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STATEMENT TO THE RECORD

Hearing on the National Labor Relations Board's Proposed Rule on Representation Case Procedures U.S. House Committee on Education and the Workforce

March 5, 2014 – 10:00 a.m.

Good morning, Committee Chairman Kline and Members of the U.S. House Committee on Education and the Workforce. It is an honor and pleasure to appear before the Committee as a witness. My name is Doreen Davis,[1] and I am a partner in the Jones Day law firm. My testimony today should not be construed as legal advice as to any specific facts or circumstances. Further, my testimony is based on my own personal views and does not necessarily reflect those of Jones Day or its attorneys. I have been practicing labor and employment law for over 35 years, and I work with employer clients located in various parts of the country with varying workforce numbers, with a focus on traditional labor matters. My background includes substantial experience practicing before the National Labor Relations Board, where I started my career as a Field Attorney handling representation cases. I am a Fellow of the College of Labor and Employment Lawyers. I served as the seventy-third Chancellor of the Philadelphia Bar Association, the oldest bar association in the U.S., and I have received many accolades from legal publications, including *The American Lawyer*, *Chambers USA*, *U.S. News & World Report*, and *The Legal 500 United States*. A copy of my CV is provided with the written version of my testimony as Attachment A.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, my testimony this morning addresses the recent initiatives undertaken by the NLRB with respect to representation case procedures. There are a few points I would like to make orally on the record.

First, the NLRB's proposed rule ignores the tens of thousands of public comments submitted in response to the virtually identical rule proposed by the Board in 2011. Instead of taking the public's commentary into account when re-proposing changes to the representation case procedures—as the Board did to an extent when it revised the 2011 rule in December 2011—the Board is returning to nearly the exact rule proposed in June 2011. Despite the inclusion in the record of public comments for the newly proposed rule, the Board is doing a disservice to the administrative process by failing to take into consideration any comments when making adjustments to those representation case procedures submitted in 2011.

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Second, and related to the issue of the Board's failure to respond to the significant public commentary on the 2011 rule, the Board has failed to take into account watershed changes that have been made to related areas of labor law since 2011. For instance, in 2011 the Board issued the landmark decision of *Specialty Healthcare*, which overruled decades of prior law on bargaining-unit determinations and allowed the certification of so-called "micro" units. The contours of this new doctrine of law remain far from clear, and the Board is expected to issue new decisions applying *Specialty Healthcare* in the coming months. Moreover, the NLRB's General Counsel, Richard Griffin, has also announced that following those decisions, he will issue further guidance for employers and employees on the new standards for bargaining-unit determinations. With such significant changes pending on issues directly related to representation elections, it is essential that the Board extend the time for comments on the new rule until after the new decisions and the General Counsel's guidance are published. This will allow the public—as well as the Board itself—to begin to understand the effect of *Specialty Healthcare* in conjunction with the proposed new representation rule.

Third, the substance of the rule changes proposed by the Board presents significant concerns for employers and employees alike, and to a large degree conflicts with the clear language and intent of the National Labor Relations Act "hereinafter "Act').. Foremost among these is the new requirement for the non-petitioning party—generally the employer—to submit a comprehensive statement of position within seven days of the election petition, setting forth all possible issues presented by the petition. Any issues not raised in this statement are forever waived by the employer. Such a requirement, rather than streamlining and making more efficient the representation processes, will almost certainly make them more litigious and drawn-out. It will also lead to fewer stipulated or consent elections, which have always been the preference of the regional offices handling these cases.

Additional concerns regarding the substance of the Board's proposed rule, including significant due-process concerns, are outlined in the written testimony. In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.

- **THE NLRB'S PROPOSED RULE IGNORES THE SIGNIFICANT NUMBER OF COMMENTS THAT WERE SUBMITTED IN RESPONSE TO THE PROPOSED RULE REGARDING REPRESENTATION ELECTIONS PUBLISHED ON JUNE 22, 2011.**

As you know, the Board, on February 5, 2014, over the dissent of Members Phillip A. Miscimarra and Harry I. Johnson, III, re-issued an extensive and far-reaching number of proposed new election rule (hereafter referred to as the "NPRM," which stands for "Notice of Proposed Rulemaking"). The NPRM is virtually identical to rule proposed by the Board in June 2011, which were subsequently revised by the NLRB in December 2011 and were to take effect in 2012. However, the rule was struck down in May 2012 by the district court for the District of Columbia on procedural grounds. Like the 2011 proposed rule, the re-issued rule would modify over 100 sections and subsections of the current Board regulations. The proposed rule, combined with commentary from the Board Members both in support and in dissent, span nearly fifty-three columned pages of the *Federal Register*.

In connection with the prior rulemaking initiative in June 2011, the NLRB received almost 66,000 public submissions or comments, supplemented by 428 transcript pages of oral testimony given during two days of hearings in July 2011. Some comments, particularly those submitted by individual citizens, reveal an inherent distrust of the Board's motives in the rulemaking and strike at the core of the Board's institutional credibility. Other comments illustrate that the Board majority's position on potential changes to representation case procedures makes for poor labor policy both procedurally and substantively, and does not properly address the concerns raised by the Board that allegedly justify such broad, sweeping amendments to the current rule.

Despite the fact that the NLRB received such a significant amount of feedback to its 2011 proposed rulemaking, the Board, approximately two and a half years later, reissued a proposed rule that is identical in substance to its 2011 proposed rule. Indeed, the new NPRM does not incorporate a single suggestion from the 66,000 public submissions or comments. Instead, the Board merely "incorporate[s] by reference into this docket the complete administrative record in the 2011 proceeding," including the comments, and claims that the comments and transcript pages "will be fully considered by the Board in deciding whether to issue a final rule." While the dissent rightfully commends the Board for incorporating the 2011 comments into the administrative record, the fact that the Board did not consider the voluminous amount of material submitted on behalf of interested parties *before* issuing the 2014 NPRM, especially considering that it had two and a half years to do so, is cause for concern. Notably, the Board had *already responded* to public commentary on the 2011 rule changes when it issued revised rule in December 2011. However, none of these changes have been incorporated into the newly proposed rule. In effect, the Board has completely ignored the public comments that are so central to proposed rulemaking under the Administrative Procedure Act.

- **THE NLRB'S PROPOSED RULE FAILS TO CONSIDER THE IMPACT OF RECENT NLRB INITIATIVES AND DECISIONS, INCLUDING UNRESOLVED ISSUES INVOLVING THE BOARD'S *SPECIALTY HEALTHCARE* DECISION.**

As dissenting Members Miscimarra and Johnson cogently pointed out, the NPRM fails to consider the potential impact of such recent NLRB initiatives as the Board's *Specialty Healthcare* standard on determining whether particular employees should be excluded from a petitioned-for unit.

In 2011, the Board released its decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011). In this 3-1 decision, the Board, over the dissent of Board Member Brian Hayes, not only overturned the standard for unit appropriateness determinations in the non-acute healthcare industry that had been in place for 20 years, but also significantly altered its traditional community-of-interest test, explaining that it would no longer address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The holding in *Specialty Healthcare* effectively reversed a 30-year-old standard for bargaining-unit determinations and has caused much concern in the employer community, with the potential for so-called "micro" units to cost employers significant time and resources and impair productivity and efficiency.

While *Specialty Healthcare* was recently upheld by the Sixth Circuit (*see Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 12-1174 (6th Cir. Aug. 15, 2013)), the

potential impact of the Board's 2011 decision remains uncertain. Indeed, the Board has yet to rule on two pending decisions applying *Specialty Healthcare* in the retail context. *See Macy's, Inc.*, Case No. 01-RC-091163; *Bergdorf Goodman*, Case. No. 2-RC-076954. In *Macy's*, the regional director certified a bargaining unit comprising only the cosmetics and fragrances department of a single retail store. Similarly, the regional director in *Bergdorf Goodman* approved a bargaining unit of just the women's shoe sales associates on two floors of a Manhattan department store. Until the Board issues its decisions in these cases, employers face significant uncertainty regarding whether and how employees may form separate units for collective bargaining purposes. If nursing assistants can form a unit separate from licensed practical nurses and other nursing-home employees, and if the sales employees in the women's shoe department can form a unit separate from the other sales employees at a department store, what of the impact on employers in other sectors? Will employees in the paint department of an auto manufacturer be able to organize separately from those who atach the windshield and windows? In short, significant questions remain unanswered.

In December 2013, the NLRB General Counsel stated in comments that the Board will issue additional guidance on the application of *Specialty Healthcare* following the decisions in *Macy's* and *Bergdorf Goodman*. Faced with such a potentially profound change to the determination of bargaining units, and consequently to Board-supervised elections, the Board should extend the period for comments to the NPRM until *after* the General Counsel issues guidance on *Specialty Healthcare*. In this way, all interested parties will be able to take stock of key changes in bargaining-unit determinations and their impact on representation cases and provide effective commentary to the changes proposed in the NPRM.

- **ADDITIONAL SUBSTANTIVE CONCERNS WITH THE NPRM.**

Substantively, the NLRB's proposed rule changes are in excess of the Board's rulemaking authority, are substantively unnecessary, and are contrary to the NLRA. Moreover, the proposed rules evidence poor public policy and are likely to exacerbate, rather than alleviate, labor tension between employers and employees.

The Statement-of-Position Requirement.

One of the central changes contained in the NPRM is the requirement for the non-petitioning party—typically the employer—to raise every potential issue at the initial election hearing or waive those issues. In other words, within seven days of the filing of the petition, the employer would have to assess the situation, consult with legal counsel, consider the propriety of the proposed bargaining unit, and make an informed decision as to what issues to raise at the hearing. Historically, pre-election hearings have been investigatory, not adversarial, in nature. The proposed statement-of-position rule effectively converts the initial hearing to a form of high-stakes litigation, with the significant consequence of issue preclusion should the non-petitioning party fail to raise issues. Moreover, because of the fear of issue preclusion, parties will be unlikely to enter into stipulated or consent elections.

With such a short time period between the petition and the hearing, employers facing the specter of waiver will likely be forced to raise all possible issues in the "statement of position." As a result, the NPRM's statement-of-position requirement presents a significant risk that the

employer will follow the approach of civil defendants in lawsuits and raise every potential issue to avoid the risk of waiver. Doing so would only extend, rather than accelerate, pre-election hearings.

Another likely—and unwelcome—consequence of the statement-of-position requirement would be a reduction in the number of election agreements between employers and employees. Current Board procedures have resulted in election agreements in approximately 90 percent of cases. *See* NLRB General Counsel, Summary of Operations (Fiscal Year 2012), GC Mem. 13-01, at 5 (Jan. 11, 2013). These agreements increase the likelihood that representation elections will be processed faster than the Board guidelines require. Additionally, such agreements are less likely to be contested and extensively litigated, resulting in elections that—whatever the outcome—have less of an adverse impact on employers and employees. With the short deadlines and draconian potential impact of issue preclusion, the likelihood of an adversarial process increases, and the likelihood of a stipulated election agreement decreases. Instead of achieving the goal of streamlined and more efficient election procedures, the NPRM appears to undermine its very intent.

The 20-Percent Rule.

Another central change brought about by the NPRM is the so-called "20-percent rule," which would require the hearing officer at an election to close the hearing and the regional director to direct the election when the only issue in dispute involves the voter eligibility of less than 20 percent of the voting unit. The likely result of the 20-percent rule is that an election would occur with the voter eligibility and unit placement of those individuals in doubt, only to be resolved in the event that their votes would determine the outcome of the election, in which case a post-election hearing would be held to the detriment of the NPRM's goal of shortening the election process.

Accordingly, the likely result of the proposed rule change is that the dispute will have been prolonged, with the status of the employees in question remaining unresolved. Not only does this increase labor tension in the workplace and for specific individual employees, but it also is contrary to the Act's goals of "encouraging practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151. Moreover, the 20-percent rule will create confusion among the eligible voters regarding the composition of the employee bargaining unit. In short, how will an employee make a free and informed choice about whether to vote for the union when the employee does not even know which of his co-workers will be included in the bargaining unit?

Conflicts with the Administrative Procedure Act.

The Board's proposed rule is also flawed in that it conflicts with portions of the Act and, in so doing, likely violates the Board's rulemaking authority under Section 6 and Section 706(2)(A) of the Administrative Procedure Act, which requires that any rule promulgated by the Board must not: (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise in violation of law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). Specifically, by limiting the scope of the pre-election hearing so drastically and allowing the regional director or hearing officer to deny the non-petitioning party a meaningful pre-election

hearing through the 20-percent rule, the proposed rule is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold "an appropriate hearing" prior to an election.

Denial of Proper Oversight.

Additionally, not only does the NPRM make substantial changes to the rules of representation cases, but it also divests employers of the right to review decisions made under those new rules. The proposed rule strips from employers any right to review the hearing officer's determinations prior to and, in nearly all cases, even *after* an election. Instead, if an employer believes that the election was improper, the fastest avenue to review will be to refuse to bargain—clearly contrary to the Act's goals of resolving disputes—and to litigate the resulting Section 8(a)(5) violation before an administrative law judge, the Board and, finally, a U.S. court of appeals. In that instance, again, the NPRM's goal of saving time is thwarted.