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WHY LABOR UNION MEMBERS NEED LMRDA REFORMATION NOW

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INTRODUCTION

For nearly 50 years, the language in the Labor-Management Reporting and

Disclosure Act (LMRDA) has frustrated the Act's primary goals of reducing corruption and curbing undemocratic conduct within labor unions

Union leadership has profited immensely from nebulous and contradictory language within the Act. Ironically, it is the very people whom the Act was originally intended to protect, that have been harmed. The Act often places the rank-and-file members in a debilitated role within their own unions. Ordinary members cannot depend on the language of the Act to protect their basic rights as union members, or, to adequately seek redressability in the federal courts.

This report will identify a major incongruity of the Act, with recommendations for reformation. Additionally, this report will reveal by example how the Act needs to be amended in a light more favorable to the rank-and-file with respect to (1) fairness in union elections; (2) restoration of rights to seek justice and relief in federal courts; and (3) addressing a more cooperative spirit between rank-and-file members and the U.S. Department of Labor.

Further, this report will focus on several technical changes desperately needed in Title IV of the Act in order that the rank-and-file may place more confidence in union elections.

These necessary changes to LMRDA will foster and encourage union democratization, while ushering in a new era of union accountability and enforcement.

A. DIRECT CONFLICT BETWEEN TITLE 1 AND TITLE 4

Title 1 of the Act provides a Bill of Rights for every union member within a labor organization. [29 U.S.C. § 411]

Section 101 (a)(1) of Title 1 allows every member of a labor organization equal rights and privileges in union elections. Section 101 (a)(4) of Title 1 grants the protection of the right of any member to sue their union, providing that internal remedies have first been exhausted.

Title 4 of the Act restricts the right of a union member to sue their union in the event that election violations occur. According to the Act, only the U.S. Secretary of Labor has plenary authority to investigate and sue a labor organization for election violations.

1. THE PROBLEM

Challenging candidates have the responsibility to initiate an election dispute. First, the challenger must address the nature of the dispute to the incumbent union officers in the union's executive body (presumably the same incumbents

who defeated the challengers). If a new election is denied by that body the challengers can appeal to the union's controlling entity (usually the international board of the union). If that appeal is denied the challenger may file a complaint with the U.S. Department of Labor (DOL) through the Office of Labor-Management Standards (OLMS). OLMS investigates the complaint and recommends to the Labor Secretary whether to proceed, or not, in a civil action against the union for a new election. If the Secretary declines to prosecute, the matter ends. The aggrieved union challenger may sue the Secretary of Labor in federal court for review of her decision, but the challenger may not sue the union. This is a direct conflict with Title 1 of the Act, which protects the union member's right to sue his union.

2. AN EXAMPLE

Say that you are a long-time union member in good standing and decide to run for an office in your union. You have spent considerable amounts of your money and time campaigning on a platform to fight corruption within the union. During the campaign, and on election day, you have discovered that the incumbents have committed fraud in order to steal the election. You have proof of this fraud. First, you must contest the election to the union officers who, most likely, are the very persons that you ran against and who committed the fraud against you. Then you must present your evidence to them. After they deny the charges, you may appeal your charges to the union's governing entity. The governing entity of the labor organization will routinely deny the charges because of their business relationship with the incumbent officers of the local union.

Then, you may go to the OLMS investigators at the DOL and file charges within 30 days of the denial of your internal appeal. Your evidence must be presented to OLMS investigators who will make a determination based on fact-finding. The Secretary of Labor will make a decision based on the OLMS recommendation. If the Secretary dismisses the charges, which is the usual practice, she will file a "Statement of Reasons" as to why the case is dismissed. You have one option remaining ---- which is to sue the Secretary of Labor for her decision. This suit must be brought in federal court as a judicial review proceeding. It is almost impossible to get a federal judge to reverse the Secretary's decision. And in the unlikely event that the Secretary is reversed, the court only will order the Secretary to provide a more complete "Statement of Reasons"

for not pursuing civil prosecution of the union. See Dunlop v. Bachowski, 421 U.S. 560, 573 (1975).

Oftentimes, the Secretary's "Statement of Reasons" is one or two pages in length and does not offer substantive rationale for dismissing a legitimate election complaint. The court will not order a new election, because only the Secretary of Labor has this authority.

You may not sue your union or its officers for election fraud, no matter how credible and strong the evidence may be. The union is protected under Title 4 by the Secretary's "Statements of Reasons," no matter how arbitrary, capricious, and irrational those statements may be. Here, you have no recourse for the harm brought on by the union incumbents in a fraudulent election, even though Title 1 of the Act **guarantees** your right to sue your union.

What remains for you? Usually the union finds a way to punish those challengers who file the initial charges and expose union corruption and undemocratic behavior within the labor organization.

The above scenario has been played out in real life many times. It is very expensive for the challenging union member, both in financial and emotional costs. In many instances, the aggrieved union challengers are expelled from their union, denied employment opportunities, or punished in some other manner, usually with little or no due process.

The Secretary's authority under Title 4, which is the only remedy currently available to address election fraud, fails union members by way of a direct conflict with the union member's right to sue their union granted under Title 1. As a result, Title 4 actually discourages union democracy by providing a layer of protection for union officers who use election fraud, deceipt and subterfuge against their own members as methods to remain in control of their labor organizations.

3. RECOMMENDED SOLUTIONS

a. Amend Title 1 of the Act.

Specific language must be added to Section 101 (a)**(4) Protection of the Right to Sue**, of the Act to include the right of a union member to sue his union in an election dispute when the Secretary declines to take action under Title 4, or, if the Secretary takes action but no relief was granted to the election challenger.

Additionally, the use of a pre-election remedy such as an injunctive suit, must be made available as a right to a

honafide candidate who discovers fraud by union incumbents **during** the course of the period leading up to the union election. Presently, no pre-election remedy is available to a candidate under LMRDA because Title 4 requires that only the Secretary has authority to step in after the election. Here, LMRDA preempts an injunction by a challenging candidate even when the challenger has evidence to prove that election fraud is occuring and that election procedures are being violated by the incumbents. Present law requires that the challenging candidate must wait until the election is over, and only then, must wait further to see if the Labor Secretary decides to sue the union. Again, union officers who do harm to the candidacies of other members are protected by the rules under Title 4.

Further, specific language must be inserted in Section 101 (a)**(1) Equal Rights**, to guarantee the equal right of a bonafide candidate to a **"fair election."** Fairness to the challengers can never be assumed in union elections. By experience, the exact opposite is normally true.

b. Amend Title 4 of the Act.

Specific language must be added to the appropriate paragraph within Title 4 [29 U.S.C. ~ 482] **Enforcement**, so that the right of a union member to sue his union under Title 1 is reconcilable with Title 4 of the Act. To be fully effective without limiting the authority of the Secretary to investigate and prosecute a flawed union election, the language must allow the challenging candidate the right to sue the union either

1) "after the Secretary declines to bring suit against the union,

or,

2) if the Secretary's suit fails."

This will protect the right of the challenger and provide him with an option to pursue redress on his own.

A real concern is the possibility of a multitude of lawsuits arising from one union election. If this occured, judicial economy would require consolidation of suits. Hence, the following recommended language should be considered

"multiple private lawsuits by election challengers shall be consolidated into one suit and into one court for judicial effeciency."

Finally, revised language should state that the Secretary has a

superceeding option to take action, or not take action, against the union before an action can take place by an aggrieved election challenger. However, the Secretary should be held accountable to the challenging candidate and all union members with her

"timely inquiry and decision, as well as by proper notice to all potential election challengers as to the Secretary's action."

c. Amend Title 1 Section 101 (a)(5).

Paragraph **(5), Safeguards Against Improper Disciplinary Action**, allows incumbent union officers to act with impunity and punish challenging candidates who dare to run against them in union elections, or who dare to expose the misdeeds of union officers during election campaigns. The following language is recommeded to be included in paragraph (5):

" (D) in which the hearing must be conducted before an unbiased and impartial tribunal; and (E) the member being disciplined may seek satisfaction in a federal court against the union or against the union officers personally who acted improperly."

d. Amend the Definitions Section.

In the relevant section titled Definitions, a new definition should be added concerning challenging candidates and their right to sue.

"challenging candidates are bonafide candidates and members in a union whose rights to sue the union in an election dispute are protected under Title 1 of the Act."

B. UNION CORRUPTION IS NOT DETERRED BY TITLE 4

Title 4 of the Act, **ELECTIONS**, provides guidelines for election and enforcement procedures during union elections. Unfortunately, Title 4 is so ambiguous that union officer incumbents can virtually write up their own rulebook for winning elections and then hide behind the ambiguity of Title 4 for protection when election disputes arise.

1. THE PROBLEM

Under Title 4, the power of incumbency has never been greater than it is in union elections. This is especially true because under Title 4, union incumbents have very little incentive to safeguard elections. The incumbents, however, do have

incentive to cheat or commit outright election fraud which will virtually guarantee their positions of power within the unions. Nowhere under Title 4, or anywhere in the Act, are penalties imposed against those who cheat or commit fraud to win union elections. The only penalty possibly imposed is that by the Secretary who has the right to reverse and order a new election if she prevails in a civil suit against the union. Not only do the perpetrators of election fraud escape punishment if they are caught cheating, also there are no rules to prevent them for running again if a new election is ordered. Therefore, incumbent officers and their service providers will resort to stealth and artiface in an attempt to avoid detection of fraud. Title 4 allows them to not fear prosecution if they are caught.

Title 4 has no real enforcement teeth in which to prevent election fraud. Instead, the incumbent union officers are allowed full control over the election process with plenty of lead time to cover up their tracks if the Secretary chooses to investigate their election procedures.

The challengers are presented with an even greater problem if they catch the incumbents cheating. In theory, Title 4 requires that the Secretary and her staff shall serve as the attorney for the challenger when prosecuting an election dispute. In reality, the Secretary and her labor officials are more likely to side with the incumbents because the DOL has a history of working with the incumbents. This places the challengers in great jeopardy after an election dispute.

The incumbents use the Secretary's "Statement of Reasons" to show that the challengers have pursued the incumbents to no avail, leaving the door open for the incumbents to punish the challengers afterwards. The Secretary cannot assist the challengers when they are retalitorially punished because it is an internal union matter. As a result the Secretary unwittingly assists the incumbents in corrupting union governance whlle stealing democratic rights from the rank and file. Whether intending to or not, the Secretary has actually furthered union corruption.

2. AN EXAMPLE

Let's say that you are a long-time union member in good standing who decides to run as a bonafide candidate in the upcoming union election. During the campaign process, you learn that the incumbents have either violated, or are about to violate, certain aspects of election rules and procedures. You go to OLMS and file a complaint. Unfortunately, you will get no relief before the election because the DOL only has authority to step in and investigate an election dispute after the election. And under current law, no relief can be sought in the federal courts because the courts do not have jurisdiction over union election disputes in which the Secretary is not yet involved.

The only avenue presently available to you the challenger is to take accurate note of the violations or misconduct by the incumbents and make a record for evidence to be presented to the Secretary after the election.

If the election is not adequately safeguarded the burden of proving that safeguards or election procedures have been violated lies on the shoulders of the challenger. The challenger must document the violations to be used much later in a complaint to OLMS.

Say that the union's Election Committee is comprised of incumbent supporters and the Committee Chairman has compromised his position by surreptitious support to the incumbents. The challenger's complaints will go unheeded until OLMS investigates, which may be as long as six-months after the election.

Or, say that the Election Supervisor is also the union's chief financial accountant through use of an outside contract negotiated by the incumbents. This direct conflict is prima facie evidence of unfairness to the challenger because the Election Supervisor has a vested interest in the outcome of the election. That is, the Supervisor wants the incumbents to win so that he will maintain his employment with the union. The challenger will get no relief from this complaint because OLMS cannot investigate until after the election.

Now, say that you as the challenger have lost a very close election and you have evidence to prove that the incumbents rlgged the election by fraud. Further, say that your evidence depends on the preservation of all election records including ballots cast and ballots tabulated. Under Title 4, all election records are kept and maintained by the union for a period of one year. By the time your complaint gets to the OLMS, up to one-half year has elapsed. This is plenty of time for the incumbents to alter the election records, which they have kept in their exclusive possession, to reflect their version of the circumstances and to refute the allegations by the challenger.

Another area of concern is the membership list which is kept in exclusive possession and under tight control by the incumbents. Although Title 4 requires that the challengers have a right to inspect the list once prior to an election, there is no credible method to prove that the membership list given to inspection is the accurate and true list of current members. Nor, is there a way to prove that the incumbents do not use an innacurate membership list for their own advantage in which to stuff ballots and give "overcounts" to themselves. In otherwords, the incumbents control almost all of the election apparatus, with little accountability for safeguards to ensure fairness to the challenger.

Finally, you as the challenger have presented your case to the OLMS for

prosecution to get the election invalidated. The Secretary will make her decision based on whether the violat-ions or fraud committed by the incumbents may have "affected the outcome of the election." The Secretary has wide discretion to make her decision, based not on whether violations or fraud occured at all, but whether or not the violations or fraud were, in her opinion, enough to make a difference in the election results. In otherwords, Title 4 may allow election violations and fraud to be committed. The only question remaining is whether, in the mind of the Secretary, the violations or fraud could have made a difference in the outcome of the election.

The fact that there were violations or fraud do not automatically set aside an election. Incumbent union officers and their attorneys know this, which provides an opportunity for them to implement new methods to win elections and stay ahead of the enforcement curve.

3. RECOMMENDED SOLUTIONS

a. Add Definitive Terms to Title 4.

(1) **ELECTION SAFEGUARDING**. [29 U.S.C. § 481]. Presently, Title 4 requires that "adequate safeguards to ensure a fair election shall be provided ..." What Title 4 does not specifically address is **who** is responsible for safeguarding the election. If the union is responsible, then members face the old dilemma of the fox safeguarding the hen house. This situation arises because the union is controlled by the very incumbents who seek re-election against the challengers. If the Election Committee or the Election Supervisor is responsible, then conflicts of interest need to be addressed and resolved accordingly. Otherwise, union incumbents will attempt to control both the Election Committee and the Election Supervisor.

Recommendation: Add new language to this clause, and to the "definitions" section of the Act, stating the revised minimum requirements for election safeguarding. The requirements to be included are addressed below.

(2) MEMBERSHIP LIST INSPECTION. [29 U.S.C. § 481]. Ballot stuffing, deceased member voting, over voting, and other methods in which to steal union elections are avialable to the incumbents. These methods of fraud rely on an important tool --- the union's membership list. No one except the incumbents are ever sure of the authenticity of the list because only the incumbents are allowed to view and control the list. Current law allows for a one-time inspection right of the challenger. However, the challenger has no way of knowing if the list he is

viewing is the true and correct list. There are many methods to "doctoring" a list, especially when a single entity maintains exclusive control over that list.

Recommendation: A true and correct list should be lodged with the U.S. Department of Labor just prior to a union election. The challengers may view the list presented to them by the DOL. If the list has been materially altered by the union the incumbents shall be disqualified from the election and the DOL may seek criminal prosecution against the union officers involved.

(3) DIRECT OR APPARENT CONFLICTS. [29 U.S.C. § 481] . Any direct or apparent conflict of interest which may adversely compromise the outcome of an election must cease before the election takes place. The Secretary must have the authority to step in and order the union to cease and desist, or the DOL will take jurisdiction over the election procedure. One example was provided above in which the Election Supervisor, who simultaneously served as the union's accountant, was not disqualified. Here, that Election Supervisor has a vested interest in the outcome of the election because he wants to retain his employment with the incumbents.

In the past, the DOL has not recognized these kinds of relationships to be conflicts. This has resulted in lengthy election disputes which could have been resolved at the outset if the Secretary stepped in and ordered the conflict to cease.

Recommendation: Provide specific language in the statute that defines when a direct or apparent conflict is recognizable, and require that the election will be considered invalidated if that conflict is not resolved prior to the election. Additionally, provide the Secretary with the statutory authority to step in before a union election with cease and desist orders.

(4) MISUSE OF THE UNION NEWSPAPER. [29 U.S.C. § 4813]. The union newspaper is written, published, and distributed through the use of union membership funding. Always, the union newspaper is used to benefit those incumbents in power by showing the members all of the good things that the incumbents are doing for the union. Never, do union newspapers publish the commentary of the challengers who will face the incumbents in a union election. Unfortunately, the DOL does not recognize the efforts by the challengers to limit the abuse of the newspaper by the incumbents during elections. The DOL has a very poor record of putting the reins on newspaper abuse, even though the DOL's regulations, as well as case law, prohibit this form of abuse.

Recommendation: Provide specific language in the Act that prohibits the union incumbents from leveraging a campaign for personal advantage through use of the union newspaper. The incumbents may argue that such a law is a prior

restraint on free speech, however, the source of the newspaper's funding is from the membership's pockets making this an issue of campaign abuse and an unfair election practice.

(5) PROBABLE CAUSE. [29 U.S.C. § 482] The probable cause standard as provided in paragraph (b) of § 482 gives the Secretary absolute discretion to bring or not to bring a civil action against the union to set aside and invalidate an election. It is impossible to que the Secretary to prosecute a case against union corruption if the Secretary refuses to act. The probable cause threshold may be reasonably triggered with ample evidence presented by the challengers. However, the Secretary may still decline to prosecute for personal or political reasons.

Recommendations: Specific language needs to be added in the Act to more narrowly define the term probable cause.

the challengers, the Secretary may decline prosecution proceedings if she believes that the amount of fraud by the incumbents cannot be measured on a vote-by-vote basis to show that the outcome of the election was affected by the fraud. In otherwards, there is a large amount of guesswork involved in determining how much election fraud the Act will tolerate.

Recommendation: Change or modify the language in § 482(c)(2) so that any election violation involving fraud automatically rescinds the election and requires that the incumbents are inelgible to re-run. In the case of fraud, or a conspiracy by the incumbents to steal the election, any election violation must be cast in the light most favorable to the challenger, or to those persons who abided by the election rules. Any election fraud at all demonstrates a willful act to steal the election and should not be rewarded.

C. THE NEED FOR COOPERATION BY THE SECRETARY

The complaining election challenger depends exclusively on the Secretary of Labor to enforce the law when fraud or violations occur in union elections. There is no guarantee, however, that the Secretary will do her job. Politics and the cozy relationships that Labor Department officials share with incumbent union bosses may interfere with the impartial and vigorous enforcement of Title 4.

Challengers will eventually lose confidence in enforcement proceedings and in the Secretary. The result is a loss of participation in future union elections and a gradual erosion of the democratic process.

1. THE PROBLEM

When the Secretary does not properly investigate and thoroughly enforce LMRDA violations and fraud, the challengers give up. Moreover, the challengers may receive punishment from the incumbents after the investigation. This acts as a deterrent for future challengers and the union gradually slides into an autocratic or dictatorial form of governance. Title 4 of the Act gives the Secretary the exclusive authority to curb union election corruption. If the Secretary does not act, there is no remaining remedy for the membership. The members lose their democratic voice in their union.

2. AN EXAMPLE

Say that you were a challenger and you lost a union election because of fraud and violations by the incumbents. Then you address your complaint to the OLMS only to find later that the Secretary will not file charges against the union officials for a new election. So you investigate on your own. After examining the DOL election complaint documents which you acquired through the freedom of Information Act (FOIA), you determine that the DOL made some serious mistakes in their investigation and that the DOL's findings are contrary to the actual evidence. You even find some documents in the DOL files that directly support your claims of fraud and election violations.

You can either sue the Secretary in federal court for acting arbitrary, capriciously and irrationally, or, you can try to ask the Secretary to reconsider her decision. Neither effort will succeed because the court always defers to the Secretary's findings and the Secretary will not reopen a closed case.

After all of this, you learn that political considerations were a major force in the Secretary's decision. The evidence that you hold, no matter how strong, will not pursuade the Secretary to do the right thing The membership suffers the consequences.

There is nothing remaining for you. You cannnot sue the union that committed election fraud. There will be no justice and furthermore, there will be no union democracy. The union members not only have lost confidence in their union leadership, they have lost confidence in the U.S. Secretary of Labor for not upholding the laws.

3. RECOMMENDED SOLUTIONS

a. The Secretary Must Retain the Election Ballots.

Immediately after a union election, the ballots must be automatically retained by the OLMS. This eliminates the never ending controversy of whether the incumbents altered the election records to reflect their version of events subject

to fraud.

b. Give the Challenger the Right to Sue.

As previously mentioned, if the Secretary declines to bring suit against the union for election violations or fraud then give the challenger the right to sue the union on those charges afterwards.

c. Produce a More Cooperative Spirit.

The Secretary is supposed to serve as the election challenger's attorney when investigating and prosecuting an election complaint. In reality, the challenger is treated with hostility by the Secretary and the DOL. This is because of the close ties the Secretary has with organized labor bosses. The Secretary needs to be reminded of her obligation to promoting union democracy.

CONCLUSION

The original intent of the authors of LMRDA were to give the rank and file a democratic voice in their unions, while holding the union officers accountable for their actions. Failure has resulted due to ambiguous language in the Act, contradiction within the statute, and the unwillingness of the Secretary of Labor to enforce the laws.

Along the way, the teeth have been knocked out of the Act. The member's rights are in question. Those rights that are not in question remain subject to the political decisions of the Secretary, creating an unfair environment.

If Congress supplements the LMRDA with critically needed amended language, some tools will finally be in place for the members to protect their own rights, and for predictable enforcement to occur. Anything less will continue the circumvention of federal labor laws and continue the downward spiral of the democratic process within labor organizations.