Statement of Dr. Gordon Lafer
Before the United States Senate
Committee on Appropriations
Subcommittee on Labor, Health & Human Services, Education and Related Agencies
Hearing on *NLRB Representation Elections and Initial Collective Bargaining Agreements: Safeguarding Workers' Rights?*
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Chairman Harkin, Senator Specter, and Members of the Committee, thank you for the opportunity to participate in this hearing. My name is Gordon Lafer. I hold a PhD in Political Science from Yale University and am currently a professor at the University of Oregon's Labor Education and Research Center. I am also the founding co-chair of the American Political Science Association's Labor Project.

Over the past four years, I have conducted extensive research measuring the extent to which National Labor Relations Board elections match up to American standards – developed from the Founding Fathers to the present -- for defining "free and fair" elections. Unfortunately, I must report that NLRB elections look more like the discredited practices of rogue regimes abroad than like anything we would call American.

I would like to briefly describe the problems that currently plague the NLRB election system as well as the difficulties in negotiating first contracts.

I have attached a report that summarizes my research on NLRB elections.

Today I want to focus on just a few highlights.

The role of secret ballots

In fact, there is no truly secret ballot in Labor Board elections, because supervisors are permitted to interrogate their underlings in terms that force most employees to reveal their political choices long before they step into the voting booth. The pressure tactics used to force employees to reveal their political preferences would be illegal in any election to the Senate – and we would not tolerate them in any foreign elections that claimed to be democratic. I would be happy to explain this problem further if Senators have followup questions on this issue.

Before going into the substance of my findings, I want to say a word about secret ballots, since so much of the debate around labor law reform has focused on the role of secret ballots.

Defenders of the current system argue that NLRB elections represent the "gold standard" for democracy in the workplace for a single reason: that Board elections end in a secret ballot.

To some, it may seem that as long as an election ends in a secret ballot, it must be fair. In the workplace, one might imagine that even in the worst case, if a worker is intimidated by his or her employer, one could lie to one's supervisor and pretend to be opposing the union; as long as, at the end of the day, you cast your ballot in the privacy of a voting booth, you are free to exercise your conscience.

It is critical to note that the American democratic tradition – from the Founders to the present – fundamentally rejects this view. In elections to public office, while the secret ballot is a necessary ingredient, there are a whole set of standards that must be met in the leadup to election day – such as equal access to the media and voters, free speech, etc. – which are equally crucial elements of defining a "free and fair" process. Indeed, our government has often condemned elections abroad when there was no question that they ended in a secret ballot, because they failed to meet these other, equally important standards.

After all, even Saddam Hussein had secret ballots. Indeed, history is full of dictatorial regimes that have remained in power despite the use of secret ballot elections. How do they do it? Through things such as threatening the livelihoods of opponents; denying them access to the media; and forcing all voters to attend propaganda rallies for the ruling party. Our government has rightly condemned these votes as "sham elections."

Unfortunately, the very standards that we insist on as minimal guarantors of democracy in other countries is violated by the NLRB system. With the exception of the secret ballot – and, as I will discuss later, there is no truly secret ballot in NLRB elections

–every other aspect of NLRB elections fails to meet American standards defining "free and fair" elections.

Today I would like to focus on just three dimensions of democratic elections: access to voters; free speech; and protection of voters from economic coercion.

Access to voter lists

The first step in any American election campaign is getting a list of eligible voters, and it is law that both parties must have equal access to the voter rolls.

In NLRB elections, however, management has a complete list of employee contact information, and can use this for campaigning against unionization at any time – while employees have no equal right to such lists. Employers use legal maneuvers to delay union elections for months. Only after all delays have been settled does the union have a right to the list of eligible voters. A federal commission found that on average, unions received the voter list less than 20 days before the election.[1] Even then, the NLRB requires employers to provide workers' names and addresses – but no apartment numbers, zip codes, or telephone numbers.

If we imagine this system being applied to Senatorial elections – where one candidate had the voter rolls two years before election day, while his or her opponent was restricted to a partial list and only got it a month before the vote – none of us would call this a "free and fair" election.

[1] Dunlop Commission, Final Report, p. 47.

Economic coercion of voters

When the founders of our country created the world's first democracy and gave the vote to the common people, they were particularly concerned that employers might use their economic power over workers to influence their political choices. In general, Alexander Hamilton warned, "power over a man's purse is power over his will."

For this reason, there is a wide range of federal and state laws that make sure employees can make political choices free from economic coercion.

In federal elections, it is illegal for a private corporation to tell its employees how they should vote, or to suggest that if one party wins business will suffer and workers will be laid off.[2] Supervisors or managers can't say *anything* to those they oversee that amounts to endorsing one side or the other. It is noteworthy that federal law doesn't require that employers spell out a *quid pro quo* threat stating, for instance, that anyone caught wearing a button supporting the "wrong" candidate will never get a promotion. It is understood that employees naturally are extremely sensitive to the need to make a good impression on their boss, and don't need a threat to be spelled out for it to influence their behavior. Thus, federal law protects the ability of workers to make a political choice based on personal conscience rather than economic coercion.

But in NLRB elections, this kind of intimidation is completely legal. Standard employer behavior involves having mass meetings where upper management attacks the idea of unionization, and then having supervisors tell each of their subordinates personally that they should vote against the union. In this way, NLRB elections maximize exactly the kind of behavior that is banned in federal elections.

[2] Under FECA, corporations are free to campaign to their "restricted class" of managerial and supervisory employees, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party. 2 USC 441(b)(2)(A); 11 CRF 114.3, 114.4. According to the FEC, "express advocacy" can be either an explicit message to vote for or against a given candidate, or a message that doesn't use such explicit language but that "can only be interpreted by a 'reasonable person' as advocating the election or defeat of one or more clearly identified candidates." Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations*, Washington, DC, June 2001, p. 31.

Free speech and equal access to media

Free speech is the cornerstone of American democracy.

In election to public office, it is a bedrock principle that there is no such thing as a neighborhood, park or shopping mall that is accessible to one candidate but off-limits to the other. Radio and television stations are required to sell ad time on the same terms to competing candidates. Even private corporations are prohibited from inviting one candidate to address employees without giving equal opportunity to the opposition. From the founders to the present, it has been understood that democracy requires free speech, equal access to the media, and robust debate.

Yet this most basic standard of freedom is ignored by the NLRB.

Management is allowed to plaster the workplace with anti-union leaflets, posters, and banners – while maintaining a ban on pro-union employees doing likewise.

In addition, anti-union managers are free to campaign against unionization all day long, anyplace in the workplace, while pro-union workers are banned from talking about unionization except on break times. As a result, research shows that in a typical campaign, most employees never even have a single conversation with a union representative.

The most extreme restriction on free speech is employers' forcing workers to attend mass anti-union meetings. Not only is the union given no equal time, but pro-union employees can be forced to attend with the condition that they don't open their mouths. If they ask a question, they can be fired on the spot.

If, during the 2004 presidential election, the Bush campaign could have forced every voter in America to watch the *Swiftboat Veterans' for Truth* movie, with no opportunity for response from the other side – or if the Democrats could have forced everyone to watch *Fahrenheit 9/11* – they might well have seized the opportunity. But none of us would call this democracy.

No Truly Secret Ballot in NLRB Elections

While defenders of the NLRB system point to its secret ballot as the guarantor of democratic rights, in fact the system does not guarantee true privacy of the ballot.

In the American democratic tradition, the principle of the secret ballot is more than simply the fact that one enters a private booth to cast one's ballot. It is, more broadly, the right to keep one's political opinions to oneself – before, during and after the moment of voting. If a friend, neighbor or canvasser asks whom you are supporting in an election, you don't have to say. Indeed, you don't have to talk to them at all. The right to a secret ballot includes the right to refuse to participate in conversations designed to flush out one's politics: you cannot be forced to engage in a conversation that reveals your political preferences. It is this right, as much as what happens on Election Day itself, that makes up the principle of the secret ballot. Each of us is guaranteed the right to make political decisions as a matter of individual conscience, and to control how and whether we choose to share that with anyone else.

While NLRB elections do culminate in a private voting booth, they effectively undermine the secret ballot by allowing management to engage in practices that force workers to reveal their political preferences long before they step into the voting booth.

The standard procedure of employers – as documented in the guidebooks of management-side attorneys and consultants -- is to have every supervisor require each of their subordinates to participate in intensive one-on-one conversations designed to flush out that worker's feelings about unionization. These conversations happen multiple times during the course of the election campaign – sometimes multiple times per week. Because it is illegal to directly ask workers how they're voting, supervisors are coached in how to get this information without using those explicit words. Supervisors are, instead, instructed to have "eyeball to eyeball" conversations, in which they make provocative anti-union statements, and then carefully observe their subordinates' body language, listen to their response, and report back to the consultants who typically run such campaigns, grading each worker on a 1-5 scale measuring their political leanings.

Employees cannot refuse to participate in these conversations. But under this type of interrogation, only the most skilled of actors or dissemblers can fool their supervisors and keep their political leanings truly secret. Everyone else reveals their preferences – indeed, one management attorney boasted that, through the use of such methods, he could almost always predict the final vote total with remarkable accuracy.

The principle of the secret ballot is that you have the right to keep your political opinions to yourself forever, not just for the 60 seconds that you stand in the voting

booth. By permitting employers to limit the secrecy of the ballot to the moment of voting, the NLRB system has hollowed out the fundamental meaning of this principle.

These practices would of course all be illegal if carried out in the context of a campaign for federal office. If we saw this happening in another country, we'd say that the secret ballot had been eviscerated in all but name. But this is the system currently in place in workplaces across our country.

Higher Standards Abroad than At Home

The truth is that we uphold higher standards for voters abroad than for American workers.

In 2002, the State Department condemned elections in Ukraine for failing to "ensure a level playing field," because

- employees of state-owned enterprises were pressured to support the ruling party;
- faculty and students were instructed by their university to vote for specific candidates;
- and the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television.

Every one of these practices is completely legal under the NLRB.

The sad fact is that right now, our government demands higher standards of democracy for voters in Ukraine than it does for Americans in workplaces across the country.

Negotiating a First Contract

As stated in the Wagner Act, it is federal policy to encourage collective bargaining. One of the major obstacles to realizing this goal, however, is the difficulty workers face, even after winning recognition of their union, in negotiating a first contract. Studies estimate the up to one-third of newly organized unions fail to ever achieve a first contract.

This remarkable failure rate represents a widespread effort of employers to eliminate collective bargaining before it can take root as established practice in the firm. These employers view first contract negotiations as a second chance – following an election in which workers choose to organize – to keep their employees from having a collective voice in the workplace.

The NLRB system, while not per se encouraging such obstructionist behavior, greatly facilitates it. Employer-side attorneys and consultants regularly counsel their clients to adopt a strategy of maximum delay, in order to erode employees' sense of hope and confidence in the collective bargaining process; there is nothing in the NLRB system to contain such tactics. Furthermore, when employers violate the law by refusing to bargain in good faith, by far the most common remedy required by the Board is simply for employers to promise to act correctly in the future; no penalty of any kind is imposed. Finally, when negotiations reach an impasse and both sides declare themselves stuck, the NLRB system imposes a one-sided solution: management's last proposal is unilaterally implemented and, by force of law, becomes the contract under which employees are governed. The ease with which most employees can be replaced, and the legal right of employers to permanently replace strikers, means that most workers cannot afford to strike to prevent this one-sided resolution. Knowing this, management-side attorneys often adopt a negotiating strategy explicitly aimed at reaching the point of impasse, forcing employees into a choice between an undesirable contract and the prospect of a long, costly and difficult strike.

Those who defend the current system against the proposal for first-contract arbitration sometimes insist that they are motivated by defending the right of employees to vote for themselves on what defines acceptable contract terms. But forcing employees to choose between a losing strike and having a one-sided contract unilaterally imposed on them is not a defense of workers' rights. I would guess that most employees would be perfectly happy to forego the "right" to have a contract unilaterally imposed on them.

Similarly, opponents of first-contract arbitration sometimes raise the prospect of arbitrators deciding contracts on terms that render an employer financially insolvent or uncompetitive. But the data do not support this fear. There is an extensive track record of labor contracts settled by arbitration – in the private sector, in the public sector, and in other countries. I do not know of a single case where a public or private entity was forced to close operations as a result of contract terms established by arbitration.

For employees – and for the federal goal of encouraging a stable regime of collective bargaining – establishing an impartial and non-confrontational means for settling first contracts would be a major step forward.

Illegal activity in NLRB system, compared with FEC

The things I've described so far are legal. However, NLRB elections are also characterized by an extraordinary level of illegal activity.

Labor law is the only area of American employment law in which it is statutorily impossible to impose fines, prison, or any other punitive damage.

As a result, it is not just "rogue" employers who break the law. Any rational employer might decide it's worth it to fire a few workers in order to scare hundreds more into abandoning their support for unionization.

In my research, I have measured the impact of illegal retaliation against union supporters by making the most conservative possible calculations. Nevertheless, the results are extremely troubling. One out of every 17 eligible voters in NLRB elections is fired, suspended, demoted or otherwise economically punished for supporting unionization.

If federal elections were run by NLRB standards, we would have seen 7.5 million Americans economically penalized for backing the "wrong" candidate in the last presidential election cycle.

Imagine what this would mean. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Most citizens would quickly become too scared to participate in any public show of support for non-incumbent candidates. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent the popular will, but would simply reflect the fear that governed the country.

What I'm describing may sound like a bad science fiction movie. But it is the reality that workers face when they try to organize.

If we compare illegal activity per voter under the NLRB with that under the FEC, the data suggests that NLRB elections are 3,500 times dirtier than federal elections.

This number may sound incredible; but it's true. But suppose my numbers are off by as much as an entire order of magnitude. Then the NLRB system would be only 350 times dirtier than federal elections.

Any way you count it, the system is profoundly broken, profoundly undemocratic, and, I would say, profoundly un-American.

Conclusion

If we're serious about having a truly democratic process for American workers, we must begin by fixing these problems.

The undemocratic nature of the NLRB election system cannot be fixed by better funding or smarter administration. In can only be fixed by changing the law.

Thank you again for the opportunity to be here today.

I would be happy to answer any questions you may have.

Attachment:

G. Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections*, American Rights at Work, Washington, DC, July 2007.