

Sequential Failures in Workers' Right to Organize

SUMMARY

It has been clear for years that America's labor law no longer protects workers' right to organize and bargain collectively through the National Labor Relations Act's election process. For example, after a careful analysis of the evidence available in 1994, the Commission on the Future of Worker Management Relations concluded:

"The evidence reviewed by the Commission 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 at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader labor and management community."¹

Our study demonstrates the persistence of this problem thirteen years after the Commission's report. Analysis of the 22,000 petitions for an election filed with the NLRB² between 1999 and 2004 produced four main findings:

1. **Few bargaining units make it from initial petition to a first contract.** Only **20 percent, or one in five**, of all cases that filed a petition for an election after showing substantial and very likely majority support for representation reached a first contract. Only 12.9 percent reached a first contract within one year of certification, during the NLRA's contract bar.
2. **Unfair Labor Practice Charges (ULPs) reduce the chances of getting a contract.** The presence of an ULP charge reduced the likelihood of completing the process by 30 percent. That is, fewer than **one in ten** cases involving an unfair labor practice reached a first contract within a year of certification.
3. **ULPs reduce chances of getting to an election.** Unfair labor practice charges had their biggest effects in the initial stages of the organizing process after a majority indicate a desire for representation by reducing the probability of getting to an election by **25 percent**.
4. **Even after a majority votes for a union, many units fail to get a contract.** Only **56 percent** of units in which a majority of employees voted for a union and were certified for bargaining by the NLRB were successful in reaching a first contract. Only **38 percent** of such units reached a contract within one year.

These results provide further evidence that the nation's labor law, and the election and first contract

¹ Report and Recommendations of the Commission on the Future of Worker-Management Relations, U.S. Departments of Commerce and Labor, December 1994, p. xviii.

² NLRB rules require unions to demonstrate that at least 30 percent of workers have signed authorization cards requesting representation. In practice nearly all unions require at least a showing of majority support before petitioning for an election. Thus, this study includes only units where a substantial and likely a majority share of workers have signed statements indicating that they want a union to represent them in collective bargaining.

negotiation procedures embedded in the law, are failing to provide workers an effective right to gain representation and a collective bargaining contract.

The Employee Free Choice Act takes a systemic approach to remedying the documented problems with the law. We urge the Congress to enact and the President to sign this bill as a first, necessary, and essential step in restoring workers' rights to choose whether or not to be represented and to gain access to collective bargaining, and to begin the larger process of updating and modernizing the nation's work and employment policies. We further suggest adding provisions to the Act to support continued evaluation of the effectiveness of the law and experimental and demonstration projects to promote the types labor-management relations necessary to meet the needs of today's workforce and economy.

BACKGROUND

This is the first study that has been able to analyze all NLRB cases from the stage that a substantial and likely majority of workers first indicate they want to be represented through to the ultimate goal of reaching a first agreement. In 1993, the Commission on the Future of Worker Management Relations' Chairman, John Dunlop, and member Thomas Kochan met with representatives of the National Labor Relations Board (NLRB) and the Federal Mediation and Conciliation Service (FMCS) to request data needed to track this complete process. They were told that technical problems made it impossible to link the NLRB and FMCS data necessary to do so.

We have now managed to link the required data, and for the first time can present the results of the type of analysis needed to assess the likelihood that a group of workers who seek representation will be successful in (a) getting to a representation election, (b) winning the election, and (c) negotiating a first contract. We can also estimate the differences in the likelihood of moving through these stages in cases that involve an unfair labor practice (ULP) charge, compared to cases with no charge.

THE STUDY

A more detailed technical paper containing the full analysis of the data that produce the findings summarized above is available upon request.³ The study data come from the administrative records of the NLRB and the FMCS. We filed a Freedom of Information Act (FOIA) request for access to all of the NLRB's records for requests to hold a representation election, and all of the NLRB's records of Unfair Labor Practice (ULP) charges, closed between 1 October 1999 and 1 June 2005. We filed a second FOIA request for all the FMCS's records on first-contract negotiations closed in the same period. The final study analyzed data from more than 22,000 representation drives.

Linking the NLRB and FMCS data was possible thanks to a data-sharing agreement originally worked out between the two agencies more than a decade ago but substantively implemented in 2003. The NLRB sends the FMCS a monthly data file listing all newly registered bargaining units; the FMCS then follows up on contract negotiation among these units. This electronic transfer between the two agencies has some remaining complications, but it has greatly contributed to bridging the administrative gap between the two agencies' purviews into which so many newly certified units used to fall. This study would not have been possible without this innovation.

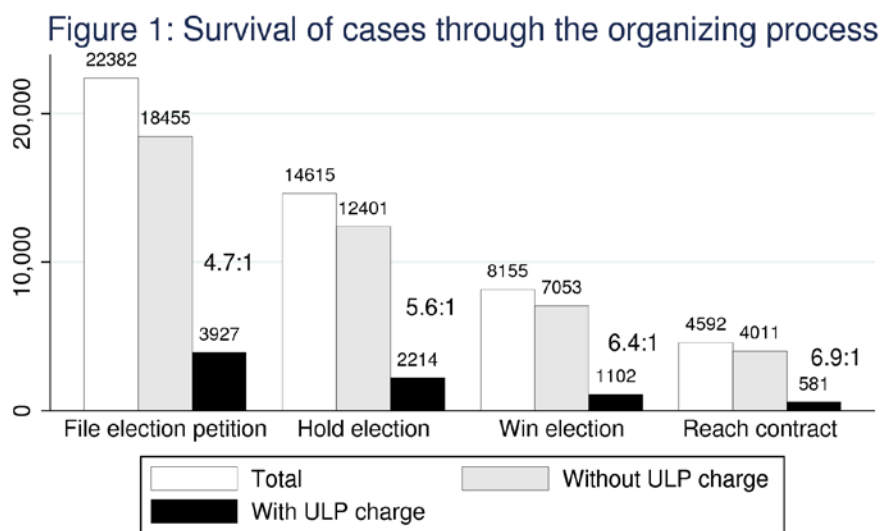
We cleaned both agencies' data, matched representation cases to ULP charge cases in the NLRB data,

³ John-Paul Ferguson, "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004." MIT Institute for Work and Employment Research, March 15, 2008.

matched the NLRB data to the FMCS data, and then merged in data on unemployment rates, local unionization rates, right-to-work laws, and other measures that serve as control variables in the analysis.

RESULTS

Figure 1 shows the survival rates of union-organizing drives at several stages of the process and compares cases with and without an ULP charge. Only 65 percent of the election petitions filed go on to hold an election. Of those, unions win 56 percent of the elections, and of those, only 56 percent reach a first contract with employers. This means that, from start to finish, only one fifth (4,592 out of 22,382) of all organizing drives that file election petitions ultimately reach a first contract. The rate of contract agreement within one year is even lower, as mentioned above. Furthermore, cases in which ULP charges were filed were consistently less likely to pass each stage than were cases without charges. This can be seen in the increasing ratio of non-ULP to ULP cases at each stage.



The ratios show the proportion of cases without ULP charges to cases with ULP charges at each stage. 65 percent of cases that filed petitions held elections; 56 percent of elections resulted in victory for the union; 56 percent of certified units reached a first contract.

We develop a multistage probit regression model to predict success at each one of these stages and to determine the effect of a ULP charge over the course of the process. That model predicts that, on average, a case that experiences a ULP charge will be 25 percent less likely to hold an election, no less likely to win an election, and 13 percent less likely to reach a first contract than a corresponding case with no ULP charge. These effects are cumulative, such that a case with a ULP charge filed before election will be 30 percent less likely to ultimately reach a first contract than a case with no such charge. Since only about one seventh of all cases reach first contracts, this effect means that only about 9 percent of cases with ULP charges reach a first contract. These effect sizes vary by the type of ULP charge filed, but the most common type of ULP charge, the 8(a)(1) violation, is associated with the largest effects. This model takes into account the size of the bargaining unit, the unemployment rate, the political party in power, the industry, and the specific union, among other controls.

RECOMMENDATIONS

These results provide further conclusive evidence that America's labor law is broken and needs to be

fixed to keep the law's promise to give workers the ability to organize and gain access to collective bargaining. The Employee Free Choice Act addresses the systemic failures of the current process. Having the option of gaining certification when a majority of employees sign an authorization card addresses our finding that the largest effect of unfair labor practices is to keep employees who have indicated that they want union representation from ever holding an election. The increased penalties for violations of the law and increased timely access to injunctive relief address illegal behaviors that the current law fails to deter. The provision for arbitration of first contracts where needed addresses the fact that only about half of all initial contract negotiations reach agreement and that, in cases involving an unfair labor practice, an even smaller share do so.

We recommend adding two complementary provisions to this Act.

First, we recommend that support and resources be provided to collect the data necessary to monitor and evaluate the effects of these changes on labor law's effectiveness in achieving its stated objectives. It should not require a Freedom of Information Act request and the difficult task of merging NLRB and FMCS data to track the experience of workers seeking to exercise their legal rights. The NLRB is currently legally proscribed from doing economic analysis, and neither the NLRB, the FMCS nor the Department of Labor have the resources or capabilities needed to monitor and evaluate our nation's labor laws. The Department and these agencies should be instructed to collect the data needed for independent analysis of the law, given the resources necessary to support this work, and tasked to report periodically to the Congress on the effectiveness of the nation's labor law.⁴

Second, passage of the Employee Free Choice Act is only a necessary and essential first step in the long-overdue task of updating and modernizing the full range of work and employment policies to meet the needs of today's economy, workforce, and employment relationships. Our labor policy should both protect workers' rights to organize and encourage the forms of labor-management relations that work best in today's economy and for today's workers and employers. Currently, there is a total absence of government efforts to promote innovative and productive labor-management relations. We therefore recommend adding a provision to the Employee Free Choice Act to instruct the Secretary of Labor to conduct experimental and demonstration projects and research to identify and promote productive labor-management relationships, and to give the Department the resources needed to do so.

Finally, it is important not to treat labor relations policy independent from other policies and institutions that need to be updated and modernized to meet the needs of today's economy and workforce. In a separate paper we have outlined this broader task by arguing for a new social contract at work.⁵ Passage of this bill will lay the foundation for taking up this larger, long-overdue task.

⁴ We applaud the NLRB and FMCS efforts to improve information-sharing between the two agencies and hope it will continue. We also hope that both agencies will reconsider decisions that have made data that were once publicly available or discoverable more difficult to obtain. For example, when the NLRB deployed its new case-tracking database in 1999, it made certain employer information that was crucial for linking representation and ULP charge cases non-discoverable under the Freedom of Information Act. More recently, the FMCS has stopped keeping track of whether the parties in first-contract negotiations file ULP charges against one another. Such policies are a step backward for both agencies, and make evaluation of the law harder.

⁵ For how the changes in labor law recommended here fit into this broader task, see Thomas Kochan and Beth Shulman, "A New Social Contract: Restoring Dignity and Balance to the Economy." Economic Policy Institute Briefing Paper, February, 2007.