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Union Representation Elections: Law and Reality
by Julis G. Getman, Stephen B. Goldberg and
Jeanne B. Herman

Myron Romkin

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Book Review

UNION REPRESENTATION ELECTIONS: LAW AND REALITY. By Julius G. Getman, Stephen B. Goldberg and Jeanne B. Herman. New York, N.Y.: Russell Sage Foundation, 1976. Pp. xvii, 218. \$7.50.

The union representation election is the cornerstone of the National Labor Relations Act. The Act gives workers the right to choose, through independently administered elections, whether or not they want a union to represent them in negotiations with their employer. The representation election, however, is more than either a mechanism for establishing unions or a determinant of union growth. It is a symbolic event in which the confrontation tension between unions and employers is heightened and the tone is set for collective bargaining. Not surprisingly, many students of labor law and industrial relations have studied representation elections and the efficacy of National Labor Relations Board (NLRB) rules governing the conduct of unions and employers in such elections.

The popularity of this subject notwithstanding, *Union Representation Elections: Law and Reality* is an important contribution to the literature. This work, by two legal scholars and a psychologist,¹ is the first to test in a direct, systematic fashion the assumptions which underlie NLRB policies. Fortuitously, the book appears at a time when an increasing number of people are questioning the benefits and effectiveness of law in regulating economic conduct.

According to the authors, the regulations governing representation elections rest on several assumptions² developed through many years of NLRB decisionmaking, but previously unverified by empirical research:

1. Employees are attentive to an election campaign.³
2. Employees will interpret ambiguous statements by employers as threats or promises.⁴

1. Julius G. Getman is a Professor of Law at Indiana University School of Law; Stephen B. Goldberg holds the same position at Northwestern University School of Law; Jeanne B. Herman is an Associate Professor of Organizational Behavior at the Graduate School of Management, Northwestern University.

2. Since the NLRB has frequently drawn a parallel between representation elections and political elections, some of these assumptions may have been borrowed from electoral politics. Of the assumptions which follow, one, three, and four seem particularly applicable to the premises on which political campaigns are based.

3. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 8 (1976).

4. *Id.* at 9.

3. Employees are generally unsophisticated about labor relations.⁵
4. The free choice of employees is fragile and may be stifled by unfair campaign tactics.⁶
5. Employees must be granted an opportunity to campaign for the union on company premises to communicate as effectively with employees as does the employer.⁷
6. The signing of authorization cards is an indication of employee choice.⁸

To test the validity of these assumptions, thirty-one single-union election cases⁹ were studied during the period from February 1972 to September 1973. Cases were selected prior to an election and were chosen so as to ensure diversity in such factors as location of the company,¹⁰ type of industry, company size, and identity of the organizing union. Each of the thirty-one cases, however, shared one important characteristic. The authors selected only those cases that had a better than average chance of producing a hotly contested election resulting in the use of illegal campaign tactics.¹¹

An important part of the book is the description of the methodology of the data collection process. After an election had been selected for study, the employees were interviewed to determine their predispositions toward unionization.¹² Specific questions in this first interview involved employee attitudes toward working conditions and unions, and voting preferences. Immediately after the election, a second interview was conducted to deter-

5. *Id.* at 11.

6. *Id.* at 13.

7. *Id.* at 19.

8. *Id.* at 20. An authorization card, when signed by the employee, is an indication of employee intent to be represented by a union in the collective bargaining process. When a union petitions the NLRB to hold an election, it submits these cards along with the petition to satisfy a NLRB rule that the petition must have the support of 30% or more of the employees.

9. The authors believed that the results of this study would be significantly affected by inter-union campaigning and, therefore, elections involving more than one union were screened out.

10. Because of the expense involved in a nationwide survey, the study was limited to the Midwestern States.

11. Since unlawful campaigning occurred in 22 of the 31 elections, the authors were apparently successful in obtaining the type of elections they were seeking.

12. The authors encountered substantial resistance in seeking the names and addresses of the employees entitled to vote in a particular election. After the NLRB refused to release this data on the grounds that employee interviews would interfere with their freedom of choice, the authors sued the NLRB under the Freedom of Information Act, 5 U.S.C. § 552 (1970 & Supp. V 1975). Almost two years after their initial request, the NLRB was ordered to release the employee lists. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).

The resulting volume shows that the Board was overly protective. As exemplified by this study, a carefully written, extensively tested, and professionally administered interview will produce valid information without compromising employee rights.

mine whether there had been any change in attitude towards employers and unions. More importantly, the employees were asked how they voted in the election. With some persistence by the interviewer, over 90% of the 1,239 employees interviewed disclosed their vote.¹³

The significant findings of the report are:

1. "[E]mployees have strong and stable predispositions to vote for or against union representation."¹⁴
2. "There was no evidence that any individual campaign issue was particularly effective in influencing employees to vote for the party raising that issue."¹⁵
3. "Potential union voters did not vote against union representation in significantly greater numbers in bargaining order elections [*i.e.*, those with discovered illegal campaigns] than in clean elections or elections characterized by lesser unlawful campaigning."¹⁶
4. None of the presumably illegal tactics—threats of reprisals, promises of benefits, selective discharge of union sympathizers, or interrogation—caused workers to switch their preferences.¹⁷

These findings and the evidence on which they are based lead the authors to recommend that written and oral communications made during representation campaigns be freed of governmental restraint.¹⁸

As a frontal assault on long-standing NLRB policies, this book will unquestionably receive scrupulous examination by social scientists, legal schol-

13. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 3, at 42.

14. *Id.* at 72.

15. *Id.* at 109.

16. *Id.* at 129.

17. *Id.* at 128-29, 141.

18. Such an alternative approach to NLRB election regulation is described in the concluding chapter. *Id.* at 139-63.

The NLRB has recently taken a significant step towards deregulating union representation campaigns in Shopping Kart Food Market, Inc., 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (April 8, 1977). In a 3-2 decision, the Board overruled the landmark case of Hollywood Ceramics Co., 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962), and held that "we will no longer set elections aside on the basis of misleading campaign statements." 94 L.R.R.M. at 1708. The Getman study was discussed extensively in the opinion and formed the basis for the Board's conclusion. In reference to the previous NLRB assumptions, now partially undermined by the current study, the Board observed:

[O]ur fundamental disagreement with past Board regulation in this area lies in our unwillingness to embrace the 'completely unverified assumption that misleading campaign propaganda will interfere with employees' freedom of choice. Implicit in such an assumption is a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties. . . . We decline to join those who would continue to regulate on the basis of such assumptions Rather, we believe the Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.

Id. at 1707.

ars, and advocates. Two issues will be the subject of the most extensive inspection: first, whether the study in fact accurately isolates and measures what it purports to measure; and second, whether one can confidently derive generalized conclusions about the nature of employee voting behavior from these findings.

When judged against the standard research practices employed by social and behavioral scientists, this reviewer finds little reason to doubt the accuracy of the obtained results. The "before and after" interview approach, while it has its methodological limitations, is an effective method of isolating the relationship between voting and campaigning. Moreover, the authors have been careful not to dispute the validity of the Board's assumptions without substantial data proving the contrary. Readers trained in statistical analysis might be concerned, however, about the authors' heavy reliance on tabular and simple correlation analysis techniques. Although multiple correlations would have made the findings even more conclusive, it is doubtful that the accuracy of the results would have been significantly affected by different modes of statistical analysis. The data supporting the authors' conclusions are simply too compelling.

While the findings of the study may be accurate, representation elections should not be deregulated on the basis of this particular study alone. The book's overall persuasiveness must be based on how well one can generalize from the studied elections to all elections. In this regard, the study does have limitations. First, there is more than a reasonable chance that the sample is not completely representative. Furthermore, the authors did not pay particular attention to the motivations of employers and workers both prior to and during the elections.

While the number of studied elections is exceedingly small, the size of the sample is not necessarily determinative of its representative nature. The issue is whether these thirty-one elections are representative of all elections—those occurring during the period from which the sample is taken and those likely to occur at a later time. Can one be sure that the economic and industrial relations conditions of 1972 and 1973 (the period of analysis) had no effect on worker attitudes or voting behavior? Will future economic conditions affect voting behavior so as to invalidate the findings of this study?

Regardless of future implications, it is questionable whether the study is representative of other elections occurring during the same time period. During the period from which the sample was chosen, the union victory rate for all elections was 51.1%¹⁹ and the rate for single-union elections, such as

19. *Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1973* (table), 38 NLRB ANN. REP. app. 231, at 232 (1973).

those studied, was 49.1%.²⁰ In the thirty-one studied elections, however, only 25.8% were won by unions.²¹ This discrepancy between the sample union victory rate and the overall union victory rate is not precluded by the laws of probability and sampling. Nonetheless, further investigation is required to determine the cause of the discrepancy.

This low victory rate may be linked to some factors likely to play a role in determining worker sensitivity to management's tactics. The authors state that elections were selected because they showed signs of developing strong campaigns and illegal campaign practices. Operationally, this makes considerable sense. In hindsight, perhaps a sample of elections in which minimal or modest managerial resistance would be anticipated should also have been studied. Could there be something unique about employers who strongly resist union intervention and who run the risk of sanctions for illegal practices, however weak those sanctions may be? Why does an apparently rational employer go to the expense of conducting an illegal campaign when, if the authors are correct, such practices have no impact on employee voting behavior?

Consider the following hypothesis. Suppose a strongly anti-union employer endeavors to keep his plant nonunion by employing only those workers who are unlikely to vote for a union. Once the plant becomes the focus of organizing efforts, however, the union is able to collect a sufficient number of authorization cards. Employees may have signed these cards because: (1) they were momentarily dissatisfied with their job and working conditions; (2) they were true union supporters and had not been screened out in the employment process, as no selection practice is perfect; (3) they signed the cards in the face of strong peer pressure; or (4) they were apathetic to the election and signed in order to be left alone.²² Faced with this showing of union sentiment, management launches an intensive campaign, not because it feels that the union has strong support among its workers but as an insurance policy. Like a bowl of chicken soup, a strongly fought campaign may not do any good, but it won't do any harm either. Thus, by selecting only hotly contested elections, the authors may have inadvertently focused only upon the strongly anti-union, and thus nonrepresentative employers.

Moreover, the authors may have narrowed their study to a particular type of worker as well as a particular type of employer. The specific motivations of the workers in a particular election should have been researched more thoroughly to determine what motivations affected voting behavior. Although the present volume devotes a large section to a study of employee

20. *Id.* at 231.

21. See J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 3, at 33.

22. See *id.* at 131.

preferences, no set of determining influences was found. Not only were preferences unaffected by campaigns, but they failed to show a responsiveness to other factors as well. Before the authors can conclusively state that campaigns do not determine employee preferences, it should be discovered what factors, if any, do influence voting behavior.

The authors' concentration on strongly anti-union employers may be significant for a different reason. In a regulated world, the decision to live close to the rules is based in part on the costs of apprehension. Thus, the NLRB rules and accompanying sanctions governing representation elections deter some employers (presumably those less antagonistic to unions) from conducting vigorous campaigns. According to the authors, workers in the nondeferred cases, however, have anticipated the anti-union tactics of their employers and have discounted them.²³ But in a nonregulated world, fewer mildly anti-union employers would be deterred from conducting a strong campaign. Would workers still discount the tactics of these employers, who might have greater credibility from the employee's viewpoint than a strongly anti-union employer?

A representation election is a highly complex event. It deals with the interests of three parties—workers, unions, and management. Moreover, an election is only one occurrence in a long term relationship among the parties, reflecting the history of labor relations and influencing the future of labor relations. *Union Representation Elections: Law and Reality* deals with much of the complexity of representation elections through a well designed research project. It is an important step towards systematic verification of labor law policies, long in need of such research. But as an argument for deregulating representation election campaigns, it overstates its case. Through future replications of the study, giving greater attention to the motivations of employers and the origin of worker sentiments, such a convincing argument may yet evolve.

MYRON ROOMKIN*

23. *Id.* at 129.

* Associate Professor of Industrial Relations at the Graduate School of Management, Northwestern University.

