board (NLRB) proposed making changes to how it will conduct union elections. It wants to speed up workplace elections, "eliminating unnecessary litigation" and "streamlining the election procedures." According to NLRB Chairman Wilma Liebman: "Resolving representation questions quickly, fairly, and accurately has been an overriding goal of American labor law for more than 75 years." AFL-CIO President Rich Trumka says the changes are "a modest step to remove roadblocks." But how "modest" is the proposal that the NLRB put forward by a 3-1 vote? Brian Hayes, the NLRB's lone Republican member, opposes what he calls the "quickie election" option. Hayes says the Board is acting at Big Labor's behest "and at the great expense of undermining public trust in the fairness of Board elections." The Board has scheduled a 75 day public comment period on the proposal.

Labor unions are in the news lately. The battle between Republican governors and state public employee unions has gotten much news coverage. So has the NLRB attempt to prevent the Boeing company from locating a construction facility in South Carolina. But a little-noticed debate emerged this summer concerning certain changes that the National Labor Relations Board proposes to make in the



conduct of union representation elections. That development may be as significant as the other labor stories - and even more explosive.

Labor union supporters downplay the importance of the proposal. They say it's merely a long overdue modernization of procedures for labor organizing. New Jersey Democratic Representative Rush Holt says the proposal is just "a small step toward an even playing field" between businesses and unions.

But according to the *Wall Street Journal* the proposal that AFL-CIO president Rich

Trumka calls a "modest step" and Holt a "small step" is introducing "the most sweeping changes to the federal rules governing union organizing elections since 1947..." It says the rule changes give "a boost to unions that have long called for the agency to give

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employers less time to fight representation votes.”

Matthew Shay, CEO of the National Retail Federation, is even more explicit. “This is nothing but backdoor card check, the same as we’ve been warning about for more than a year.

Unions weren’t able to get the Employee Free Choice Act through Congress, so they’re using administrative procedures at the NLRB to turn as much of the bill into law as possible.”

How will the NLRB proposal increase union power?

- The proposal would speed up the election process. Currently 38 days is the median time elapsing between when a petition is presented to the NLRB requesting a vote to unionize a workforce and the holding of the election. Under the proposal, an election would be required “in 10 to 21 days after the filing” of a petition.

- After an election is scheduled the employer would be required to provide the union with a final voter list containing employee contact

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Labor Watch is published by Capital Research Center, a non-partisan education and research organization classified by the IRS as a 501(c)(3) public charity. Reprints are available for \$2.50 prepaid to Capital Research Center.

information, including phone numbers and email addresses in electronic form.

- The proposal would make NLRB review of the election results discretionary rather than mandatory.

House Republicans and the Business Community React

The NLRB conducted 1633 union representation elections in 2008-2009 (the most recent reporting period), and employees voted to join a union in 64 percent of these elections. Nonetheless, union representation fell from 12.3 to 11.9 percent of the American workforce last year.

This data must have been on the minds of union officials when they arrived at a July 7 hearing called by the Republican-controlled House Committee on Education and the Workforce. The hearing’s title: “Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers’ Free Choice.”

Facing a room filled with labor union members and their supporters clad in matching neon T-shirts, House committee chairman Representative John Kline (R-MN) invited discussion on the NLRB’s proposal to “rush” union elections.

Kline, a strong critic of the proposal, observed: “The Board’s recent proposal is part of an ongoing effort to promote a culture of union favoritism that is creating greater uncertainty among America’s job creators.” The NLRB proposal, released by the agency’s General Counsel, is called “An Outline of Law and Procedure in Representation Cases.” It comprises over 450 pages in 24 sections. Some “outline.”

Rep. Kline complained that the NLRB proposal would not give employees enough time to make a decision on whether to join a union. They will have to “grapple with the full consequences of all this in as little as 10 days,” said Kline. As for employers, Kline thought even a large firm with its own in-house legal staff would find the NLRB requirements daunting. Kline said the underlying pro-union agenda embodied in the proposal became increasingly apparent as each layer of the outline is peeled away. “We cannot sit by and become willing accomplices in the NLRB’s job-destroying agenda,” he said.

Michael Eastman, executive director of labor law policy at the U.S. Chamber of Commerce, noted the NLRB’s continuing push for pro-labor policies “since President Barack Obama’s appointees have become a majority.” A study in Cornell University’s Industrial and Labor Relations Review had examined how new presidential appointees to the NLRB tend to vote on unfair labor practice decisions. The study concluded: “To inject either pro-union or pro-management biases into the law, through presidential appointment process, patently violates the very spirit of the [National Labor Relations] Act.”

The National Labor Relations Board is supposed to enforce the 1935 National Labor Relations Act. But critics say the current NLRB distorts the law so that it no longer guarantees a worker’s right to choose whether to join a union. Instead, the agency helps labor unions tilt the playing field. Using the government’s rulemaking authority the NLRB tries to push workers into becoming union members and it compels employers to acquiesce in increasingly radical union proposals.

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“The confrontational rhetoric and negative-sum bargaining of some US unions, warmly endorsed by progressive intellectuals and the New York Times, is straight from the Arthur Scargill handbook,” observes Clive Crook, the Washington columnist for the *Financial Times*.

Crook laments how the Obama administration is misusing U.S. labor law and his reference to Arthur Scargill is intended to remind Americans about all that can go wrong when unions go to extremes. Scargill was the militant leader of the British mineworkers union whose radical positions and violent rhetoric provoked a long and bitter strike in Great

Britain in the mid- 1980s. It was only the unyielding stance of British Prime Minister Margaret Thatcher that defeated Scargill and ended the strike with the union’s shattering defeat. But there is no Margaret Thatcher in the White House.

How Much Time Is Enough?

Committee chairman Kline asked, “Is it fair to tell workers they may have as little as ten days to consider all of the ramifications of joining a union before they cast a ballot in the election?” According to the July 7 testimony of Michael Lotito, a partner in Jackson Lewis, a labor and employment law

firm, the NLRB proposal “if adopted, would largely preclude employers from speaking to employees about unionization when it matters most – in the period leading up to an NLRB election.”

By contrast, the unions complain that too much time now elapses between an initial petition to hold an election and when the election actually takes place. They argue that the purpose of the 1935 law is to give more voice to workers, not employers. The current process gives management too much time to mount an anti-union campaign making use of videos and holding one-on-one meetings with workers. Unions have seen

their private sector membership dwindle over the past half-century from 36 percent of workers to a dismal 7 percent today. No doubt the unions believe the NLRB proposal will assure a higher rate of union membership in future years.

New York University law professor Samuel Estreicher told the New York Times “employee interest in collective representation can wane and dissipate simply with the passage of time.” He believes the NLRB proposal reflects the unions’ desire to retain employee interest in joining a union.

But Larry Getts, a former member of the United Auto Workers, appealed to his own experience in his committee testimony:

“In the end, the experience taught me something all too many workers have learned firsthand: Union organizers have an uncanny ability to harass, misinform, mislead and manipulate in pursuit of their goals.”

NLRB member Brian Hayes, the Republican dissenter from the agency’s proposal, said, “Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.”

Giving Unions Personal Contact Information

In addition to the time requirements, the House hearing also paid close attention to the NLRB’s proposal to give unions access to employees’ private contact information. Under the guise of “efficiency” and “modernization,” the new rules require employers, “before and after the pre-election hearing,

to provide detailed information regarding the identities and contact information, for all employees who would be (or might be) covered by the petitioned-for unit, or any unit the employer suggests as an alternative.”¹³ The private contact information includes private email addresses.

Mark Mix, President of the National Right to Work Committee, is outraged that “almost immediately after union officials file for an election, union organizers must be given the names and addresses – and in an unprecedented requirement – email, telephone and shift information for all employees they seek to unionize.” He says this kind of union access to information far exceeds the boundaries of fair and reasonable election processes.

Furthermore, the proposal does not put any enforcement mechanism in place to ensure that unions do not use the information after the election to continue to contact employees. Critics note that if a union loses an election, embittered union organizers may pester and harass employees, especially those who have been outspoken in opposition to union representation.

Rep. Todd Platts (R-PA) notes the clear difference between an employee who voluntarily submits contact information to a union and a government mandate imposed on employers requiring them to provide contact information from their employees to union organizers: “If people decide to share their private information, they’re free to do so, but to have someone do it for you is a different issue.”

How Flawed is the Current System?

In his House hearing testimony, former NLRB chairman Peter Schaumber, a Bush

appointee who served from 2002 to 2010, defended current NLRB election procedures and criticized the board’s assumption that protracted union election campaigns generate employer intimidation.

Schaumber noted that 95% of all elections are currently held within 2 months, with most issues resolved before the election occurs.

Schaumber acknowledged that “in a very small number of cases, elections have been substantially delayed as the result of a union filing unfair labor practice charges that block the election or for circumstances beyond the control of the parties, such as delays by the Board in issuing a decision.” But he noted that these account for only about five percent of elections that occur more than two months after a petition is filed. Current NLRB procedures encourage informal resolution of “pre-election issues” such as disputes over where and when an election will be held, voter eligibility rules, and forms of balloting. In 86-92% of these cases, elections occur without the need for a hearing. That makes the NLRB proposal unnecessary.

Said Schaumber: “A brief overview of the Board’s current election practices and procedures and the agency’s timeliness in processing election cases demonstrates that there was little need for the sweeping changes the majority proposes.”

New Aggressive Phase for the NLRB?

This isn’t the first time the NLRB has tried to dictate America’s labor agenda. As has been reported, the agency recently tried to prevent Boeing from locating an airliner production facility at a factory in South Carolina. According to Mike Underwood, a lawyer with

the Employer Law Report, “the NLRB and its Acting General Counsel (AGC) have embarked on an aggressive campaign to increase the NLRB influence and control over labor-management relations.”

Its current proposal to implement certain procedural election “reforms” is another attempt to assist union organizers. Peter Schaumber put his finger on the problem:

“The proposed rule demonstrates once again that the current Board majority feels unconstrained by the limits of the law and its role under the Act to be completely neutral on the question of unionization. This is not a sudden phenomenon: it has developed over the last 30 years as a result of several factors – such as the decline of unionization in the private sector, changes in the process for selecting Board members, and the impact of the political response chosen by organized labor to address its decline.”

Mark Mix underscores Schaumber’s point: “Once such a precedent is established, union chiefs would be emboldened to file more frivolous unfair-labor-practices charges against employers, hoping the NLRB will impose this ‘new’ punishment on their targets.”

By contrast, the *Washington Times* observes that the NLRB does not file charges of unfair labor practices against states that force unionism on employees, “including a California law that threatens workers with fines and even jail time for returning to work during union-boss-ordered strikes.”

Supporters of America’s free enterprise system have a special worry. They fear that union leaders will work with Obama

NLRB appointees to undermine the authority of state Right-to-Work laws. The NLRB’s brazen willingness to challenge Boeing’s legal right to shift its airliner production to a facility in South Carolina, a Right-to-Work state, shows that no state, no employer and no legislation, however well-established, is secure from attack by the current NLRB leadership.

Conclusion

In *The Art of War* the Chinese military philosopher Sun Tzu wrote: “Be extremely mysterious, even to the point of soundlessness. Thereby, you can be the director of the opponent’s fate.”

The NLRB is trying to move quickly and soundlessly. With appointees selected by President Obama the agency proposes what its supporters call “modest” and “small” procedural changes to union election practices. The Board proposes to restrict employer communication with employees while it forces employers to give their employees’ private information to union organizers. Many employers cheered when Congress refused to pass “card-check” legislation (the misnamed Employee Free Choice Act). But with little fanfare the NLRB seeks to impose it by regulation.

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LaborNotes

Spend a couple hundred million to elect a president, and what does it get you? Unions are increasingly concluding about **Barack Obama** – not much. They didn't get card-check. And on August 3rd, it was reported that Obama was hiring a non-union crew to work his enormous 50th birthday party. **Jim Hoft** reported on *Gateway Pundit*: “A confidential and trusted union source contacted me today to report that the crews called in to work Obama's birthday bash are non-union. Union members are OUTRAGED that Obama would turn his back on them. Curiously, my source added that the day rate is actually higher for the non-union members to do the work.” Oh, the indignity!

Well, they huffed and puffed, but unions have failed to blow the House of Walker down. Ever since the introduction of Wisconsin Gov. **Scott Walker**'s collective bargaining reform bill six months ago, unions have vowed vengeance. First, they challenged the law (which they correctly see as an existential threat) in the courts. They failed. They then vowed to take the Wisconsin State Senate in a special election by defeating six Republicans who voted for the bill. On August 10th, they failed at that, too. Republicans held four of the six seats targeted for recall, leaving the GOP in the majority. Walker's reforms are safe, for now. The unions, meanwhile, poured upwards of \$28 million and who-knows how many hours into the fight. As the *Wall Street Journal* put it, “For the bucketloads of cash, the political impact is negligible.” To say the least - *Labor Notes* cannot recall a more crushing defeat for organized labor in many years.

Just when you think union protesters have reached rock bottom, you read this in New Jersey's *Star-Ledger* on a labor dispute between **Verizon Communications, Inc.** and about 45,000 of its unionized employees: “A video posted online appears to show a Verizon picketer placing his young daughter in front of an oncoming truck — presumably carrying non-union employees — and then taunting the passengers with profanity-laced statements. ‘That's who you're hurting,’ the man says, pointing to the girl. ‘You're taking it from our family. Good job. Go back where you came from. Look at her face.’” Negotiations between Verizon and two unions, the **Communications Workers of America** and **International Brotherhood of Electrical Workers**, broke down on August 7th, and *Labor Notes* understands everyone is a little upset. But putting your child in front of an oncoming truck? Wow. You can view the video yourself at http://www.nj.com/business/index.ssf/2011/08/verizon_strike_picketing.html.

Speaking of the Verizon dispute, the communications giant has “reported a dozen cases of sabotaged cable lines and warned of delays in repairs and customer service on the second day,” of the strike, according to the *Boston Globe*. Customers in Massachusetts, Maryland, New Jersey, and New York have seen their service lines, including cable TV and Internet, sabotaged since the strike began. “This could be a dangerous situation if people need to reach fire, police, or emergency responders and can't use their phone,” said a Verizon spokesman. No kidding. Naturally, the unions are denying any involvement. “We don't do that, and nobody in the union leadership supports any of that,” proclaimed Myles Calvey, business manager for the **International Brotherhood of Electrical Workers**.

In the wake of successful charter school experiments throughout the country, parents and even some Democratic politicians have turned against powerful teachers unions and their tooth-and-nails fight against any and all meaningful education reform. Now even some unionized teachers are joining the chorus: **Jordan Henry**, a 12-year teaching veteran, has organized the **New Teachers of Los Angeles** (NewTLA) as a dissident faction within the **United Teachers of Los Angeles** (UTLA), dedicated to changing the union from within. According to TIME, “After the last union election, NewTLA holds 90 of the 350 seats in the union's house of representatives... NewTLA is already taking on tough issues like seniority and urging UTLA to move from its narrow focus on the teachers' contract to a broader one about how to improve schools.”