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The Honorable John Kline, Chairman
U.S. House of Representatives
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

March 2, 2014

Re: Written Statement of William L. Messenger

Dear Chairman Kline.

Thank you for the opportunity to testify before the Committee on Education and the Workforce regarding the Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule. Please accept the following as my written statement for inclusion in the hearing record: the comments of the National Right to Work Legal Defense Foundation in opposing the NLRB's proposed rule.

Sincerely,

/s/ William L. Messenger
William L. Messenger

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August 18, 2011 *Via Electronic Filing*

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Comments of the National Right to Work Legal Defense Foundation Regarding Proposed Amendments to the Board's Rules Governing Representation Case Procedures (76 Fed. Reg. 36,812; RIN 3142-AA08)

Dear Mr. Heltzer:

Please accept the following comments of the National Right to Work Legal Defense Foundation regarding the National Labor Relations Board's proposed amendments to its rules governing representation case procedures, 76 Fed. Reg. 36,812 (June 22, 2011) (RIN 3142-AA08).

The Foundation is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. Foundation attorneys represent individual employees in cases involving both representation and decertification elections, as well as in cases involving employees' right to hold a deauthorization election to rescind the compulsory unionism clauses governing their employment. Cases in which Foundation attorneys are or have been involved include *Rite Aid/Lamons Gasket*, 355 N.L.R.B. No. 157 (Aug. 27, 2010); *Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004); *Covenant Aviation Security*, 349 N.L.R.B. 699 (2007); *Albertson's/Max Food Warehouse,* 329 N.L.R.B. 410 (1999). Among many other important cases litigated before this Board, Foundation attorneys secured employees' right to demand a secret-ballot election as a means of challenging suspect card-check recognitions in *Dana Corp*., 351 N.L.R.B. 534 (2007).

The Foundation strongly opposes the proposed rules because:

(1) the shortened time-frame for representation elections will adversely affect the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampers the ability of employees opposed to union representation to organize themselves in opposition to unions;

(2) the providing of employees' personal contact information—to include their phone numbers, email addresses, and work times—to a union, and thus potentially to their co-workers and other individuals with whom the union shares its information, invades employees' right to privacy and places them in danger of harassment or worse; and

(3) the Board not determining the proper scope and composition of a bargaining unit if less than 20% of the unit sought by a union is disputed conflicts with § 9 of the Act.

The Foundation further proposes two amendments to the Board's representation procedures, which should be adopted as common sense reforms even if the proposed rules are not adopted:

(1) the Board's so-called "blocking charge" policy should be repealed so that any allegations of unfair labor practices are resolved post-election, to end the routine union tactic of using frivolous unfair labor practice charges to delay employee votes when the union fears that it may lose the vote; and

(2) the Board should eliminate the ability of petitioners to withdraw election petitions after they are filed. The Board should always conduct an election after a proper election petition is filed, to end the routine union tactic of calling off or delaying secret-ballot elections when a union fears that it may lose the election that it requested.

I. Although Section 7 Equally Protects Employees' Right to Join or Oppose a Union, the Proposed Rule Unduly Restricts the Ability of Employees to Learn About the Union and Oppose Unionization If They So Choose.

The proposed rules' chief purpose is to shorten the time frame from the filing of a petition to the date on which an election is conducted. Under the proposed rules, elections will be conducted in approximately 10-21 days, as compared to the recent median time frame of 38 days from the filing of the petition. 76 Fed. Reg. at 36,831 (Hayes, dissenting). This shortened time-frame will adversely affect the right of employees to educate themselves about the merits or demerits of monopoly union representation and, if they choose, to organize themselves in opposition to the union.

The Supreme Court recently recognized that the NLRA grants employees an implicit "right to receive information opposing unionization." *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008). Indeed, in enacting Sections 7 and 8(c) of the NLRA, Congress intended to foster "'uninhibited, robust, and wide-open debate'" regarding unionization. *Id.* (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). In other words:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967); *see NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

The proposed rules are deliberately calculated to minimize the time that employees have to receive information from their employer and elsewhere about the potential drawbacks of monopoly union representation, and thus make an informed choice to accept or reject unionization. Because the union initiates an organizing campaign and controls the timing of the filing of the election petition, employees will doubtlessly be fully exposed to union blandishments and propaganda. Unions will have their literature and talking points prepared and disseminated in advance of requesting any election. But employees will have little opportunity to hear opposing viewpoints.

The result is a less-informed electorate, as employees will be unable to fully educate themselves about unionization before being forced to vote on the issue. *See*, *e.g.*, *Healthcare Ass'n v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006) ("It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly[,] hindering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes.").

Moreover, those who oppose unionization will have insufficient time to organize themselves in opposition to the union and share their beliefs with their co-workers. This grossly tilts the playing field in the union's favor in representation elections, as a union requesting a certification election will certainly prepare and organize itself well in advance of the time that it files an election petition with the Board. The short time frame under the proposed rules will make it extremely difficult, if not impossible, for individual employees opposed to unionization to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

In short, the Board majority threatens to turn the Act's policies on their head by devising rules that place union officials' self-interests above employees' statutory right to make a fully informed choice regarding unionization. "By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). "[W]hat the statute was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a

bargaining agent of their own choosing." *NLRB v. Red Arrow Freight Lines*, 193 F.2d 979, 981 (5th Cir. 1952). The proposed rules fly in the face of these principles, and thus must be withdrawn.

II. Providing Employees' Personal Information to Unions and, Thus, Their Supporters Invades Employees' Privacy and Places Them in Danger.

The proposed rules require employers to give a petitioning union, within two-days after an election is directed, an electronic list of all employees' telephone numbers, email addresses, work shifts, classifications, and locations. This will be a gross invasion of employees' privacy that subjects employees to the danger of harassment or worse from union agents or supporters.

A. *The Contemplated Disclosure of Employees' Personal Information to Unions Violates Employees' Right to Personal Privacy*

1. Most employees would be appalled to learn that a government agency is contemplating compulsory disclosure of their personal information to a private special interest group *for the purpose* of making it easier for that group to cajole, induce or harass them to support its agenda. Over 93% of private sector employees have chosen not to associate themselves with unions.[1] Only a minority of Americans have favorable views of unions.[2] Many, if not most, Americans do not support the far left-wing agenda that union officials aggressively advance.[3] For this agency of the Obama Administration to compel disclosure of individuals' personal information to these unpopular and politicized special interest groups is indefensible, and functionally no different than the Administration requiring disclosure of citizens' information to ACORN or Greenpeace so as to facilitate their abilities to advance their narrow agendas.

Indeed, the contemplated disclosures run contrary to federal efforts to protect the privacy of citizens' personal phone numbers and email addresses. In 2003, Congress enacted the Do-Not-Call Implementation Act, Public Law No. 108-10, 15 U.S.C. § 6101 *et. seq*., pursuant to which the

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[1] *See* Dept. of Labor, Bureau of Labor Statistics Economic News Release, *Union Member Summary*, USDL-11-0063 (Jan. 21, 2011) (6.9% of private sector employees were union members in 2010) (available at http://www.bls.gov/news.release/union2.nr0.htm).

[2] *See* Pew Research Poll (Feb. 17, 2011) (unions viewed favorably by 47% of public, unfavorably by 39%) (http://people-press.org/2011/03/03/section-4-opinions-of-labor-unions/).

[3] *See, e.g*., http://www.teachersunionexposed.com/dues.cfm ("When teachers were given the chance to opt out of paying for the political causes of education unions, the number of teachers participating in Utah dropped from 68 percent to 6.8 percent, and the number of represented teachers contributing in Washington dropped from 82 percent to 6 percent.").

Federal Trade Commission and Federal Communication Commissions' created a national "Do Not Call" registry to allow citizens to opt out of unwanted telemarketing solicitations.[4] In the same year, Congress also enacted the CAN-SPAM Act, Public Law No. 108-187, 15 U.S.C. § 7701 *et seq*., to protect individuals from receiving unsolicited email communications.

Notably, the disclosure of employees' personal information will occur absent any stated intent or desire whatsoever by these employees to make their home phone numbers, email addresses, and work times available to a union. Indeed, the compelled disclosure will occur even if the employees strongly object to the disclosure, because there is no opt-out mechanism in the proposed rules. Nor could there realistically be such an opt-out considering the extremely short time frame in which the employer must give up the employees' information. Thus, employees who might have qualms about a union obtaining their phone numbers and personal email addresses, and learning where and when they work—and this would include most sensible employees given some unions' long association with violence and intimidation—would have no way to protect their privacy.

2. The proposed rules purport to limit the contemplated invasion of employees' privacy by requiring that unions can only use employees' personal information for "purposes related to the representation proceeding and related Board proceedings." 76 Fed. Reg. at 36,838. This ostensible restriction is both meaningless and unenforceable.

First and foremost, the restriction does nothing to stop the intended invasion of employees' privacy—*i.e.*, union operatives and supporters calling and emailing employees, tracking their movements to and from work, and visiting their homes to cajole or coerce them to support the union in an election (or to secure enough authorization cards to allow a "card check" and thereby avoid an election). Employees who take measures to protect their personal privacy—such as by not listing their telephone numbers or limiting with whom they share their email addresses—will find their attempts at privacy upended by the compulsory disclosure of detailed personal information to an outside third-party—one that the employees may vehemently oppose.

Second, the phrase "related to the representation proceeding and related Board proceedings" is as vague as it is broad. It could be interpreted to include *any* union use of information that regards concerted activity under the Act, as *all* such activities could potentially result in a "Board proceeding." This includes using the information to drum up unfair labor practice charges against the employer, which is a common tactic in union corporate campaigns.[5] The information could also be used by a union to obtain voluntary recognition from the employer, which could result in unfair

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[4] *See, e.g.*, http://www.ftc.gov/bcp/edu/microsites/donotcall/index.html *and* https://www.donotcall.gov.

[5] *See*, *e.g.*, *Pichler v. UNITE*, 542 F.3d 380, 383-84, 395-86 (3d Cir. 2008).

labor practice proceedings or a *Dana* election proceeding (unless the current Board majority overrules that decision).

Third, the proposed restriction is unenforceable as a practical matter. How will the Board or anyone else be able to determine exactly how a union uses employees' personal information? How would the Board enforce this restriction? Through a feckless unfair labor practice prosecution? And what sanctions could it realistically levy for misuse of the information? Absent the unusual circumstance of an internal union whistle blower or an odd happenstance, it will be impossible to determine how the union used the information and with whom it shared that information. Thus, it will be impossible to effectively sanction such a miscreant union or one of its rogue supporters.

One need not look far to see that union officials are predisposed to ignore any restriction placed on their use of employees' personal information. Union indifference to employees' privacy rights is exemplified by the recent conduct of UNITE officials. The Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq*., makes it a federal crime for any person knowingly to obtain or disclose personal information from a motor vehicle record, subject to certain limited exemptions. Yet, even this prohibition did not deter UNITE from not once, *but twice*, engaging in systematic and widespread efforts to obtain employees' personal information by covertly copying their license plate numbers and illicitly accessing their motor vehicle records. *See Pichler v. UNITE*, 446 F. Supp. 2d 353, *judgment modified*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), *aff'd*, 542 F.3d 380 (3d Cir. 2008); *Tarkington v. Hanson & UNITE*, Docket No. 4-00-CV-00525 (E.D. Ark. 2000). Considering that unions such as UNITE are willing to blatantly disregard federal statutes that prescribe criminal penalties and significant liquidated damages in order to obtain and use personal information about employees, the notion that unions will refrain from misusing employees personal information based on whatever paltry sanctions the Board majority postulates borders on the laughable.

B. *The Contemplated Disclosures Will Place Employees in Personal Danger from Individuals with Whom a Union Shares Their Personal Information*

1. Even worse than the danger that arises from union use of employees' personal information is the danger posed to employees by misuse of the information by individuals with whom the union shares their information. In election campaigns, unions operate through their agents and supporters. This often includes individuals who are employed at the workplace targeted for unionization. Given that the Board majority's purpose for forcing employers to provide unions with employees' personal information is to facilitate union contact with employees, *see* 76 Fed. Reg. at 36,820, it is both intended and foreseeable that unions will share employees' personal information with their agents and supporters, including the employees' co-workers who support unionization.

Once a union shares employees' personal information with its supporters, those individuals can and likely will misuse this information to the detriment of the employees. The potential for harassment, unwanted sexual advances, identity theft, and property crime are readily apparent.

Harassment. Militant union supporters could easily use personal information to retaliate against individuals who dare oppose the union that they support— incessant and late night phone calls, threatening emails, using the email addresses to sign employees up for spam or malware, and the theft or destruction of their property when they are not at home. For example, UPS employee Rod Carter began to receive threatening late night phone calls following his opposition to a strike by the Teamsters, and was ultimately stabbed with an ice pick by Teamsters militants who tracked his driving route.[6] Of course, union supporters can also use employees' personal information to harass those against whom they have a personal grudge.

Such harassment can occur both with and without the union's knowledge. It can also continue long after the election proceeding ends, for a union has no way to fully retrieve the information that it shares with its supporters (who can simply copy it).

Sexual Harassment. It is unlikely that women in many workplaces will feel comfortable knowing that their personal email addresses, telephone numbers, and when they get off work will be made known to any co-worker or stranger who supports the union's campaign. These individuals can plainly misuse that information to make unwanted sexual advances, and to stalk those who refuse their advances. Indeed, with current technology, an individual's physical movements can even be tracked via their cell phone if their cell number is known.[7]

Sexual harassment is already a well-recognized problem within the workplace. Facilitating the spread of employees' personal information amongst the workforce, as the Board's proposed rule will, can only serve to exacerbate the problem.

Identity theft. A certain result of the Board compelling the disclosure of electronic lists of employees' personal information is identity theft. This is the fastest growing white collar crime in

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[6] *See* http://articles.latimes.com/2001/apr/13/business/fi-50418, last accessed July 14, 2011.

[7] *See* Justin Scheck, *Stalkers Exploit Cell Phone GPS*, WALL STREET JOURNAL (Aug. 3, 2010) ("researchers with iSec Partners, a cyber-security firm, described in a report how anyone could track a phone within a tight radius. All that is required is the target person's cellphone number, a computer and some knowledge of how cellular networks work . . . .") (available at http://online.wsj.com/article/SB10001424052748703467304575383522318244234.html).

the country, and can exact devastating harms on its victims.[8] An electronic list that contain dozens or hundreds of employees' names, addresses, phone numbers, email accounts, employers, and job descriptions is tailor-made for identity theft.

For example, agents of Communication Workers of America Local 1103 in Connecticut recently used personal information that they attained about Patricia Pelletier to sign her up for hundreds of unsolicited and unwanted magazines and consumer products in retaliation for her petitioning for a decertification election.[9] Not only was Pelletier forced to spend several hours each day canceling individual subscriptions and products, but she was billed for thousands of dollars by unwitting marketers and publishing companies, jeopardizing her credit rating and causing her severe emotional distress. With access to employees' detailed personal information, union militants can easily subject other employees to the same or similar types of retaliatory harassment.

Equally dangerous is the identity theft that will occur without the union's knowledge. Because unions cannot control how their agents and supporters will use the personal information provided to them, they cannot prevent their supporters from innocently or inadvertently sharing the information with others who may have wrongful inclinations.

Property Crime. Providing information regarding employees' work schedules and shifts also will facilitate the theft of employees' property and the burglary of their homes. To know when someone is at work is to know when they are not at home, and thus leaves them susceptible to home invasion. If the proposed rule goes into effect, any union agent or supporter—or anyone with whom the agent or supporter shares the information—will gain knowledge of employees' home addresses and times when they are not at home.

2. There is no rule or restriction that the Board can impose on unions to eliminate these dangers to employees' well-being, because they can and will occur without the union's intent or knowledge. The dangers are inherent in the union sharing employees' personal information with its agents, supporters and employees' co-workers—which is the inevitable and intended result of the disclosures. Once a union shares employees' personal information with its supporters, the union: (1) cannot control how these individuals will use the information; (2) cannot control with whom they

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[8] *See*, *e.g.*, Nick K. Elgie, *The Identity Theft Cat-and-mouse Game: an Examination of the State and Federal Governments' Latest Maneuvers,* 4 I/S: J. L. & Pol'y for Info. Soc'y 621, 622-23 (2008).

[9] *See Patricia Pelletier v. CWA, Local 1103*, Case No. Cv-08-5021589-S (Conn. Sup. Ct. 2010); *CWA Communications Workers of America & Its Local 1103 (Connecticut Student Loan Foundation)*, N.L.R.B. Case No. 34-CB-3017.

will share the information; and (3) cannot take the information back if it is misused or after the organizing campaign ends. The "cat" is forever out of the proverbial "bag."

For example, assume that a union shares employees' addresses, phone numbers, email addresses, and work times with several of its supporters. Even if the union shared the information solely to facilitate its organizing campaign, the end result is the same—employees' personal information is now in the hands of individuals who may have their own agendas. These individuals can use this information to stalk a co-worker or engage in identity theft. Even if the union supporters are not themselves miscreants—their associates or teenage child who likes to hack computers may be a different story.

In sum, the only way to protect employees' privacy and safety in the first place is not to compel disclosure of their personal information to unions. Employees' privacy and safety must come before union self-interests in acquiring more dues-paying members.

III. Not Determining the Proper Scope of a Bargaining Unit If Less Than 20% of the Unit Sought by a Union Is Disputed Conflicts with § 9 of the Act.

The proposed rules require that the proper scope of a bargaining unit not be determined before an election if less than 20% of the proposed unit is in dispute. 76 Fed. Reg. at 36,823-36,824. Instead, an election is to be conducted with the disputed employees voting subject to challenge. *Id*. The dispute regarding the proper scope of the unit is to resolved only if the challenged votes affect the election's outcome. *Id*. If the union wins the election irrespective of the challenged votes, the Board will certify the union as the representative of a bargaining unit that includes the disputed employee classifications without determining whether that unit is appropriate. *Id*. at 36,824. This proposal violates the statutory requirements of § 9 of the Act in at least two respects.

First, the Board cannot determine whether there is a question concerning representation under § 9(c)(1) without knowing the size and composition of the bargaining unit. Section 9(c)(1) requires that, after a petition is filed

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1). The Board has long required a showing of interest signed by at least 30% of the employees in a bargaining unit to support an election petition. *See* Casehandling Manual (Representation), Sections 11020-11042.

Obviously, the Board cannot determine if 30% of a bargaining unit desires an election if it does not first determine how many employees are in the unit. For example, assume that a union petitions for an election in a unit that it alleges contains 100 employees based on showing of interest signed by 31 employees. The employer contends that a proper unit contains 118 employees. If the employer is correct, the union lacks the 30% showing necessary to establish a question concerning representation. Nevertheless, under the proposed rules, the Region will not resolve the dispute because the 18 disputed employees are less than 20% of the unit. Rather, it will direct an election without first determining if a question concerning representation exists, as § 9(c)(1) requires, and the faulty showing of interest will never be rectified. In effect, the Board now proposes to lower the threshold for a showing of interest for certification elections to less than the traditional 30%.

Indeed, if these proposed rules come into effect, unions will deliberately seek to exploit them in the manner described above. If a union lacks the necessary 30% showing of interest to properly obtain an election, it can simply file a petition for a unit that is 20% smaller, no matter how glaringly inappropriate the proposed unit. When the employer asserts that the unit is inappropriate and under-inclusive, the Region will never bother to determine if there exists an adequate 30% showing of interest or a true question concerning representation. Instead, it will mindlessly direct an election in the ersatz unit.

Second, § 9(b) of the Act requires that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). But under the proposed rules, if less than 20% of the bargaining is in dispute, the Board will *not* determine the unit appropriate for collective bargaining if the union wins an election by a margin that makes the votes of employees in the disputed portions of the unit irrelevant to the electoral outcome. Instead, the Board will blindly certify the union as the representative of a unit that includes the disputed employee classifications, without ever determining if those classifications are properly part of the unit. The Board majority's comments to the proposed rules expressly contemplate this result:

> If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.

76 Fed. Reg. at 36,824.

For example, assume that a union petitions for an election in an asserted unit with three job classifications and 118 employees. The employer contends that the unit is improper because one job classification that contains 18 individuals consists of supervisors. Under the proposed rule, the Board will conduct the election without resolving the "scope of the unit" issue because it concerns less than 20% of the unit. If the union wins the election by a margin that renders the votes of the 18 disputed-individuals irrelevant to the electoral outcome, the Board will blindly certify the union as the exclusive representative of all three job classifications—to include the 18 individuals who might be supervisors —without ever resolving if that unit is proper.

The Board majority's deliberate refusal to determine the proper scope of the unit in this circumstance is plainly inconsistent with not only § 9(b), but also § 9(a).[10] Indeed, both Supreme Court[11] and Board[12] precedent are clear that a precisely defined "bargaining unit" is at the heart of the Act's structure. Nowhere in the NLRA's text or history is there any evidence that Congress wished to permit an erroneous class of workers (equaling up to 20%) to be included in a bargaining unit even if those workers have no real connection to the unit. "[T]he Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law' it must be reversed." *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 171-2 (1971) (citations omitted).

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[10] Section 9(a) provides that only "representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a) (emphasis added).

[11] *See*, *e.g.*, *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) ("Section 9(b) of the Act vests in the Board authority to determine 'the unit appropriate for the purposes of collective bargaining.' . . . . The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a 'community of interest.' A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." (citations omitted)).

[12] *See*, *e.g.*, *Chester Valley, Inc.*, 251 N.L.R.B. 1435, 1450 (1980) ("Because of this substantial deviation between the appropriate unit and the unit specified in the . . . bargaining demand, that demand was not a proper request to bargain."); *Motown Record Corp.*, 197 N.L.R.B. 1255, 1261 (1972) ("In order to impose a bargaining duty upon an employer, the union's demand should clearly define the unit for which recognition is sought.").

The Board's proposed "20%-is-close-enough" rule also demonstrates a callous disregard for the rights of the individuals within the disputed portions of the unit. The Board majority will subject these persons to monopoly union representation (and, likely, forced union dues obligations), without bothering to determine if they share a community of interest with the rest of the unit, or even if they are statutory employees.

The Board's intended refusal to determine a proper bargaining unit when the votes of the disputed portions do not affect an election will provide unions with a strong incentive to file petitions that encompass supervisors and/or inappropriate job classifications because it presents them with a "no lose" situation. Consider the three possible outcomes of this gambit under the proposed rules:

(1) If the union wins the election irrespective of the challenged votes, it benefits because it will become the exclusive representative of supervisors and/or inappropriate job classifications, as the Board will never determine the proper scope of the unit.

(2) If the union loses the election irrespective of the challenged votes, then the union is no worse off, as it would have lost the election amongst a proper unit anyway.

(3) If the union will win the election if some or all challenged votes are not counted, then the union can simply change its position and concede that those supervisors or inappropriately classified workers whose votes stand in the way of its certification are not part of the unit.

As is readily apparent, the proposed rules give unions every incentive to abuse the representation process, game the system, and make repeated attempts at becoming the exclusive representative of individuals who would not be considered part of a proper bargaining unit if the Board actually adjudicated the issue.

Overall, the Board majority seeks to enshrine in its rules the principle that being up to 20% wrong is "close enough for government work" when determining whether there is a question concerning representation and whether a bargaining unit is appropriate under the Act. But this huge margin of error is not "close enough" under NLRA § 9. Indeed, the courts have consistently refused to enforce Board orders when there is an appreciable difference between the scope of the unit during the election and that ultimately certified. *See*, *e.g.*, *NLRB v. Beverly Health & Rehab. Servs*., 120 F.3d 262 (4th Cir. 1997) (unpublished) (unit differed by 20%); *Nightingale Oil Co. v. NLRB*, 905 F.2d 528, 531 (1st Cir.1990) (units differed by 10%); *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506-08 (2d Cir.1986) (units differed by 10%); *cf. NLRB v. Lorimar Prods*., 771 F.2d 1294 (9th

Cir.1985) (units differed by a third); *Hamilton Test Sys. v. NLRB*, 743 F.2d 136 (2d Cir.1984) (units differed by more than half).[13]

In sum, Congress enacted § 9 of the Act to give the Board a clear duty to determine whether a question concerning representation exists, as well as a clear duty to determine with precision the size and composition of a proper bargaining unit. The Board cannot neglect its duties and declare that anything within a 20% margin of error is "close enough for government work," thereby rushing elections for the sole benefit of union officials seeking more compelled dues payors.

IV. The Board's "Blocking Charge" Policy, Which Allows Unions to "Game The System" in Decertification Cases, Must be Eliminated.

The Board majority claims the proposed rules are justified because of the need to "eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results." 76 Fed. Reg. at 36,817. The Board also justifies pushing many current pre-election issues to post-election hearings because "Congress did not intend the hearing to be used by any party to delay the conduct of the election." *Id*. at 36,822. To the extent that these rationales have any validity, then the Board's blocking charge policy must also be eliminated, because it provides unions with an unfettered license to "game the system" and interminably block and delay decertification elections by raising issues that are better left to post-election challenges. Congress clearly did not intend for this result, since it did not legislate "blocks" to elections. Rather, the Board has created such "blocks" in its own discretion.

The Foundation, therefore, proposes that the Board's blocking charge policy be eliminated, and that all decertification elections should go forward and the ballots be counted notwithstanding any previous or contemporaneous unfair labor practice charges. Any allegations in such charges can and should be litigated as post-election challenges/objections. In no case should unfair labor practice charges be allowed to block or delay a decertification election sought by employees. Moreover, ballots should not be impounded because of such charges.

The Foundation's staff attorneys know from decades of personal experience that the first reaction of almost every union facing a decertification petition is to spend .44 cents and mail to the Regional office a "blocking charge," no matter how frivolous. How could it be any other way, because every

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[13] These cases are not distinguished by the Board majority's assertion that, under the proposed rules, employees would not be misled as to the proper scope of the unit because the disputed employee classifications would be voting subject to challenge, 76 Fed. Reg. at 36,824. This does not change the fact that the Board will not actually determine whether the disputed employee classifications are properly within the bargaining unit unless those votes are actually challenged as affecting the electoral outcome.

incumbent (whether a union or politician) wants to remain in power and will do whatever is necessary to block or delay the day of electoral reckoning. We ask the Board to review its own statistics and determine the percentage of decertification elections that are subject to a blocking charge or similar delay. We expect the number to be astronomically high given our experience with unions routinely "gaming the system" to block and delay such elections.

The Board's Casehandling Manual Section 11730 states laudably that "it should be recognized that the [blocking charge] policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." However, the blocking charge policy is consistently misused by unions for just this purpose. This abuse of the process occurs regularly and has been going on for decades. We ask the Board to take administrative notice of the record in just a few recent or currently pending cases, which are examples of the misuse:

(1) *Metal Technologies, Inc., United Steelworkers Local 2-232, and Pamela J. Wichman (Employee)*, Case No. 30-RD-1526: The decertification petition was filed on November 17, 2010, but blocked until June 2011 by unfair labor practice case 30-CA-18806 (filed by the union on November 23, 2010, just 6 days after the petition). The election *may* occur in August 2011, if no more blocking charges are filed.

(2) *Scott Brothers Dairy/Chino Valley Dairy Products, Teamsters Local 63, and Chris Hastings (Petitioner)*, Case No. 31-RD-1611: The union has filed a long series of unsuccessful unfair labor practice charges, including 31-CA-29944, in an effort to stall the election. The election was held in May 2011, but the ballots remain impounded by additional charges. The union consequently remains as bargaining agent despite grave doubts as to its majority status.

(3) *Cortina's Painting, International Union of Painters & Allied Trades District Council 5 ("IUPAT"), and Sergio Martinez Santos (Petitioner)*, Case No. 19-RD-3890: This decertification petition was filed on March 2, 2011. IUPAT has blocked two previously scheduled elections by filing a series of unfair labor practice charges against Cortina's Painting, the latest in June. An election has again been scheduled for August 19. In all, union blocking charges have delayed an election for almost six months despite clear evidence that a majority of the employees no longer support the union.

(4) *SEIU District 1199, Community Support Services, and Susan Ritz (Petitioner)*, Case No. 8-RD-02179. This decertification petition was filed in February 2010 (after a prior one in 2008 was blocked), but no election was held until February 2011 due to additional blocking charges.

These are just a few examples of unions' misuse and abuse of the blocking charge policy. The Board has recognized that such "blocking charges" serve to deny employees their fundamental § 7 rights. *See Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004). Nonetheless, in practice the Board

routinely imposes such "blocks," forgetting that the Act's fundamental and overriding principle is employee free-choice and "voluntary unionism," not the entrenchment of incumbent union officials. Because any "bar" to a decertification election deprives employees of rights expressly granted to them under the Act, *see* §§ 7 and 9(c)(1)(A)(ii), all such "bars" should be strictly and narrowly construed. *See Saint-Gobain Abrasives*; *Waste Management of Maryland*, 338 N.L.R.B. 1002 (2003) ("a finding of contract bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative").

Employees enjoy a statutory right to petition for a decertification election under§ 9(c)(1)(A)(ii) of the NLRA. But that right is trampled by arbitrary "bars" or "blocking charges" which prevent the expression of true employee free choice. Indeed, most of the Board's "bars" and "blocking charge" rules stem from discretionary Board policies, which should be reevaluated when industrial conditions warrant. *See Dana Corp.*, 351 N.L.R.B. 434 (2007); *IBM Corp.*, 341 N.L.R.B. 1288 (2004). It is long past time for the Board to drastically alter, if not end, its "blocking charge" rules.

Employee free choice under § 7 is the paramount interest the NLRA is intended to advance. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act"). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *Levitz Furniture Co.*, 333 N.L.R.B. 717, 725 (2001) ("Board elections are the preferred means of testing employees' support"). This right of *employee* free choice should not be sacrificed by allowing unions to "game the system" by blocking elections with unsupported allegations that an employer committed an infraction of the law.

For this reason, the Board's "blocking charge" practice has faced severe judicial criticism. *See*, *e.g.*, *NLRB v. Gebhard-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968); *NLRB v. Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960). Judge Sentelle's concurring opinion in *Lee Lumber*, 117 F.3d at 1463-64, highlights the unfairness of the Board's policy:

> As the court today notes in discussing the imposition of the bargaining order, "employee 'free choice' ... is a core principle of the [National Labor Relations] Act." (citing *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir.1996)). However, in cases like the present one, the Board, in the face of that core principle, presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union's strength by the employers' apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case. Consider anew the facts before us. In 1990, 85.7 percent of the

employees of the bargaining unit signed a petition asking for a chance to exercise their free choice. Seven years later, those employees still have not had the election they sought because the Board presumes that the employers' refusal for a few days to bargain with the Union thoroughly fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board.

Instead of arbitrarily blocking elections and treating employees like children, the Board should conduct elections in all decertification cases without delay. Employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. *Id*. Even in where employers commit an unfair labor practice, the Board's "blocking charge" rules are arbitrary and anti-democratic because they halt decertification elections without regard to the desires of the employees, based upon "the sins" of the employer. *Overnite Transp. Co.*, 333 N.L.R.B. 1392, 1398 (2001) (Member Hurtgen dissenting). This does nothing but unfairly entrench incumbent unions.

In sum, the Board must end the misuse and abuse of blocking charges by NLRB Regional Offices and incumbent unions bent on clinging to power. The Board's rule should be amended to provide that unfair labor practice charges will not block an election, but instead will be considered (if deemed sufficiently meritorious by the General Counsel) in conjunction with any objections to the outcome of the election.[14]

V. The Board Should Amend Its Rules So That Petitioners Cannot Prevent the Board from Conducting Otherwise Valid Elections by Withdrawing Petitions.

When unions believe that employees will vote against them in the voting booth, they resort to a common and unsavory tactic: simply cancelling the election by withdrawing their election petitions. Roughly *one-third* of all union representation petitions are withdrawn by the union before

[14] The Board posited nine different options concerning the current blocking charge policy. 76 Fed. Reg. at 36,827-36,828. Option Number 8, to ban blocking charges, is the best course. However, if the Board does not scrap entirely the current policy, it should at least require unions filing unfair labor practice charges in the face of an election petition to simultaneously offer proof and provide immediate access to its witnesses so the Region can expeditiously investigate the charges. In no event should the election be delayed or cancelled, or the ballots impounded, while this investigation occurs.

an election occurs.[15] This union practice of effectively "taking their ball and going home" whenever defeat is likely must be halted.

First and foremost, unions already enjoy a great electoral advantage by being able to control if and when they petition for an election. This enables unions to time the election for when they believe their support will be at its peak. It also enables unions to effectively marshal their resources and organize their campaigns. By contrast, employees and employers are in the dark about exactly when the union blow will fall upon them.

To compound this electoral advantage with the ability to unilaterally withdraw an otherwise valid election petition if the union fears defeat, and potentially re-file the petition later when conditions improve, is grossly unfair. It is akin to giving an incumbent President the ability to control not only the date of the next presidential election—which he would of course time to coincide with a favorable political environment—but also to cancel the election if the political winds unexpectedly shift against him, and then reschedule at a different more advantageous time.

Second, union withdrawal of election petitions advances neither the NLRA's core policy of effectuating employee freedom of choice, nor its subsidiary policy of improving "industrial stability." If there is a question concerning representation amongst employees under § 9 of the Act, resolving that question with an election—one way or the other—clearly advances both policies. Indeed, this is very reason for the existence of election procedures under § 9 of the Act. In contrast, not resolving a legitimate question concerning representation merely because a union fears that employees may exercise their § 7 rights to refrain from representation impairs both employee freedom of choice and industrial stability.

Finally, the Board majority should limit the ability of unions and other petitioners to withdraw valid election petitions because of the impact of some of the other proposed rules. For example, the mandatory disclosure of limited information about employees *before* an election hearing, and the mandatory disclosure of their detailed personal information two-days *after* an election hearing, dictates that unions *not* be permitted to unilaterally cancel the election after receiving this personal information. Otherwise, unions will surely engage in the loathsome tactic of petitioning for an election just to obtain private information about employees, but then withdraw the petition and use that private information to facilitate a corporate campaign against the employer or for other nefarious purposes. If unions are given automatic access to detailed personal information about employees within nine days after filing a petition—which is what the rules contemplate—it is imperative to prevent them from using that private information for purposes other than the election itself.

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[15] According to the Board's statistics, the following percentage of RC petitions were withdrawn over the past five years: 30% in 2010; 31% in 2009; 32% in 2008; 43% in 2007; 36% in 2006; and 40% in 2005. *See* http://www.N.L.R.B..gov/rc-elections-bar-chart#chart1bar.

For these reasons, the Board's regulations should be modified to effectively prohibit unions and other petitioners from withdrawing otherwise valid election petitions. The rules should provide that, when an election petition is filed, the Region *shall* determine whether a question concerning representation exists, conduct an election if such a question exists, and certify the results thereof *irrespective* of the petitioner's further participation in the process.

CONCLUSION

Under the Act, "[u]nions represent employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting). In proposing these changes to its electoral policies, the Board majority seeks to stand this principle on its head by disadvantaging employees to satiate union self-interests. The proposed amendments to the NLRB's election rules must be rejected and the Board's blocking charge and withdrawal policies amended as described above.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

RJL/wlm