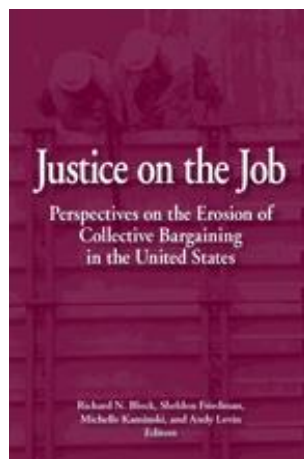

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3

International Elections Standards and NLRB Representation Elections

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Many workers' rights, including the right to freedom of association at the workplace and the right to bargain collectively with employers, are recognized in international human rights agreements, including the United Nations Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (United Nations 1948; 1966). Many, if not all, workers' rights recognized in international human rights law were preceded by the passage of Conventions or Recommendations by the International Labour Organization (ILO) on the same subjects (ILO 2003, p. 2). The ILO's Declaration of Fundamental Principles and Rights at Work requires all ILO member states to "respect, to promote, and to realize in good faith" five core rights, which are considered fundamental human rights. They are 1) freedom of association, 2) the right to collective bargaining, 3) the elimination of all forms of forced or compulsory labor, 4) the effective abolition of child labor, and 5) the elimination of discrimination in respect to employment or occupation (ILO n.d.).

In the United States, the National Labor Relations Board (NLRB) representation election is the primary means by which private sector workers exercise their rights to choose to be represented by a union. Because the "win rate" for unions in NLRB elections has declined over the past 50 years, and because increasingly smaller percentages of employees voting in these representation elections select unionization, observers have raised questions about the fairness and the conduct of these elections. Implicit standards for the conduct of democratic elections have existed for a long time. It is only since the end of the cold war, however, that international organizations have developed explicit

best practices that can be directly applied to evaluating the fairness of NLRB representation elections.

This chapter argues that the new international standards for national political elections prove that NLRB representation elections, as currently implemented, are not free or fair. The lack of free and fair NLRB representation elections deprives workers of their rights to freedom of association and collective bargaining at the workplace.

THE NLRB REPRESENTATION ELECTION PROCESS

The basic procedure U.S. workers must use to exercise their right to freedom of association is found in the National Labor Relations Act (NLRA). The procedural details have been filled in through the administrative regulations issued by the NLRB.

The process usually starts, however, outside the structures of the NLRA. The workers in a facility talk among themselves and decide that they would be better off if they joined a union. In most cases, workers call a local union office for help. If the workers can find a union that has an organizer available, the union will usually agree to send an organizer to meet with some of the workers. If, after talking with the initiating workers, the organizer believes that the prospects for a successful organizing drive are good, the union may agree to help organize workers. The following steps outline a typical process for organizing a union:

- 1) Meetings are held before or after work, usually at a worker's home, to discuss the benefits of forming a union and the strategy and tactics of organizing.
- 2) The union organizer and committed workers distribute cards to other workers to sign if they are interested in joining a union.
- 3) After at least 30 percent of workers in a bargaining unit sign the cards, workers can petition the NLRB to hold a secret ballot election. In modern practice, union organizers usually collect cards from 60 to 70 percent of the workers in the bargaining unit before proceeding to the next step (Compa 2000). At this point, the employer can choose to recognize the union without proceeding further.

- 4) If voluntary recognition does not occur, there is a four- to eight-week-long election campaign. During this preelection period there is vigorous campaigning on both sides (Roomkin and Block 1981).
- 5) NLRB agents conduct a secret ballot election at the workplace, allowing all workers to vote during work time. In the past several years, workers have chosen union representation in about half of all elections held (Compa 2000). However, in the past few years, only about 20 percent of workers who have joined unions have done so as a result of the election process (Sweeney 2003).
- 6) Either party may file an objection to the election with the NLRB, claiming unfair practices by the other side.
- 7) If the NLRB certifies the election as fair and finds that a majority of those casting ballots prefer union representation, the employer is required by law to recognize the union and to collectively bargain with workers over the terms and conditions of their work “in good faith.”

There is nothing inherently undemocratic about these steps. Having an election campaign to inform voters and using a secret ballot election to determine whether workers freely choose to join a union seems, on the surface, fair. Over the years, however, there have been numerous disputes between unions and management over the details of the implementation of the preelection, election campaign, and postelection rules. When adjudicating these disputes, the federal courts and the NLRB have given greater weight to the private property and free speech rights of employers than they have to the rights of free speech, freedom of association, and collective bargaining for workers. The cumulative effect of these rulings has been to change the rules, allowing management increasingly greater influence over the process by which workers choose to join a union (Block, Beck, and Kruger 1996; Gross 1999).

ARE THE NLRB ELECTION PROCEDURES DEMOCRATIC?

Scholars have used a variety of approaches to demonstrate that NLRB representation election procedures are not democratic:

- 1) summarizing the testimony of workers concerning the discrimination they have faced when attempting to form a labor union (Block, Beck, and Kruger 1996; Bronfenbrenner 1998; Compa 2000);
- 2) comparing NLRB representation elections with U.S. election procedures (Becker 1998; Levin 2001; Weiler 1997) and with ILO standards (Adams 2001; Compa 2000);
- 3) linking changes in representation election rules to higher win rates for the antiunion party (Block and Wolkinson 1985; Roomkin and Block 1981); and
- 4) presenting survey results showing a high unmet demand for unionization (Freeman and Rogers 1999).

Testimony before the U.S. Departments of Commerce and Labor Commission on the Future of Worker-Management Relations in 1993 indicated that many workers felt that it has become increasingly difficult to form unions using NLRB representation election procedures (Block, Beck, and Kruger 1996). The workplace, which is the principal location of the election campaign, is not a neutral forum where the costs and benefits of unionization are discussed openly and freely. Instead, employers have a near-monopoly over access to voters. Employers have learned how to use procedures under the NLRA to delay the election, thus extending the time in which they can use their campaign advantage. Weak penalties for unfair labor practices under the NLRA encourage employers to push their advantage to the boundary of possible permissibility. Long delays in NLRB adjudication of cases of unfair labor practices against employers mean that the penalties, when administered, are usually hollow victories for workers (Block, Beck, and Kruger 1996).

Many have claimed that U.S. national political elections would be widely condemned as unfair if they were run like NLRB representation elections (Becker 1998; Levin 2001; Sweeney 2003; Weiler 1997). There are, however, no explicit U.S. federal election rules of procedure

that provide best practices for conducting elections. The U.S. Constitution and election laws let individual states decide on most of the details of election procedure. Thus, even U.S. election laws do not provide a set of best practices against which NLRB representation elections can be explicitly compared. After the experiences in the 2000 presidential election, some, including former President Carter, think a statement of democratic principles in U.S. elections is needed (Davis 2001).

Workers' freedom of association in the United States also comes up short when compared against ILO standards for national policies protecting this right (Adams 2001; Compa 2000). The main problem with using ILO Conventions and Recommendations for making the argument that NLRB representation elections in the United States are not democratic is that ILO enactments, like U.S. federal laws, do not directly address the best practices for conducting democratic elections. The dictates of the ILO were drafted to assist all governments of the world, the vast majority of which do not use bargaining-unit elections as a way for workers to express their choices about whether to join a labor union.

Even if the ILO provided such guidance, it is unlikely that employers and Congress would accept the ILO's judgement as constituting the appropriate yardstick for measuring labor policies and practices in the United States. Potter and Youngman (1995) argue that ILO standards reflect a European view. European norms and procedures, they argue, do not transfer well to the U.S. context because of differences in constitutions, history, customs, and institutions. Thus, it is not surprising that out of 143 Conventions passed by the ILO, the United States has ratified only 7, declaring the remainder to be within the jurisdiction of the states (Henkin et al. 1999). The U.S. government has, on occasion, even threatened to withdraw from the ILO, arguing that 1) there are too many nondemocratic members, 2) the ILO is critical of the United States and a handful of other states but ignores worse labor laws and practices elsewhere, and 3) the ILO has become increasingly politicized (Henkin et al. 1999).

Still others have argued that the low and declining level of union density in the United States and the increasing avoidance of NLRB representation elections as a way for workers to join unions is evidence of unfair NLRB representation election rules (Sweeney 2003). There is a substantial literature showing the economic benefits of union mem-

bership in the United States (see, for example, Buchmueller, DiNardo, and Valletta 1999; Fay 1998). Yet, the current unionization rate among private sector employees is approximately 9 percent, and 80 percent of those who join unions do not join by participating in NLRB representation elections, they join by accepting a job with a unionized employer (Sweeney 2003). Is this low level of union density the result of union representation election procedures that are biased against workers who wish to join a union?

To answer this question, one must consider the results of surveys showing what workers want. In their now well-known survey of U.S. workers, Freeman and Rogers (1999) asked nonunionized workers in the private sector, “Would you vote for or against a union in an NLRB election at your workplace?” They also asked nonunion workers how they thought their colleagues would vote in such an election. Putting those numbers together, Freeman and Rogers estimated that one-third of nonunionized workers in the private sector wanted a union and believed that, were an election to be held, workers at their firm would support a union. According to a national survey by Peter D. Hart Research Associates conducted for the AFL-CIO in 2002, half of nonmanagement workers who do not already have a union say they would join a union tomorrow if given the chance. This was a full 8 percentage points higher than in 2001. Among all workers—including union members—54 percent said that they would vote for a union tomorrow (Sweeney 2003).

There is also some supporting research linking specific bad results for the pro-union party to changes in NLRB interpretations of election rules (Block and Wolkinson 1985). For example, research demonstrates that employers commonly prolong the election campaign phase of the process. Based on an analysis of 45,000 NLRB representation elections occurring between 1972 and 1978, Roomkin and Block (1981) found that the longer the election campaigns, the greater the rate of employer victories. They also found that nonparticipation increased with delay, suggesting that the campaign itself discouraged participation.

Some argue that surveys and signed authorization cards are useless as indicators of demand, because workers lack the information necessary to make an informed decision about whether they want to be represented by a union, and they can only get that information in an election campaign (Greer 2003; Potter and Youngman 1995). By im-

plication, longer campaigns result in more employer victories, because longer campaigns allow voters to receive more information about the disadvantages of unions. Moreover, a secret ballot election, they assert, is a fundamental device in any democratic system and is the best way to allow workers to freely choose whether to join a union (Greer 2003; Potter and Youngman 1995).

Critics of the “bad results” arguments claim that they provide an unconvincing critique of the fairness of NLRB representation elections. After reviewing a wide variety of surveys on worker attitudes toward unions, Farber and Krueger (1993) concluded that almost the entire decline in union membership between 1977 and 1991 was due to a decline in demand for union representation. This decline in demand for union representation has been caused by the steady expansion of federal and state laws protecting workers, more enlightened management practices, and increased vulnerability of U.S. workers to global competition (Employment Policy Foundation 1998; Potter and Youngman 1995). Controlling for these and other factors contributing to the declining demand for unionization among U.S. workers, studies have shown that management opposition has virtually no effect on union density (Employment Policy Foundation 1998; Moore and Newman 1988). But these issues are essentially irrelevant to the question of eliminating bias from NLRB representation election procedures. If, as critics of the “bad results” view argue, the demand for union representation has declined, workers would continue to vote against union representation even in unbiased elections.

NEW INTERNATIONAL STANDARDS FOR DEMOCRATIC POLITICAL ELECTIONS

As noted, the purpose of this chapter is to demonstrate that NLRB representation election procedures do not even meet recently developed minimum international standards for what constitutes a free and fair democratic national political election. The new international standards were designed to provide an explicit set of best practices for achieving free and fair democratic elections in countries with a wide variety of institutional arrangements and economic endowments. Since they address

elections specifically, they can be applied directly to the evaluation of the fairness of NLRB representation elections. They are particularly useful in this context because it is hard to argue that these standards are biased in any way or alien to U.S. culture.

The new international standards are free of bias because they were produced in settings relatively free of the ideologically infused, self-interested, conflict-based politics of the usual debates over proper public policy regulating management–labor relations. They are not regionally biased either. Whether the particular statement of standards was developed in Latin America, Europe, or Africa, the same or at least very similar elements are present. They are the kinds of standards for a democratic election that might have been produced if experienced and informed people came together to set union election rules under what political theorist John Rawls (1999) calls the “veil of ignorance.” In the union election context, the veil of ignorance is a hypothetical situation where those who develop the election procedures must do so before they know what roles they will play—employer or worker—once the rules have been established.

Most important, the international standards cannot be criticized as alien to U.S. culture, because the U.S. government has been a leader—perhaps *the* leader—in the setting of international standards for national political elections. In 1976, the Commission on Security and Cooperation in Europe, an independent U.S. government agency, was created to address and assess democratic, economic, and human rights developments in the 55 countries participating in the Organization for Security and Cooperation in Europe (OSCE). The commission consists of nine members of the U.S. House of Representatives, nine from the U.S. Senate, and one member each from the Departments of State, Defense, and Commerce. The OSCE’s Office for Democratic Institutions and Human Rights is the lead agency in Europe in the field of election observation. It coordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with international standards for democratic elections and other democratic political institutions.¹

Of course, international standards for democratic elections are not objective in the sense of being “value free.” They are unabashedly designed to promote democratic practices around the world. Therefore, they are useful and impartial for the purpose of evaluating the NLRB

representation election process in the United States as long as it is agreed that NLRB representation elections should be as democratic as possible.

WHY NLRB-SUPERVISED UNION REPRESENTATION ELECTIONS ARE NOT FREE

According to international standards for political elections, a “free” electoral process is one where fundamental human rights and freedoms are respected. The following criteria are necessary for a free, democratic election:

Freedom from violence, intimidation, or coercion. According to the NLRA’s Section 8(a)(3), any discrimination against workers by employers for concerted activity, including union activity, is prohibited. Nonetheless, according to Compa, “Firing a worker for organizing is illegal but commonplace in the United States” (2000, p. 18). According to Bronfenbrenner (2000), 25 percent of employers illegally fire at least one worker for union activity during organizing campaigns, and 52 percent of employers threaten to call the Immigration and Naturalization Service during organizing drives that include undocumented employees. After studying 407 union representation campaigns in 1998 and 1999, Bronfenbrenner found that, in 51 percent of the campaigns, employers threatened to close or move if the pro-union party won. Thus, it is no surprise that workers in a nonunionized, private sector workplace are usually afraid to openly support the pro-union party. Intimidation of members of the pro-union party is illegal, but the law is not vigorously enforced.

Freedom of speech and expression by voters, parties, candidates, and the media. Unfortunately, limiting workers’ free speech rights in the workplace is both common and legal. During many, if not most, union election campaigns, workers are subjected to mandatory captive audience meetings and mandatory one-on-one meetings with supervisors in their workplaces (Bronfenbrenner 2000). These measures are allowed under Section 8(c) of the NLRA, the 1947 “employer

free speech” clause. Bronfenbrenner (2000) also found that 78 percent of employers force employees to attend one-on-one antiunion meetings with managers and 92 percent force their employees to attend mandatory antiunion presentations. In contrast, workers can be and usually are prohibited from engaging in pro-union speech in the workplace during work times (Block, Beck, and Kruger 1996).

Freedom of assembly to hold political rallies and to campaign. Technically, workers have this right but have difficulties exercising it because it is illegal for pro-union workers to assemble on company property, even during nonworking hours, without the permission of the employer. Workers who favor forming unions are limited to contacting their colleagues outside the workplace or during breaks and lunch periods (Block, Beck, and Kruger 1996). Many low-wage workers, who need union representation the most, do not own a car, so attending meetings in a location different from the workplace may be difficult (Ehrenreich 2001). There are no similar obstacles to freedom of assembly by the employer, because the employer may use work time to present its message.

Freedom of access to and by voters to transmit and receive political and electoral information messages. While workers are allowed to receive information from union advocates in nonwork areas and on nonwork time within the workplace (Block, Beck, and Kruger 1996), the worker access of pro-union workers is far less than that of the employer, who controls the workers’ work day and who can use that control to deliver its antiunion message. Moreover, the union may not enter the employer’s property unless the workers live on the property (Block, Beck, and Kruger 1996).

Freedom to question, challenge, and register complaints or objections without negative repercussions. This freedom is crucial to ensuring respect for all the other freedoms. Individuals do not really have any right unless it is recognized in law, and there is an effective, speedy, legal remedy for those who feel that the right guaranteed to them under law has not been respected. The labor relations law does allow for legal avenues of appeal by workers who feel that their rights were not respected during an NLRB union representation election. However, the

long delays in the U.S. labor law system, coupled with weak penalties for employers who eventually are found guilty of an infraction, make the exercise of this right fruitless. If a terminated worker appeals to the NLRB for help, the appeal usually takes years, and the potential reward for the persistent worker is small (reinstatement with back pay). For many employers, this penalty is a small price to pay to destroy a workers' organizing effort by firing its leaders (Compa 2000, p. 18).

WHY NLRB-SUPERVISED UNION REPRESENTATION ELECTIONS ARE NOT FAIR

According to international standards for political elections, a "fair" electoral process is one where the playing field is *reasonably* level and accessible to all voters, parties, and candidates. Therefore, the following criteria are required in a fair democratic election:

Clearly defined universal suffrage. The question of who should vote in a union election is often a matter of dispute. The NLRB determines which workers make up the bargaining unit and which do not. Employers work hard to influence this part of the process, often claiming that pro-union groups of workers should not be included in the vote. Although unions also try to influence the definition of the bargaining unit too, perhaps the biggest impact of the dispute of the definition of the bargaining unit is delay. Delay prolongs the election campaign, which, in turn, helps the employer because of the employer's access advantages (Block and Wolkinson 1986; Roomkin and Block 1981).

Equitable access to financial and material resources for party and candidate campaigning. In the union representation election context, there is rarely "equitable access to financial and material resources" by the pro-union and antiunion parties. The employer almost always has an overwhelming resource advantage. Logan (2002) estimates that during 75 percent of union representation campaigns, employers hire high-priced, experienced, professional, antiunion consultants to help them conduct their antiunion campaign. The pro-union "party" is almost always financially overmatched.

Equitable opportunities for the electorate (workers) to receive election-relevant information. Becker (1998) argues that the abilities of the pro-union and antiunion parties to communicate with workers are so unequal that many “workers vote against representation because they have never heard the union’s arguments” (p. 101). As noted, the substantial workplace-access advantage of the employer makes it impossible for the workers to receive as much information from the union as from the employer.

Equitable treatment of voters (workers), candidates, and parties, by elections officials (the NLRB), the government, the police, the military, and the judiciary. While the most important reason for the inability of workers to exercise their freedom of association at the workplace has been determined opposition by employers, government agencies have played their part too. Gross (1999) writes the following about government support for freedom of association rights, particularly over the past 30 years: “The White House, no matter who the occupant, has either been hostile or non-committal; Congress has also been hostile, finding it more politically profitable to run against the NLRA than to be for it; the courts, including the Supreme Court, have issued decisions freeing employers from the constraints of the law” (p. 80). Thus, although there is no evidence that the NLRB staff that administers elections are biased against workers, it is clear that there is little support at higher levels of government for workers’ rights to unionize.

CONCLUSION

As this chapter shows, the procedures under which NLRB representation elections are conducted violate international standards for free and fair elections. Our conclusion concerning the undemocratic nature of NLRB representation elections supports most previous research on the subject. It contributes to previous research findings because it is based on a different, arguably neutral, and more explicit standard for what elements should be present in a democratic election. The law should be changed to make it easier for workers to exercise their right to freedom of association at the workplace. Workers should have the

freedom to make their own choices about joining a union without interference from management. While a free and fair election campaign can provide useful information to voters, NLRB representation election campaigns are not free or fair. The election procedures and remedies permit employers to intimidate voters, thereby frustrating the desire of workers at many workplaces to join a union and to have a collective voice at work.

In all societies, employers inherently have more power than unorganized workers because unorganized workers are dependent on the employer for their livelihoods. If the U.S. federal courts and the NLRB had wanted to level the playing field, they would have developed union representation election procedures that gave more weight to the importance of workers' freedom of speech, freedom of association, and right to collective bargaining than they did to employers' property and free speech rights. Because the courts and NLRB took a different path, too many biased preelection and postelection practices have accumulated and have become entrenched in U.S. labor law. Compa (2000) contends that the broken election procedures can be fixed by tinkering with the existing rules. Unfortunately, it would take decades, perhaps generations, to undo the harm that has been done. Union representation election procedures, therefore, for all practical purposes, are beyond repair.

Note

1. The benchmark standards used in this paper are based on international standards for free and fair elections that have been developed and promulgated by governmental and nongovernmental organizations. See, especially, OSCE (1990, 2003), and Inter-Parliamentary Union (1994). International nongovernmental organizations have promulgated similar principles, such as the guidelines developed by the International Foundation for Election Systems (<http://www.ifes.org>); Common Borders (<http://www.commonborders.org>); and the Administration and Cost of Elections Project (<http://www.aceproject.org>). Information about election standards also can be found on the Web sites of the International Institute for Democracy and Electoral Assistance at <http://www.idea.int>; and the National Democratic Institute for International Affairs at <http://www.ndi.org>.

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