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23 LRW 973

NLRA

### **Professor/Arbitrator Calls NLRA 'Pretty Sick,' Calls for Both Substantive, Procedural Fixes**

The National Labor Relations Act is “pretty sick” and needs to be fixed substantively regarding union organizing, employee free choice, and collective bargaining and fixed procedurally regarding how the statute is administered, Richard N. Block, a professor and labor arbitrator, said June 11 at the Labor and Employment Relations Association's National Policy Forum.

The proponents of the proposed Employee Free Choice Act (H.R. 1409, S. 560), which would make it easier for employees to obtain union representation by having the National Labor Relations Board certify whether a majority of unit employees have signed union authorization cards, are correct that the current representation election rules favor employers, Block said. He teaches at Michigan State University's School of Labor and Industrial Relations.

Charles I. Cohen, a former NLRB member who is now a management attorney with Morgan, Lewis & Bockius in Washington, D.C., asserted that union density has fallen over the last several decades because the “globalized economy has changed fundamentally” our nation's economic structure. That and several other factors—and not a broken election system—have caused decreased union density, Cohen said, arguing against a need for EFCA.

Sarah M. Fox, who also served as a board member and is of counsel with the union-side law firm Bredhoff & Kaiser in Washington, D.C., said it is significant that the focus of debate in Congress has shifted from whether labor reform is needed to what kind of reform to make. “The prospects are excellent for getting NLRA reform and getting it this year,” she asserted.

### **Current Election Rules Favor Employers, Block Says**

The overall purpose of the NLRA and the NLRB is to create, maintain, and support a system of worker choice regarding union representation and collective bargaining if workers choose representation, Block said. Worker choice must be determined through fair procedures and not be subject to economic leverage by the employer controlling whether the workers have jobs, he said.

The current rules for representation elections favor employers by allowing them complete access to employees during working hours, with very little regulation of what employers can say to workers, Block said. He noted that employers can exclude union representatives from employer property and that a large “union-avoidance industry” provides consultants to advise employers. The current representation election process does not meet international standards for fairness, Block said. He asserted that the elections are not sufficiently free and fair because of asymmetries in access and resources.

NLRB data shows that unions won 52.0 percent to 63.6 percent of elections during the 2000s, Block said. But he observed that unions have been more successful organizing smaller units than larger units. Is that because bigger units have better working conditions or because the employer has bigger resources to oppose unionization, he asked.

Even if unions won every election held, the overall percentage of private sector employees having representation only would go up a miniscule amount, Block said. He found that the mean number of employees each year who had the opportunity to vote in a representation election was 77,366 during the period 1992-2008.

When employees choose union representation in an election, too few new units reach a first bargaining contract, Block said. He cited a study showing that 62 percent of units did not have a bargaining contract within one year of NLRB certification.

The board's administration of the NLRA is hampered by perceptions of partisanship and a lack of confidence by unions and employers, Block said. He found that both the number of recess appointments by the president to place members on the board and the number of nominees who are not confirmed by the Senate have risen dramatically since the board was created in 1935.

There were no NLRB recess appointments before 1980, but 10.5 percent of all nominations during the 1968-1987 period and 63.3 percent during the 1988-2008 period involved recess appointments, Block said. He found that the percentage of NLRB nominations that never were confirmed was zero before 1968, was 10.5 percent during 1968-1987, and was 26.7 percent during 1988-2008. Those numbers indicate that there is no interest or no attempt being made to reach a political consensus on individual nominees, Block said.

In response to the current “broken” system, unions have used their economic leverage to pressure employers to sign neutrality and/or card check agreements and used their political leverage to push for passage of EFCA in Congress and “living wage” laws in numerous municipalities, Block said.

## **Block Would Make Workplaces ‘Neutral Territory.’**

Making his own proposals for change, Block asserted that workplaces should be “neutral territory” with equal access to employees by both sides. If the employer holds a captive-audience meeting to talk about why it wants the employees to vote against the union, he would require that the union have the opportunity to hold its own employee meeting in the workplace. He would forbid visits to employees at their homes.

Block also called for speedy elections, within 30-45 days of the union filing an election petition, with all issues about unit scope resolved by the NLRB regional director during the campaign period and no opportunity for employers to obtain indirect review by refusing to bargain with a certified union. Block expressed support for the EFCA provisions increasing remedies for unfair labor practices committed during an election campaign or during bargaining for a first contract.

Regarding first-contract bargaining, Block would allow for mediation if either party requests it. If the parties still fail to reach agreement, he would require arbitration—limited to a one-year agreement covering only core issues such as wages, benefits, time off, seniority, grievance procedures, and management rights—conducted by arbitrators who are members of the National Academy of Arbitrators. He also would require the parties to undergo collective bargaining training during the first year conducted by the Federal Mediation and Conciliation Service.

As for administration of the NLRA, Block proposed changing the board's composition to include two union representatives, two management representatives, and a neutral member. This tripartite structure should encourage movement to a reasonable middle territory, reduce extremism, and “neutralize and depoliticize” the board, Block said. He also recommended reducing the scope of judicial review of board decisions to increase their finality and reduce delays.

Possible standards, he said, include review limited to whether the decision is based on the NLRA and the evidence, whether the board used fair and regular procedures, whether the decision is “repugnant” to the NLRA or “palpably wrong,” whether the board had jurisdiction, and whether the board provided due process.

### **Unions Challenged by Globalized Economy, Cohen Says**

The globalized economy is “an enormous challenge” for unions, Cohen said. Citing the automobile industry, he observed that the “big three” U.S. auto makers used to be able to pass all their costs to the consumer but now have to compete with foreign companies with lower costs.

Recalling the start of his legal career as an attorney in an NLRB regional office in the 1970s, Cohen said those “were not the good old days” for unions. He said that the 1970s were “more difficult as far as employer resistance” and that the trend since then has been more positive employer-employee relations.

Although Cohen acknowledged that some employers violate the law, he asserted that more employers are using teams and actively soliciting input from employees, which he said improves employees' job satisfaction. Other factors that have contributed to reduced union density are the "huge growth" in laws that protect employees' individual rights and the cultural trend toward less participation in group activities, he said.

NLRB already holds representation elections quickly, Cohen said. He cited statistics showing that the median time from petition to election is 38 days and that 95 percent of elections are held in 56 days. Less than 1 percent of elections end up going to an appeals court based on an employer's refusal to bargain in order to test a union's certification, Cohen said. That source of delay "simply is not a significant problem," he said. Unions currently are winning nearly two-thirds of elections, although "admittedly in a smaller base," Cohen said. He observed that it is "not surprising" that unions are more likely to win elections in smaller units.

The EFCA provision that would require mandatory, binding, interest arbitration of first contracts if certain time limits are not met has been described as the answer to a big problem, Cohen said. But he observed that NLRB General Counsel Ronald Meisburg (R) three years ago launched an initiative to address the high degree of failure to reach a first contract and that the numbers "have gone down fairly substantially" as a result of those efforts. "That's the responsible way to deal with the problem," not partisan political measures, Cohen said.

Cohen also argued that interest arbitration is a bad idea because arbitrators are not trained in how to run a business and compete in a globalized economy and, unlike the parties, would not have to live with the terms of the contract. Interest arbitration is the antithesis of collective bargaining, he said.

By Susan J. McGolrick