REMAPPING DEBATE
Asking "Why" and "Why Not"

Lobyying not to change the rules

Leads | By Alyssa Ratledge | Labor, Regulation

Sept. 21, 2011 — In recent years, the effort to ease the process by which workers can elect to be represented by a union has focused on passing the Employee Free Choice Act, under which union certification would be permitted based on a petition joined by a majority of unrepresented employees in an appropriate bargaining unit. That effort has been stymied by fierce and unrelenting opposition from business groups and Republican members of Congress.

In late June of this year, the National Labor Relations Board (NLRB) proposed several amendments to the existing rules governing the procedures leading up to and following unionization elections in the workplace. The Board's fact sheet on the proposed rules describes the changes as simply "designed to fix flaws in the Board's current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communications technologies." Among the key changes, the NLRB would shorten the maximum permissible time between the filing of a petition to unionize and the employee vote on whether to accept unionization.

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Comments on the proposed amendments were due by Aug. 22, and replies to those comments were due by Sept. 7. The Board held one public hearing on July 18-19. Remapping Debate reviewed the testimony at the hearing and reviewed a substantial number of the initial and reply comments.

The comments and testimony — as well as additional information on flaws in the current process uncovered by Remapping Debate's original reporting — make clear that business interests have several basic questions that they have failed to answer. (Unions have a couple, too.) In addition, the fight over the rules highlights difficult decisions that unions have to make in terms of how to allocate limited resources.

Issues for exploration

One of the principal points made by those testifying and commenting against the rules was that the changes were not necessary. Opponents said, for example, that the median number of days between the filing of a petition and the holding of an election is 38, well within the NLRB's target range.

But does that figure divert attention from more relevant data? Retired NLRB examiner Michael Pearson pointed out in his comments that the 38-day median time between petition and election is "misleading." The more pertinent subset of elections to analyze, Pearson said, were those that took place pursuant to NLRB direction where employers and unions disagreed over matters like the makeup of the bargaining unit and the timing of the election. The median for those elections, he continued, ranged over time from 58 to 70 days. And the fact that *most elections* may occur within a reasonable period does not change the fact that some vigorous anti-union campaigns result in delays in the process that can drag on for months and years.

What the rules would do

The proposed rules contain several provisions aimed at shortening the time between the filing of a unionization petition and the election. For example, both the prospective union and the employer would be required to state their positions and any objections at the start of the hearing (the most common objection to a petition to unionize is over the definition of the proposed bargaining unit). Both parties would be required to submit evidence in support of any objections at the hearing, in an effort to cut down on frivolous claims on both sides.

Additionally, litigation over a proposed bargaining unit that affects less than 20 percent of the proposed unit would be deferred until after an election takes place, in an effort to reduce time-consuming proceedings that would be rendered moot by an election that resulted in a lopsided victory for either side.

Parties would be required to seek review of any regional-level rulings in a single post-election request rather than in multiple pre-election requests.

Pre- and post-election hearings currently do not occur at predictable times; time frames for these hearings differ across cases and across regions of the country. The rules would require that pre-election hearings take place seven days after the notice for a hearing is served and that post-election hearings be held 14 days after ballots are tallied.

The rules would also streamline the process by adapting the rules to modern technology. For the first time, documents related to NLRB hearings or dispute litigation could be transmitted electronically. The Excelsior lists — lists of prospective unit members' names, shifts, and contact information that employers are mandated to provide to unions — would be required to be transmitted electronically unless the company does not use computers, and the time period for sending this electronic list would be shortened from seven days to two. The Excelsior lists would also for the first time include employees' cell phone numbers and email addresses. Currently, they only include home addresses.

At the hearing, unions pointed to several instances of long delays that workers faced when seeking to hold an election to unionize. For example, some employers were said to seek out extension after extension on hearings that covered only frivolous objections. One employer was said to have drawn out hearings and litigation for three months over the eligibility of a single person in a unit. In perhaps the most extreme example, the Service Employees International Union brought a worker to testify that she and her coworkers had waited 13 years since the filing of their petition for a unionization election.

Remapping Debate found further examples, too (see two illustrations on page three). Yet opponents of the rules appear to ignore this subset of NLRB cases, instead choosing to focus attention on the fact that most elections take place relatively quickly. They should be asked to confirm that there is indeed a subset of cases where long delays do occur and to justify why those extensive delays should continue to be permitted.

As is commonly the case, associations and law firms that primarily represent large businesses asserted that the rules would harm small businesses. The claim was that small businesses would have neither the time, nor the resources, nor the expertise to respond to an abbreviated process. Unions, when asked, pointed out that small businesses are not typically the targets of unionization and asserted that those employers who are unrepresented will be solicited by management attorneys who regularly scrutinize NLRB's docket to find potential clients.

The extent to which opponents' professed concern for small businesses is genuine needs to be examined. Likewise, opponents should be asked whether they concede the accuracy of the union assertion that the unionizations campaigns today are overwhelmingly focused on larger businesses. Finally, opponents should be asked why issues about the shape of an election to certify a union would be either complicated or difficult to navigate in the context of a small shop.

> Notwithstanding employer complaints that the rules would preclude them from objecting to problems that emerge after the statement of position has been filed, the rules still do allow employers or unions to challenge the results of an election or regional-level decision after an election takes place but before a union is certified.

Those favoring the rules should be asked to respond directly to the issue of what occurs in the circumstance, however unusual, where it is the workers of a smaller business that a union seeks to organize. In those cases, does an expedited process unfairly disadvantage the small employer?

Another focus of employer comment was that all employers — including large employers — would be unfairly disadvantaged by what was characterized as the requirement under the proposed rules that employers fully set forth their position, including all of their objections, before a pre-election hearing begins. This aspect of the rule — which applies to information already available at the time of the statement of position — is clearly designed to press parties to put all their cards on the table. The NLRB says that the purpose of the provision is to facilitate the ability of its regional offices to weed out frivolous objections early in the process. Under the rules, requests for reviews of regional decisions would be deferred until after an election took place.

Notwithstanding employer complaints that the rules would preclude them from objecting to problems that emerge after the statement of position has been filed, the rules still do allow employers or unions to challenge the results of an election or regional-level decision after an election takes place but before a union is certified. Moreover, a union would not be certified if the NLRB ultimately found that an employer's objections were meritorious. Aren't the real objections that a consummated election (a) leaves a company with less room to erode support for the union over time, and (b) takes an employer's objections from the realm of the abstract to a concrete matter of whether there are substantial reasons to ignore what on its face is the democratic voice of a majority of workers who have literally cast ballots?

Finally, opponents claim to be concerned that the privacy interests of workers would be compromised if a union had access to the email addresses and telephone numbers of the workers. Reporters might question the sincerity of the concern about privacy in view of employers' insistence on being able to look at any email sent by an employee while at work (or to be able to monitor every keystroke made by an employee on a computer). Leaving that aside, is it really unreasonable for a prospective union to have the same email and telephone access as an employer? Isn't the issue the fact that employers know that having to rely on communications — either in person or by postal mail — to a worker's home is distinctly more cumbersome and less effective than using nearly ubiquitous modern methods for instantaneous communication?

Delay, delay, delay — part 1

Remapping Debate found several examples of extensive delay in the unionization process. One was related by Joseph Cohen, an attorney with the United Electrical, Radio and Machine Workers of America. According to Cohen, his union sought to organize about 400 workers in an aluminum casting company in Wisconsin. Despite filing the petition to organize in 1993, the election date is still in limbo as of 2011 — 17 years later.

The employer used numerous tactics to delay the election, including extensive litigation challenging who qualified to organize in the unit. After several months, an election was held, but the employer quickly petitioned to have those results overturned because there had been a minor translation error on a notice provided to Hmong-speaking workers. Before a second election could be held, the employer withheld a wage increase from the workers in retaliation for the organizing effort. The NLRB ultimately found that the employer's action was, in fact, illegal under federal labor law, and a federal appeals court upheld that determination, Cohen said.

Yet, Cohen continued, workers were frustrated with both their workplace and with the union after years of litigation and delay. By the time the federal appeals court had issued its decision in favor of the workers, the company had new ownership, many workers employed at the time of the original petition had left, and the total number of employees in the plant had decreased dramatically. Now, as the union prepares to hold an election some time this year, only a small fraction of the 400 original workers still work in the plant.

On the union side, the AFL-CIO said in its reply statement that there is no evidence of abuse of current voter lists. Nevertheless, unions should be asked if they acknowledge that safeguards would need to be taken to ensure that email and telephone data secured through the process is not misused in the future.

All original reporting on which this Leads piece was based was contributed by Alyssa Ratledge. Questions suggested as follow-up for our colleagues at other media outlets were developed by the editors.

Delay, delay, delay — part 2

Lowell Peterson, the executive director of the Writers Guild of America, also had a story to tell:

"We have several NLRB election cases, and in a couple of the cases, the employers have used every trick in the book to delay the process — the kinds of things that are addressed in the proposed rules. Endless challenges to ballots, objections to the election process, delayed hearings, requests for adjournment, requests for extensions of time, playing games with subpoenas, just over-lawyering these things, which costs the employer a lot of money, but apparently it's worth it to them economically to keep the union out…"

"We have two more employers that [are] still spending money on lawyers [after many years] and we're still not certified, and in both cases the majority of employees have voted for union representation, and in both cases ultimately we will get an order directing the employer to negotiate, but that could be up to a year after we started the process. In that period of time, employee turnover is huge. And even if it's not huge, what employees see is a process that simply doesn't work. So they go into the election process knowing that they're risking their jobs. They're subjecting themselves to all kinds of meetings and propaganda about how awful it would be to 'be union,' even though they look around and see that unionized employees are doing okay..."

"We are on month eight with one of the cases. The hearings have not concluded yet, and probably won't conclude for a couple of weeks. Then there's briefing. Then there will be a decision at the region level. Presumably there will be some sort of appeal to Washington. Especially with what's going on right now, at the Board level in D.C., that could add another year, easily. It could be that it will take two years to get a ruling that says, 'The majority has spoken. Bargain with the union.' Then what do we do? It's two years after, easily two years after the election. We go in. Most of the employees who were there at the time of the election will be gone, and the remaining employees will look around and say, 'What am I getting myself into? These guys can't even do the simplest thing,' which is to sit down at the bargaining table…They look at the federal government and think, 'These guys don't know what they're doing…'"

"This is what organizing is like in the real world now. People talk about how the union share of the labor market is plummeted, and it's true. But what do we do when the federal agency that's supposed to be enforcing the law has become so toothless?"

This content originally appeated at http://remappingdebate.org/article/lobbying-not-change-rules