

## Labor Education Service

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## *Under Threat: Why do we need "labor peace" when we have the NLRA?*

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I have been asked to present information regarding labor peace agreements, or what often are referred to as card check and neutrality agreements. To understand this alternative form of election, it is important to understand the current legal environment that workers who desire to join a union operate within.

### **National Labor Relations Act (NLRA)**

The National Labor Relations Act, as amended, is the primary labor law in the United States. Passed in 1935, this law protects workers' rights to organize and makes it illegal for employers to interfere with that right. The law's "Findings and Facts" points to the positive aspects of collective bargaining.

*The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of strife or unrest ....*

*The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract ... substantially burdens and affects the flow of commerce and tends to aggravate recurrent business depressions, by depressing wage rates and purchasing power of wage earners....*

*Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury... by restoring equality of bargaining power between employers and employees ....*

The NLRA also established the National Labor Relations Board (NLRB) that oversees and administers the implementation of the law. The law provides for a secret ballot election if 30% of the employees indicate an interest in joining a union.

The NLRA meant to create a level playing field, where employees could organize into unions and bargain collectively. The law promoted unions and collective bargaining as a means for

securing labor peace and harmonious relations between labor and management. However, the law's actual results are mixed.

On the one hand, collective bargaining largely works. The Worker Representation and Participation Survey (as well as other surveys) found that 90% of union members would vote to keep their union if they had to make the choice again. Nearly two-thirds of all managers in unionized workplaces say that the union makes for a better work environment (Dunlop Commission Report, 36). On the other hand, the process by which workers elect to join unions is increasingly unbalanced.

### **Why some argue that the NLRA no longer creates a “level playing field”**

In a recent Associated Press poll, 61% of all workers approve of unions while only 22% disapprove. Polls now say that over 50% of all workers would chose a union if they had a chance (up from 32% in the mid-1990s). Yet, fewer than 13% of all workers belong to a union, and only about one-half of all union elections result in workers voting for union representation. The obvious question is “Why the difference?”

Kate Brofrenbrenner (Cornell University) has the most comprehensive data available analyzing union organizing campaigns. Her work spans almost two decades of NLRB administered elections. What she found is startling.

- 91% of all employers force employees to attend mandatory, closed-door (“captive audience”) meetings to listen to anti-union messages
- 80% require immediate supervisors to attend training on how to deliver effective anti-union messages to employees.
- 80% hire outside consultants to run anti-union campaigns.

Despite being illegal,

- one-half of all employers threaten to shut down their facilities if the employees join a union.
- three out of every ten employers fire union organizers.
- nearly a third of employers never negotiate a contract.

The penalties for engaging in illegal behavior are minimal, oftentimes only involving a written statement that such behavior will not be practiced again. Because of the appeal process (and under-funding of the NLRB) it often takes years before violations of the law are resolved. By this time many employees have given up or have taken new jobs.

The effect of such tactics has a chilling affect on union organizing. According to the 1995 Dunlop Commission, nearly 80% of all workers think that employees seeking to unionize will lose their jobs; over 41% think they, themselves, will lose their job if they chose to organize.

## **An inherent imbalance in power**

Employers often argue that they should also have a right to tell employees their side of the story. Legally, they have that right, within certain parameters. But such employer assertions ignore that any communication between the employer and employee is inherently unequal.

A union can persuade, can plead, can even threaten, but ultimately they have very little if any power to affect an employee's employment status or working conditions. The employer, however, has the power to discipline, even fire the employee. In other work situations, disobeying a supervisor's instructions are grounds for discipline or discharge for insubordination. With that in mind, the line between an employer benignly communicating a point of view and that employer directing an employee (implicitly or explicitly) to act in a certain way regarding union activities is a very fine line indeed.

This inherent imbalance of power between employer and employee is well-recognized in other labor-management relations. For example, sexual harassment laws recognize that a supervisor who requests to see a subordinate outside of work for a date puts the subordinate employee in an awkward position. Although the employer may view such a request as harmless, it is inherently coercive because the subordinate employee can reasonably believe a refusal might result in retaliation.

Another way to see this imbalance in power is to extend to political elections the same conditions experienced in union elections. Most people would find it unacceptable to require all employees (under threat of discipline) to attend political meetings for a particular candidate. Most people would find it unacceptable for an employer to have supervisors tell employees that they should vote for the Democratic candidate to keep their jobs. Most people would reject a CEO who takes an employee into a closed-door office and tells the employee who to vote for in an upcoming election. While each of these scenarios might be dismissed as simply communicating a point of view, most people see this type of employer interference in political elections as coercive because it potentially forces an employee to wonder if s/he disagrees with the employer whether s/he might be fired or disciplined.

Yet, nine out of every ten employees engage in such communication and tactics when it comes to secret ballot union elections.

## **An Unfair Advantage**

The Human Rights Watch issued an extensive report examining United States labor law in August 2000 ("Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards"). They found:

*The reality of NLR enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized in reprisal for their exercise of the right to freedom of association (Summary, 2).*

The report highlights that U.S. labor law legally guarantees the right of workers to organize, but in practice such a guarantee does not extend to actual protection. The investigation found:

*Any employer intent on resisting workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct... (Summary, 2)*

Employer delaying tactics often become paramount to denying employees the right to organize.

### **How elections are delayed or denied**

The NLRA, on its face, provides for a speedy secret ballot election within 45 days of workers filing an election petition. However, such speedy elections are the rare exception. Employers faced with a union organizing campaign routinely file objections. Some objections have merit; many do not. Union avoidance seminars discuss frankly the effectiveness of filing objections before an election to delay it, or afterwards to overthrow it. Such delaying tactics often are enough to end a union organizing drive: either because workers move onto different jobs or because they become demoralized or give up because successful organizing appears futile. It is common to delay election results for months, even years.

In 1999 in Duluth, St. Mary's Hospital filed objections to the election for technical workers. The result was an almost two-year delay before the NLRB directed another election, without ever counting the original ballots. The same pattern repeated at Miller Dwan Hospital and St. Lukes Hospital, where workers had to wait 21 months and 7 months respectively before the ballot boxes were open and the votes counted. The union won the election in all three cases

The delays that can occur before an election are equally daunting. When the Teamsters sought to represent the workers at the USG fiberboard plant in Cloquet in June 2000, the company filed objections to the election. The Regional Director of the NLRB held sixteen days of hearings over six months. During this time, the company waged an aggressive anti-union campaign. Eventually, none of the employer's objections were found to have merit. Yet, although the union filed the election petition with support from 2/3 of the workers, after the employer's delays and anti-union campaign the union overwhelmingly lost the election nine months later.

Most people would not tolerate these types of delays in political elections. While it took almost a year to count all of the ballots in Florida, George Bush was already inaugurated as President when the questionable final results were tallied. Few people would advocate delaying the presidential inauguration for years while the objections were all heard. Yet, such delays are commonplace in union elections. For these reasons many workers are looking for election processes that do not rely on the NLRB.

### **Alternative election processes**

In 1993, U.S. Labor Secretary Robert Reich and Secretary of Commerce Ronald Brown established what came to be known as the Dunlop Commission on the Future of Worker-Management Relations. In 1995, the Commission "*confirmed that the process by which workers decide whether or not to engage in collective bargaining is among the most contentious aspects of American labor relations*" (40). They noted that the evidence demonstrated

*conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented in the workplace (9).*

The Dunlop Commission called for “quickie” union elections within two weeks of a petition being filed to help mitigate the disadvantage unions faced during delays under the traditional NLRB election process. The Commission set a goal of providing “*workers an uncoerced opportunity to choose, or not to choose, a bargaining representative and to engage in collective bargaining*” (15). They also encouraged unions and employers to utilize “card check” agreements. The Commission noted,

*card check agreements build trust between union and employer and avoid expending public and private resources on unnecessary election campaigns. Such agreements are a classic example of potential or former adversaries creating a win-win situation for themselves (42).*

Similarly, the 2000 Human Rights Watch Report recommended that

*Public policy should encourage the use of voluntary card-check agreements as an alternative means of establishing workers' majority sentiment and collective bargaining rights (Findings and Recommendations, 4).*

There are a number of alternative election procedures, but card check agreements -- also known as labor peace agreements -- are the most common. Card check agreements are nothing new; in fact, they preceded NLRB elections. Canada uses card check as its standard election process for union elections. States such as New York and New Jersey have instituted card check agreements for a number of different employee groups. Increasingly, many employers and unions utilize labor peace agreements to avoid acrimonious (and costly) confrontations.

## **Labor Peace Agreements**

Labor peace agreements do three things:

- 1) allow workers to vote for or against union representation without undue delay in an atmosphere free from intimidation and coercion;
- 2) ensure a fair, democratic election process;
- 3) promote labor peace between employers and unions.

As signatories to a labor peace agreement, the union and the employer *both* agree to an expedited representation election and agree to refrain from intimidating or coercive activities that might prejudice an employee's decision during the election process.

The process for employees indicating their preference can be done through a secret ballot election, through a petition, or through actually signing a union authorization card. This is not that different from the first step of a traditional NLRB election process. But unlike an NLRB process, under a labor peace agreement, if a majority of employees indicate a desire for union

representation (as verified by a neutral third party) the employer agrees to recognize the union as the employees' bargaining representative. Even with an employer's blessing, a union cannot become the bargaining representative of employees unless a majority of those employees specifically request such representation. Ultimately, the employees have the sole discretion.

Labor peace agreements can take on a variety of forms, but some common elements include:

1. A union agrees to not take any economic action against an employer who signs the agreement (such as strikes, boycotting, leafleting, corporate campaigns, etc.)
2. An employer agrees to not pressure or try to influence employees against the union (such as mandatory meetings, one on one conferences, legal delaying tactics, threats or intimidating comments, letters urging employees to vote "no", etc.)
3. A non-confrontational process is agreed upon between the union and employer for employees to indicate their desire of whether or not to join a union, free from any coercion or intimidation on the part of either the employer or the union.
4. The union and employer meet to agree upon the appropriate unit (which employees will potentially be represented).
5. The employer agrees to provide the union with the names and addresses of employees (such as they would under the National Labor Relation Board's "Excelsior Rule") and abide by the majority will of the employees.
6. A reasonable time period is agreed upon during which time the neutrality/card check agreement is in place.