

TESTIMONY OF NANCY SCHIFFER
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BEFORE THE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

"Strengthening America's Middle Class Through the Employee Free Choice Act"

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Chairman Andrews and Members of the Committee:

My name is Nancy Schiffer. Since 2000 I have been an Associate General Counsel with the AFL-CIO.

Thank you for this opportunity to testify before you today about the Employee Free Choice Act. This is a special privilege for me because I have spent my thirty plus years as a lawyer working with employees who want a union in their workplace so they can bargain a contract to improve their working conditions.

I started my career at the National Labor Relations Board's Detroit Regional Office, its busiest. While there, I conducted representation elections for workers as an NLRB agent; I was a Hearing Officer who heard evidence and made determinations about objectionable conduct affecting an election; and, as a Field Attorney, I investigated and prosecuted violations of the National Labor Relations Act. I then worked with a private law firm in Detroit that was counsel to numerous local unions and several national unions in a variety of industries. For the next 18 years, I worked in the Legal Department of the United Auto Workers in Detroit.

Both at the firm and with the UAW I spent most of my time meeting with workers who wanted to form a union and helping them through the National Labor Relations Board's representation process. Hundreds and hundreds of workers: teachers, accountants, nurses, retail sales clerks, engineers, nursing home aides, factory workers, and many others. I would tell them about their rights under the National Labor Relations Act and what to expect from their employer. In every organizing effort, I tried to get workers ready for what would happen to them when their employer discovered their interest in a union. And it always happened. I would listen to their stories of employer intimidation, misrepresentation, and abuse and try to make sure their rights were protected.

At some point in my career, however, I could no longer tell workers that the Act protects their right to form a union. Because I knew that, despite the wording of the statute, in practice it does not. And I knew that they would have to be heroes to survive their organizing effort, just because they wanted to form a union so that they could bargain for a better life.

That's wrong and I have always wanted an opportunity to tell their stories to someone

who has the authority and the power to do something about it. The Employee Free Choice Act is the “what” of what can be done and you are “who” that can make it happen.

The Employee Free Choice Act represents an opportunity to change the National Labor Relations Act in a way that will restore its purpose, as set forth in the Act in 1935:

It is declared to be the policy of the United States to ... encourag[e] the practice and procedure of collective bargaining and ... protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

This law was designed as a shield to facilitate employee representation and promote their ability to enhance working conditions through collective bargaining with their employers. Its stated purpose has remained our nation’s official and principal labor-relations goal even following changes in 1947 with the Taft Hartley Amendments.

But over the years, the law has been perverted. It now acts as a sword which is used by employers to frustrate employee freedom of choice and deny them their right to collective bargaining. When workers want to form a union to bargain with their employer, the NLRB election process, which was originally established as their means to this end, now provides a virtually insurmountable series of practical, procedural, and legal obstacles.

The NLRA’s procedures for representation still sound facially workable. But here’s the problem: There is a world of difference between the rights guaranteed in the NLRA and the reality of what happens to workers when they want to achieve collective bargaining. Only by deliberately denying the reality of employee organizing can anyone conclude that the NLRA’s path to union representation and collective bargaining for workers is anything but hopelessly off course.

Why does this matter? Economic inequality is the hallmark of our time. Wages have stagnated. Only 38 percent of Americans say their families are getting ahead. Less than a quarter say they expect the next generation’s standard of living will be better than today. Six million fewer Americans have health insurance today than in 1995. Meanwhile, corporations are reaping unprecedented profits. Corporate CEOs earned 262 times as much as the average workers in 2005 – up from 35 times more in 1978.

Collective bargaining is the best opportunity that working men and women have to achieve individual opportunity, restore economic fairness and rebuild America’s middle class. Union workers earn 30% more than non-union workers. For women and workers of color, the union wage advantage is even higher: 31% for women, 36% for African-Americans and 46% for Latinos. Collective bargaining helps to narrow race and gender wage gaps. The union advantage extends to health care coverage and retirement benefits. Union workers are 63% more likely to have medical and health insurance through their jobs. Union workers are nearly four times as likely to have a guaranteed pension, and

77% more likely to have jobs that provide short-term disability benefits.¹ Workers in low-wage occupations such as childcare workers, cooks, housekeeping cleaners and cashiers, have been able to raise their earnings above the poverty line through collective bargaining. Collective bargaining provides an opportunity for workers to bargain for a better future.

Recent surveys show that 60 million non-union workers would like to have a union for collective bargaining in their workplace. But the NLRA no longer protects workers' rights to form a union. And for more and more workers, it no longer provides a process that will lead to union representation and a collectively bargained contract.

According to NLRB statistics, in 1969, the number of workers who suffered illegal retaliation for exercising their federal labor law rights was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination. In 2005, according to the NLRB's Annual Report, 31,358 workers received backpay because of illegal employer discrimination in violation of the National Labor Relations Act – one worker every 17 minutes. Imagine if, instead of firing workers to guarantee a union-free workplace, this many workers were fired to maintain a women-free workplace or a minority-free workplace.

Sadly, as these statistics and my own experience demonstrate, initiating the NLRB's election process triggers a campaign of intimidation and misrepresentation by employers in the workplace. "Union avoidance" has become an area of legal practice that is listed in law firm directories along with estate planning and corporate mergers and acquisitions. Maintaining a "union free" workplace is identified by many of our largest corporations as a high-priority goal for human resource management. An entire business of consultants, now a \$4 billion dollar industry, has grown up in the United States devoted to making sure that the NLRA's election process does not result in collective bargaining.² Some of these groups are so confident of their campaign tactics to scare and frighten workers that they guarantee the employer its money back if their workplace doesn't remain union-free. Anti-union consultants are hired by employers in 75 – 82 % of worker campaigns to form unions.³

The NLRB election process is broken. Only by relying on rhetoric and ignoring the reality of what workers face when they want a union for collective bargaining, can it be argued otherwise.

If general political elections were run like NLRB elections, only the incumbent office holder, and not the challenger, would have access to a list of registered voters and their home addresses. The challenger would not get these until just before the election. Only

¹ U.S. Department of Labor, Bureau of Labor Statistics.

² John Logan (2006), "The Union Avoidance Industry in the USA," *British Journal of Industrial Relations* 44:4, December 2006, p. 655.

³ Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," September 6, 2000, Table 8, p. 73; Chirag Mehta and Nik Theodore, "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns," report for American Rights at Work, December 2005.

the incumbent, and not the challenger, would be able to talk to voters, in person, every single day. The challenger, meanwhile, would have to remain outside the boundaries of the state or district involved and try to meet voters by flagging them down as they drive past. The election would always be conducted in the incumbent candidate's party offices, with voters escorted to the polls by the incumbent's staff. And finally, during the entire course of the campaign, the incumbent, but not the challenger, would have the sole authority and ability to electioneer among the voters at their place of employment, during the entire time they are working. Moreover, the incumbent could pull them off their jobs and make them attend one-sided electioneering meetings whenever it wanted. The challenger could never, ever make voters come to a meeting, anywhere or anyplace. And the incumbent could fire voters who refused to attend mandatory meetings, or if they tried to leave the meeting, or even if they objected to or questioned what was being said.

But this is how an NLRB election process is conducted. An employer can and does compel workers to attend one-sided anti-union meetings. These compulsory meetings are conducted in 92% of worker campaigns. And if a worker refuses to go or tries to leave, the employer can legally fire them. And if a worker tries to object to what is being said or even to ask a question, the employer can legally fire them. Compulsory meetings are conducted with large and small groups of workers; they often involve high level management officials whom workers have never met before, but who are now intensely focused on their interests – in collective bargaining.⁴

Mandatory meetings are also conducted with individual workers, either at their workplace or by being called into their supervisor's office. Supervisors are required to be the employer's front line offensive team in the anti-union campaign. They are responsible for monitoring and assessing the union sympathies of the workers they supervise. Many times, the worker has never actually talked to the supervisor before and thought the supervisor only knew her as "Hey, you." Now the worker is in the office with just her supervisor or perhaps the supervisor and another, higher level, management official. They are both telling her that the union will bring violence to the workplace, that the employer will never agree to any improvements in working conditions, or even, that choosing a union will result in layoffs or in the workplace being closed down. In over half of worker campaigns, employers threaten or predict that the workplace will close if workers vote for collective bargaining – even more in mobile industries [71% in manufacturing].

Sometimes employers spy on their workers. Fourteen percent use electronic spying, video and still cameras, long distance microphones, company guards, supervisors, and even the local police for spying. Supervisors are sent to offsite union meetings to observe who attends. I have been involved with cases where supervisors followed union supporters around the work place and even into the bathrooms to see who they talked to and who they didn't. The company even posted management observers in nearby restaurants and other gathering places to see which workers talked with union representatives. Long-distance microphones were aimed at them to find out what they talked about while they were on their breaks, outside the workplace.

⁴ See above, Bronfenbrenner; Mehta and Theodore.

Employers also offer bribes to influence workers during the campaign. They promise either all or selected employees increased benefits, a better shift assignment, a promotion or some other advantage. Fifty-one percent offer bribes or other special favors; fifty-nine percent promise to improve wages.⁵

In one fourth of worker campaigns for collective bargaining, workers are fired. A new study by the Center for Economic and Policy Research (CEPR) supports an ever higher number, that one in five activists are fired.⁶ When a worker who has supported the union is fired, fear is instantly and inevitably injected into the workplace. Workers are afraid that the same thing will happen to them if they support the union. This fear devastates the organizing campaign. And the fear persists because workers are rarely returned to their jobs as lengthy legal delays are common.

This adds up to an inherently and intensely coercive environment. Before the NLRB agent ever arrives at the workplace with the voting booth and cardboard ballot box, workers have been harassed, intimidated, spied on, threatened and fired. How can a secret ballot election cure this? It can't and it doesn't.

What is free about your choice when your employer has threatened to relocate your work if the union wins? What is free about your choice when your employer points to a nearby sister location that voted for a union with an almost 100 vote margin and, four years later, no bargaining has taken place [but fails to mention that it's because the employer is gaming the system]? What is free about your choice when you can plainly see that union support means being followed and harassed and videotaped? This kind of fear does not disappear when the worker is handed a ballot. It's their job and their families' livelihood. That's too much to risk. It's too much to have to risk.

One night I talked with a woman who worked at a store where workers were trying to organize. I remember this conversation well. It was late in the evening and I was at home; so was she. Her supervisor had told her that if she supported the union, he would get rid of her. She told me she knew this was illegal, but she was afraid to give her story to the NLRB agent investigating charges against her employer. She was afraid that the employer would find out and that she would be fired. In tears, she explained that her ten-year-old son had asthma and she could not afford to jeopardize her job because she needed her health care coverage to pay for his medications. She wanted to do the right thing, but she was afraid. Afraid for her son. That kind of fear doesn't go away.

Workers who have been subjected to this kind of coercive campaign believe their employer will retaliate against them if the union wins the election. Either the employer will continue its campaign of fear and intimidation after the election, or the employer will figure out who voted for the union and retaliate. Or both. And workers know how little the law does to protect them. In one election-related case I litigated, there were thirteen

⁵ See above, Mehta and Theodore.

⁶ John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research, January 2007.

votes in favor of the union in a secret ballot election. Within six months each of the thirteen workers who had voted for the union had been terminated.

Part of the reason for workers' fear and part of the reason employers violate the Act with impunity is that no effective remedies are imposed. And that they come months and years too late. What happens if an employer is prosecuted for illegally threatening workers that it will close or lay off workers if they vote to form a union? Or for illegally spying on workers' who are supporting a union? Or illegally telling workers that they cannot talk about the union? After the case is investigated and evaluated, it is litigated in a hearing before an NLRB Administrative Law Judge, appealed to the National Labor Relations Board and enforced in federal court. Only then can the employer be required to take any remedial action whatsoever. It will be required to post a notice on a bulletin board saying that it will not violate the law again. A piece of paper stapled to the bulletin board. In one of my cases the notice the employer posted required three 11" x 14" sheets to list all of the violations it had committed. Yet during the time the notice was posted, the employer committed all of the same violations again.

The employer is also subject to a cease-and-desist order, which is limited to the specific violation charged. If the initial violation is for illegally interrogating workers about their union support and then the employer subsequently illegally threatens to reduce wages if employees choose representation, this constitutes an entirely different circumstance under current Board practice and the process starts all over again: investigation, hearing, appeal, appeal. If employees at several facilities of a single employer are organizing, violations at one worksite almost never produce an order not to commit those same violations at the other worksites.

I have often asked workers to testify about their employer's illegal conduct. They know they will have to confront their supervisor and probably their supervisor's supervisor in a hearing, face-to-face. They are terrified, but they want to do the right thing. When they ask what the employer will have to do if found guilty, I tell them, "Post a Notice." They are incredulous, jaw-dropping and eye-opening incredulous: "That's it?" And they lose heart because they feel betrayed by the law that they thought protected them.

What if a worker is fired in retaliation for union support? After the legal process has been concluded, the employer must pay the worker for lost wages, minus any money the employee earned in the meantime. If the worker is able to secure a job elsewhere at the same rate of pay, the employer pays absolutely nothing. If payment is required, interest is simple interest, not compounded. There are no compensatory or punitive damages. In 2003, the average backpay amount was \$3,800 and most workers never return to their jobs. A small price to pay to stay "union-free."

In September 2000, Human Rights Watch, one of the world's most respected human rights organizations, published an historic book-length report on workers' freedom to form unions and bargaining collectively in the United States, based on an 18-month survey. HRW Executive Director Kenneth Roth summarized the report's findings:

Our findings are disturbing, to say the least. Loophole-ridden law, paralyzing delays, and feeble enforcement have led to a culture of impunity in many areas of U.S. labor law and practice. Legal obstacles tilt the playing field so steeply against workers' freedom of association that the United States is in violation of international human rights standards for workers.

The HRW report places part of the blame for this failure on the lack of effective remedies for violations of workers' rights during campaigns to form a union:

Many employers have come to view remedies like backpay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.⁷

What happens in the workplace while the discharge case is being filed, investigated, and litigated? Workers are afraid to support the union. No one wants to be fired. Who can afford to jeopardize their family's welfare, even if they are deeply committed to bringing collective bargaining to their workplace. Interest in the union has been successfully smothered. But the employer pays absolutely nothing for this collateral damage.

Even when workers are able to form their union, they are not able to bargain a first contract. Out of 1,586 initial contract bargaining case closed by the Federal Mediation and Conciliation Service (FMCS) during 2004, 710 (45% of the total) were closed without a contract being reached.⁸ According to NLRB General Counsel Ronald Meisburg, meritorious NLRB charges alleging illegal refusals to bargain by employers are filed in 28% of all newly certified bargaining relationships. Of all NLRB charges alleging refusals to bargain by employers, half occur in first contract bargaining. What is the remedy when an employer engages in unlawful bargaining tactics? The employer is ordered to bargain some more.

In one of my cases, by the time the parties reached the bargaining table – not concluded their first contract but only finally reached the bargaining table – 6 ½ years had elapsed since the workers voted by an almost 100 vote margin for union representation. The woman they had elected as their president had retired and moved to Florida. And the woman elected to lead the bargaining had had a massive heart attack and died, just two weeks before their first negotiating session.

Anti-union consultants and “union-avoidance” specialists know that the employer's anti-union campaign does not end when the Board certifies the union as the workers' representative. These consultants and specialists typically offer their services through the entire bargaining process. If they can continue the campaign of fear and intimidation and not reach a contract for a year, they are rewarded with another opportunity to eliminate the union. If no contract is concluded in twelve months, the NLRB will conduct another

⁷ Human Rights Watch, “Unfair Advantage, Workers; Freedom of Association in the United States Under International Human Rights Standards,” 2000, p. 10.

⁸ http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc.

election. So the strategy for remaining union-free includes stalling contract negotiations, frustrating collective bargaining, and fomenting disillusionment and a feeling of futility.

The Employee Free Choice Act is aimed at removing the obstacles workers face when they want to be able to bargain with their employer. It does this in three ways.

First, the Employee Free Choice Act allows workers to have their union recognized when the majority of workers has expressed its decision to form a union for collective bargaining. The legislation amends the National Labor Relations Act by providing a process by which workers can have their union certified by the National Labor Relations Board if a majority has signed valid authorizations designating the union as their representative for collective bargaining. It does not change in the process for petitioning for an election and does not eliminate the election process.

Under current law, recognition based on majority sign-up is already perfectly legal and has been since the passage of the Wagner Act in 1935, when it was widely used. It has been endorsed by Congress, recognized and enforced by the National Labor Relations Board and federal courts, and approved by the United States Supreme Court.

Majority sign-up is how many public sector workers choose unionization. The states of California, New York, New Jersey and Illinois now provide majority sign-up for their public sector workers. And it has increasingly been the path to unionization in the private sector, used by many thousands of workers, including those at Cingular, Kaiser-Permanente, Alcoa, Inc., and others.

Under current law, the employer has the right to veto this decision of a majority of the workers. In fact, even if every single worker in the workplace wants to form a union to bargain a contract, the employer has no obligation whatsoever to recognize their union and bargain. Without the Employee Free Choice Act, the employer – not the workers -- has the right to decide whether the workers' choice will be honored. Today, workers can be forced by their employer into the delay-ridden, divisive, coercive representation election process.

Majority sign-up procedures would make the process for choosing to form a union similar to the process already in place for disbanding a union. No NLRB election is required when workers no longer want a union to represent them. If a majority of workers demonstrate that they no longer want their union, the employer can and must withdraw recognition and refuse to bargain a contract. Or workers can petition the NLRB to conduct an election to decertify the union. The NLRB will conduct such an election if only 30 percent of the workers support the petition request. Even an employer can file a petition and trigger an election if it has evidence that the union *may have* lost its majority support. The Employee Free Choice Act does not change these existing procedures.

Although poll after poll shows that worker are very satisfied with their unions, [a December 2006 Hart poll showed that 87 percent of union members approve of unions

and only 7 percent disapprove, compared to 65 percent approval of unions by the public overall], nothing in the Employee Free Choice Act would make it harder for workers to terminate their union representation.

Under current law, union coercion in connection with signing authorization forms is illegal. The Employee Free Choice Act does not change this current law. Coercion would continue to be illegal. But the Employee Free Choice Act adds additional protections. It directs the National Labor Relations Board to establish procedures for determining the validity of signed authorizations. Such procedures would allow the NLRB to determine whether authorizations are invalid because of coercion or fraud. The Employee Free Choice Act includes further protections by also directing the NLRB to formulate model authorization language so that the effect and purpose of the authorization is perfectly clear to potential signers. A union could not be certified without a majority of valid authorizations which comply with these procedures.

Is coercion in the signing of authorizations a legitimate concern? A recent review of 113 cases cited by the HR Policy Association as “involving” fraud and coercion identified only 42 decisions since the Act’s inception that actually found coercion, fraud or misrepresentation in the signing of union authorization forms. That’s less than one case per year. Compare that to the 31,358 cases in 2005 of illegal firings and other discrimination against worker for exercising their federally protected labor law rights.⁹ That’s a ratio of over 30,000 to 1.

Allowing employees to demonstrate their union support through signed authorizations will avoid the intimidation and fear triggered by the current NLRB election process. Workers’ choice for representation and collective bargaining would be recognized and honored – not left to the whim of their employer. Workers would not be required to endure the coercive onslaught that has become an employer’s anti-union campaign only to be forced, for a second time, to demonstrate their choice for union representation as part of the NLRB’s election process.

Second, the Employee Free Choice Act would provide for first contract mediation and arbitration to insure that workers actually achieve meaningful collective bargaining. The mediation and arbitration would be conducted by the Federal Mediation and Conciliation Service (FMCS). This legislation will give both parties access to mediation and arbitration. If mediation is not successful in producing a mutually agreeable contract, the dispute is referred for binding arbitration. This process will ensure that workers who choose a union actually achieve the contract they seek. Otherwise, the right to choose is illusory and accomplishes nothing.

Thirdly, the Employee Free Choice Act would create meaningful penalties for violations of the Act. It would provide for triple back pay awards to workers who have been illegally fired during organizing and first contract efforts. Illegal threats, coercion and other intimidation would be subject to fines of up to \$20,000 per infraction. The bill provides guidelines for the determination of such civil penalties that take into account the

⁹ NLRB Annual Report, 2005.

gravity of the violation and its impact on the charging party, workers and the public interest. Finally, the Employee Free Choice Act provides for timely injunctive relief against egregious illegal employer conduct when workers are trying to form a union and negotiate a first contract. Currently, the National Labor Relations Act mandates such injunctive relief only for violations of the law by unions. But there is no current, parallel provision of the Act that requires injunctive relief to protect workers from illegal conduct by their employers. The National Labor Relations Act provides a discretionary process for such violations, but it has been so rarely used in recent years that it has all but disappeared. The Employee Free Choice Act would correct this imbalance by requiring mandatory injunctions for significant illegal conduct by an employer when its employees are seeking union representation, including during first contract negotiations.

Injunctive relief is essential for protecting workers' rights. A notice posting three years after illegal interrogations or threats does not remedy anything. It will not dispel the fear and it will not convince workers that they are really free to exercise their right to support union representation. Reinstating the lead union supporter years after her termination will not restore workers' confidence in the ability of the law to protect them. Injunctive relief works.

Conclusion:

The Employee Free Choice Act would reform the NLRA so that workers can choose union representation and collective bargaining without fear and intimidation. When a majority of workers demonstrate their choice to form a union their representative can be certified by the NLRB without the need for the delay-ridden, coercive and divisive NLRB election process. Federal labor law would finally, and again, assure that workers who want collective bargaining are able to have it. And it would guarantee that that collective bargaining would be conducted effectively and efficiently and would result in a contract. Finally, it would create real penalties as a deterrent to unlawful employer conduct.

We urge your support of the Employee Free Choice Act.

Thank you again for this opportunity to address the committee.