NLRB REPRESENTATION ELECTION SUBJECT OF SENATE HEARING

Starkly different views about the state of the National Labor Relations Board’s (NLRB) system for representation elections were aired during a Senate hearing, with NLRB Chair Peter C. Schaumber (R) asserting that the agency has an “exemplary record” in conducting fair and timely elections and Member Wilma B. Liebman (D) saying the “dramatic declines” in representation petitions “reflect a loss of confidence in the board and its processes.”

Senator Tom Harkin (D-Iowa), chair of the Senate Appropriations subcommittee, who called the hearing at the request of Senator Arlen Specter (R-Pa.) says, “We want to make sure that the NLRB is doing everything in its power to make sure elections are fair and that we get a full and accurate picture of the barriers that exist to union organizing.” Harkin and Specter were the only senators who attended the hearing. The second panel of witnesses at the hearing consisted of Gordon Lafer, a professor at the University of Oregon’s Labor Education and Research Center, and John N. Raudabaugh, a former NLRB member and now a management attorney with Baker & McKenzie in Chicago.

Harkin is one of 46 Senate co-sponsors of the proposed Employee Free Choice Act (EFCA) (H.R. 800, S. 1041), which would require the NLRB to certify a union as the exclusive bargaining representative if a majority of the unit workers express that choice by signing union authorization cards. The bill also would provide for mediation and arbitration if the parties fail to reach a first bargaining contract within certain time limits and would set tougher penalties for unfair labor practices committed during an organizing campaign or during bargaining for a first contract. Specter, who is not an EFCA co-sponsor, expressed concern in his opening remarks about delays in the resolution of the NLRB cases, saying “justice delayed is justice denied.” He says he would consider a legislative change allowing board members whose terms have expired to stay in office until a replacement is confirmed, which could reduce vacancies that contribute to delays in board decisions.

Without expressing any opinion on legislative proposals, Schaumber says the Supreme Court has recognized that board-conducted, secret-ballot elections are “preferred” and are “the most reliable means” for determining employee sentiment about union representation. He asserts that failure to reach a first contract does not show that the board is failing to enforce the duty to bargain in good faith. If there is a perception that the NLRB and the National Labor Relations Act (NLRA) are broken, “I respectfully disagree,” he says.

In contrast, Liebman says it is “fair to ask” whether the 73-year-old NLRA is “still working,” given the transformations in the U.S. economy over the decades, rising income inequality, the decline in the number of workers represented by unions, and declines in the filing of both representation petitions and unfair labor practice cases. She observes that unions increasingly seek to negotiate the terms for recognition rather than use board-conducted elections, which are perceived as taking too long and leaving workers vulnerable to intimidating and coercive tactics by employers. Liebman cites recent scholarly research showing that the first-contract failure rate has continued to rise. She asserts that the board through its recent decisions has created new obstacles to achieving certification, voluntary recognition, and first contracts, and that the board is “not doing everything it could to protect collective bargaining relationships.”

Lafer says that just because the board process ends in a secret ballot election does not mean that the preceding process was fair. He says that the NLRB allows employers to engage in tactics that force workers to reveal their preference long before they place their vote. Another unfair aspect is that employers are allowed to campaign in the workplace during working time, while barring employees from doing the same, they legally may force workers to attend the employer’s anti-union meetings, Lafer adds.

Raudabaugh says workers’ rights are protected by NRLB elections as the union win rate is the same as it was in the early 1970s, elections are held in a timely manner, and refusal to bargain charges occurs only in a small percentage of cases. Raudabaugh asserts that the EFCA’s proposed system for interest arbitration of first contracts if the parties do not meet certain deadlines contravenes the NLRA and freedom of contract. He instead expresses support for legislation called the Teamwork for Employees and Managers Act, which would relax restrictions on employee participation committees. The legislation was passed by both houses of Congress but was vetoed by President Clinton.

The written testimony of the four witnesses is available at http://appropriations.senate.gov/hearings.cfm?s=lbr.

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