THE CENTURY FOUNDATION

THE NEW ERA OF EXECUTIVE ACTION

STREAMLINING AND STANDARDIZING NLRB ELECTIONS FOR THE MODERN WORKPLACE

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Background

Unions have played an important role in the American labor market for well over a century and are a critical force for promoting democratic values in workplaces across the country. Since the 1970s, however, unions have seen a dramatic decline in membership, particularly in the private sector. This has been attributed to a number of factors, including increased employer opposition to labor organizing and the vast resources employers have invested in anti-unionization campaigns.

The right to engage in collective bargaining and unionization became law under the National Labor Relations Act (NLRA; also known as the Wagner Act) in 1935. The National Labor Relations Board (NLRB) was created under this act, and it has the power to enforce and interpret the NLRA. The NLRB was a direct successor to the National Labor Board that had existed under the National Industrial Recovery Act of 1933, which was created by an executive order from President Franklin D. Roosevelt. It is intended to be an independent body, with five members appointed by the president, three of whom are typically of the administration's party.

When seeking recognition from an employer as the sole representative allowed to collectively bargain a contract for a given group of workers, employees must file a petition with the NLRB, which then determines if the petitioners constitute an appropriate bargaining unit and decides whether an election should be held based on the level of employee interest. If the petition passes these hurdles, the NLRB then administers an election and, if a majority of eligible employees vote in favor, the employer is legally required to recognize and bargain with organized unit.

Many elections, however, do not go smoothly, and it is the responsibility of the NLRB in this process to settle disputes between labor and management. To do so, the NLRB is empowered either to make rules or to adjudicate cases. Unlike most other federal agencies, the NLRB has typically chosen to act as a court, such as when it issued a decision on December 11, 2014, that overturned precedent and allowed workers to use their workplace e-mail

This brief is part of The Century Foundation initiative, The New Era of Executive Action, which is available online at https://tcfdotorg.atavist.com/executive-action.

accounts to organize in their free time. (This more easily allows for virtual organizing, a topic The Century Foundation explores in a recent report.) Occasionally, however, the NLRB chooses to use its rulemaking powers, such as its 2011 attempt to streamline and improve election processes. That rule was overturned by a federal appeals court, because the NLRB lacked a quorum of board members when it voted on the new measure.

While NLRB rules are not technically executive actions, the work it does is widely seen as a political tool of the administration in office, due to its limited reliance on precedent, which has led to a number of inconsistent rulings on contested issues, and due to the fact that its five-year terms facilitate significant turnover during a given presidential administration. For these reasons, rules and decisions by the NLRB are often seen as an extension of executive branch policy.

Action

In December 2014, the NLRB adopted final rules on election procedures by a three-to-two vote that split along party lines. The rules seek to "streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication and delay, and update the Board's rules on documents and communications in light of modern communications technology." They took effect on April 14, 2015.

What It Does

Several of the new rules were aimed at modernizing the filing and communications process that occurs during a union petition and election. The NLRB now:

- allows documentation and petitions to be submitted online via email instead of through the mail or by fax;

- requires employers to disclose the e-mails and phone numbers of the employees (if they are available to the employer) to organizers within two business days of the approval of an election agreement; and

- provides all parties, including employers, with more information about the litigation and election process so that they can make more informed decisions about the election process.

The updated procedures also standardize some of the election processes across the entire NLRB system, which comprises twenty-six regional offices. Before the new rule, scheduling of pre- and post-election hearings depended on the schedule of whichever regional office handled the election. Now, all pre-election hearings will be held eight days after a hearing notice is served, and all post-election hearings will begin twenty-one days after the ballot count.

The most controversial of the new rules pertain to changes that shorten the petitioning and election-scheduling process:

- parties are now required to state any issues in dispute before the pre-election hearings;

- any issues that do not affect the ability to schedule an election are now deferred to post-election hearings;

- elections will not be automatically stayed to consider any requested review of the regional director's decision, a process that has previously delayed elections for twenty-five to thirty days, although doing so rarely has affected the result of an election;

- briefs will now only be submitted after the election if the regional director deems them necessary; and

- the NLRB now does not have to review issues that were not under dispute.

These rules are intended to standardize and speed up the process of petitioning and holding an election, but they have also served to level the playing field for workers. Organizers now have greater access to information about employees, which was previously only available to employers. By reducing the time between the filing of a petition and the election, and by limiting the ability of the employers to intentionally delay the election, employers have less time to use the intimidation tactics that have become common practice.

Status

For the moment, the rules remain in effect, although they have undergone several serious challenges in Congress and the courts:

- Senate Joint Resolution 8, which would have overturned the NLRB rules, passed both the House and Senate with votes almost entirely along partisan lines, but it was vetoed by President Obama on March 31.

- Multiple cases have also been brought to federal courts by business groups, including the U.S. Chamber of Commerce. One such case was dismissed by a judge in Texas, and another awaits a decision.

Impact

In the first month since the new procedures went into effect, the petition and election process has already begun to change. This includes:

- a 35 percent decline in the number of days between the filing of a petition and the scheduling of an election, as compared to the same time period last year, and

- a 17 percent increase in petitions filed, as compared to the same time period last year.

Whether the changes are directly attributable to the new rules will require further study, and it is important to note that the success rate of elections has seen no discernible change.

Response

As might be expected, conservatives and business interests adamantly opposed the changes at every step of the process.During the legislative battle over the rules, House Speaker John Boehner stated:

> The NLRB's ambush election rule is another example of the Obama administration expanding Washington's reach at the expense of American small businesses and workers. What is supposed to be a fair and neutral agency has instead become a tool for the administration to advance an agenda dictated by the president's special interest allies. The ambush election rule the NLRB finalized last year will deny workers the opportunity to gather all the information they need before deciding whether to join a union.

President Obama and labor unions have supported the new procedures. Obama described them as "modest but overdue reforms to simplify and streamline private sector union elections" and said:

> Workers need a strong voice in the workplace and the economy to protect and grow our Nation's middle class... Workers deserve a level playing field that lets them freely choose to make their voices heard, and this requires fair and streamlined procedures for determining whether to have unions as their bargaining representative.

Richard Trumka, president of the AFL-CIO, released a statement saying:

> The modest but important reforms to the representation election process announced today by the National Labor Relations Board will help reduce delay in the process and make it easier for workers to vote on forming a union in a timely manner. Too often, lengthy and unnecessary litigation over minor issues bogs down the election process and prevents workers from getting the vote they want. . . . Strengthening protections for workers seeking to come together and bargain collectively is critical to workers winning much-deserved wage gains and improving their lives.