WRITTEN STATEMENT OF RAYMOND J. LAJEUNESSE, JR.,
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ON
The National Labor Relations Board's Failure to Fully Enforce Workers' Right to Refrain from Union Support under the National Labor Relations Act

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
Hearing on "Restoring Balance & Fairness to the NLRB"
Tuesday, February 14, 2017

Chairman Walberg and distinguished Members of the Committee:

Thank you for the opportunity to testify today.

My name is Raymond LaJeunesse. I am Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to workers who wish to exercise their rights to refrain from joining or assisting labor organizations and to freely choose whether or not to be represented by such organizations.

I have worked for the Foundation for more than forty-five years. I currently supervise seventeen Foundation staff attorneys who have represented thousands, of employees in unfair labor practice and representation cases before the National Labor Relations Board. Currently, Foundation attorneys represent workers in sixty-eight cases pending at the Board and in its various Regions.

I commend you for investigating the adequacy of the National Labor Relations Board's enforcement of the rights of individual workers under the

National Labor Relations Act to refrain from union associations. Unfortunately, the Board majorities President Obama appointed have in many respects denied or diminished those rights. In the time that I have today I can only highlight a few of the more important examples.

Forcing nonmembers to subsidize union politics.

In states without a Right to Work law that prohibits agreements requiring payment of union fees as a condition of employment, one of the most important rights that individual workers have is the right not to pay the part that represents the union's costs of political, ideological and other nonbargaining activity. That right was recognized in our victory in *Communications Workers v. Beck*, in which the U.S. Supreme Court affirmed a Fourth Circuit decision that under the NLRA objecting nonmembers cannot be charged a union's "'labor legislation' expenditures."[1] Moreover, in *Beck* the Supreme Court ruled that decisions as to what nonmembers can be charged as a condition of keeping a job under the Railway Labor Act are "*controlling*" under the NLRA;[2] and, in *Machinists v. Street* the Court held that the RLA does not authorize union officials to use objecting employees' "exacted funds to support" "the promotion or defeat of legislation,"[3]

[1] *Beck v. Communications Workers*, 776 F.2d 1187, 1210-11 (1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 487 U.S. 735 (1988).
[2] 487 U.S. at 745 (emphasis added).
[3] 367 U.S. 740, 769 & n.17 (1961).

Yet, in 2012, *United Nurses & Allied Professionals*, the Obama Board held that "[s]o long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors," even if the bills lobbied "would not provide a direct benefit to members of the" objectors' bargaining unit.[4] Worse, the Board majority proposed a "rebuttable presumption of germaneness" for legislation, such as minimum wage legislation, that "would directly affect subjects of collective bargaining."[5]

The Board retained jurisdiction in *United Nurses* to decide how it "should define and apply" this new "germaneness standard."[6] Four years later it still has not done so, and thus the Charging Party in *United Nurses*, who is represented by Foundation attorneys, has been unable to appeal the Board's decision. Moreover, two "Members" of the *United Nurses* majority were unconstitutional "recess appointees" under the Supreme Court's *Noel Canning* decision.[7] A request for reconsideration in *United Nurses* on that ground has been pending before the Board for almost three years.

Watering down nonmembers' procedural protections.

United Nurses also exemplifies another way in which the Obama Board has eviscerated nonmembers' rights not to pay for union activities other than

[4] 359 N.L.R.B 469, 475-76 (2012) (3-1 decision).
[5] *Id*. at 477.
[6] *Id*.
[7] *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2104).

bargaining and contract administration. The Supreme Court has held that if a union negotiates a forced unionism clause under the NLRA, it must notify workers that they may satisfy its "membership" requirement by not joining the union and only "paying fees to support the union's representational activities."[8] And, in *Teachers Local 1 v. Hudson*, the Court held that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," including "the major categories of expenses, *as well as verification by an independent auditor*."[9]

Yet, in *United Nurses* the Obama Board ruled that a union need not provide objectors with an auditor's verification, that it is sufficient if the union tells them that its figures were independently verified.[10] The Board majority explicitly declined to follow a directly contrary holding of the Ninth Circuit, *Cummings v. Connell*.[11] They argued that unions' conduct under *Beck* "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases such as *Hudson* and *Cummings*.[12] However, the D.C. Circuit had already explicitly rejected that argument in three cases, in two of which it reversed the Board.[13]

[8] *Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998).
[9] 475 U.S. 292, 306-07 & n.18 (1986) (emphasis added).
[10] 359 N.L.R.B. at 471.
[11] 316 F.3d 886, 890-92 (9th Cir. 2003).
[12] 359 N.L.R.B. at 471.
[13] *Penrod v. NLRB*, 203 F.3d 41,45 (D.C. Cir. 2000); *Ferriso v. NLRB*, 125 F.3d 865, 868-70 (D.C. Cir. 1997); *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995).

The Obama Board also has applied a lenient standard to a hurdle that union officials typically erect to make it difficult for nonmembers to exercise their right not to subsidize union political and other nonbargaining activities: the requirement that *Beck* objections be submitted during a short "window period"—typically a month or less—and be renewed every year. After three federal courts ruled that workers should be free to make objections that continue in effect until withdrawn,[14] the Obama Board reconsidered its earlier approval of annual objection requirements. But, instead of holding that annual objection requirements are per se unlawful, as the courts did, the Board decided to evaluate those requirements on a union-by-union basis "to determine 'whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.'"[15]

Applying that loose standard, the Obama Board upheld the United Auto Worker's annual objection requirement without even considering the union's purported justifications for it, finding that the burden the requirement imposed on nonmembers was "de minimis."[16] However, as Member Hayes said, dissenting, the burden of objection under the UAW's scheme "is plainly and decidedly not de minimis," because objecting employees

[14] *Seidemann v. Bowen*, 499 F.3d 119, 124-26 (2d Cir. 2007); *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000).
[15] *UAW Local #376*, 356 N.L.R.B. 1320, 1320 (2011) (2-1 decision) (quoting *Machinists Local Lodge 2777*, 355 N.L.R.B. 1062, 1062 (2010) (3-2 decision)), *vacated sub nom. Gally v. NLRB*, 487 F. App'x 661 (2d Cir. 2012).
[16] *Id.* at 1322.

> must undertake the affirmative task of writing and mailing a statement of continued objection each year; they must remember to do so before their 1-year objector term expires; and, if they fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures . . . for nonrepresentational purposes, for some period of time.[17]

Barring secret-ballot elections in "card-check" situations.

The Obama Board has not only failed to enforce fully workers' rights under *Beck* not to subsidize union political and other nonbargaining activities. Perhaps even more egregiously, it also has repeatedly undermined the right to refrain from union participation and support that NLRA section 7 guarantees workers.[18]

A union may become an "exclusive representative" of all employees in an appropriate bargaining unit, including those who oppose the union, in two ways. It may either win a Board-conducted secret-ballot election[19] or obtain the employer's recognition "based on a union's showing of majority support" on union authorization cards or a petition.[20] Either way, this creates a monopoly: exclusive representation "extinguishes the individual employee's power to order his own

[17] *Id.* at 1323.
[18] 29 U.S.C. § 157 (emphasis added) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any and all such activities* . . . ."
[19] 29 U.S.C. § 159(c)(1).
[20] *Dana Corp.*, 351 N.L.R.B. 434, 436 (2007).

relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[21]

The Act permits employees to petition for an election to decertify an exclusive representative, [22] but not within one year after a valid secret-ballot election has been held.[23] That statutory bar does not apply to voluntary recognition of a union. However, the Board in 1966 created a policy barring a decertification election after an employer recognizes a union until a "reasonable time" to negotiate a collective bargaining agreement has elapsed.[24] Another Board-created rule was that an agreement "executed during this insulated period generally bars Board elections for up to 3 years of the new contract's terms."[25]

By 2007 the Board had more experience as to how "card checks," which often are coercive, work in practice. That year, in *Dana Corporation*, the Board significantly increased the ability of workers to get rid of unwanted union representatives imposed on them by "card checks." To "achieve a 'finer balance' of interests that better protects employees' free choice," the Board modified the "recognition bar." The Board held that, where an employer recognized a union by card check, decertification elections would be conducted if 30 percent or more of the unit employees filed a valid petition requesting an election within 45 days of

[21] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).
[22] 29 U.S.C. § 159(c)(1)(A)(ii).
[23] 29 U.S.C. § 159(c)(3).
[24] *Keller Plastics Eastern*, 157 N.L.R.B. 583 (1966).
[25] *Dana Corp*., 351 N.L.R.B. at 434.

the employer's posting in the workplace of an official NLRB notice that the union had been recognized and that the workers had a right to an election.[26] Moreover, the majority modified the "contract-bar rules" so that a bargaining agreement executed on or after voluntary recognition did not bar a decertification petition "unless notice of recognition has been given and 45 days have passed without a valid petition being filed."[27]

The *Dana* Board ruled as it did, because "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation,"[28] which "is better realized by a secret election than a card check."[29] The majority noted that "card signings are public actions, susceptible to group pressure exerted at the moment of choice," and that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options."[30]

In the almost four years that followed, 1,333 *Dana* notices were requested, 102 election petitions were subsequently filed, and the Board conducted sixty-two *Dana* decertification elections. In seventeen (or 25%) of those elections, the union that had been recognized by the employer based on union authorization cards

[26] *Id*.
[27] *Id*. at 435.
[28] *Id*. at 434.
[29] *Id*. at 438.
[30] *Id*. at 438-39.

without a secret-ballot election was rejected by the employees, freeing them from unwanted union representation.[31]

Nonetheless, in 2011, in *Lamons Gasket*, the Obama Board in a three-to-one decision overruled *Dana*.[32] The Board majority disingenuously claimed that, although voluntarily recognized unions were rejected in 25% of the *Dana* elections, the statistics concerning *Dana*'s implementation "demonstrate that . . . the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment."[33] Even more incredibly, the majority asserted that *Dana*'s ruling that employees should have a limited opportunity for secret-ballot elections "undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification."[34]

Rigging election rules to facilitate unionization: "ambush elections."

On April 14, 2015, a complex revision of the Board's representation election rules went into effect.[35] Adopted 3 to 2, Board Chairman Pearce counter-intuitively trumpeted the 81-page, single-spaced Final Rule as merely "[s]implifying and streamlining the process."[36] Rather, as the two dissenting Board Members said,

[31] *Lamons Gasket Co.*, 357 N.L.R.B. 739, 742 (2011).
[32] *Id.* at 739.
[33] *Id.* at 742.
[34] *Id.* at 740.
[35] 79 Fed. Reg. 74,308-74,490 (Dec. 15, 2014).
[36] NLRB Issues Final Rule to Modernize Representation-Case Procedures, NLRB Office of Public Affairs, Dec. 12, 2014.

"the Rule's primary purpose and effect" is that "initial union representation elections must occur as soon as possible."[37]

The Foundation strongly opposed the new rules for several reasons that have proven to be true in the rules' application. To begin with, the shortened time-frame for representation elections has adversely affected the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampered the ability of employees opposed to union representation to organize themselves in opposition to unions and timely obtain legal counsel to assist them in navigating what the dissenting Board Members correctly called "the Mount Everest of regulations."[38]

Second, the new rules have violated workers' privacy rights by requiring employers to provide employees' personal contact information—including their phone numbers, email addresses, and work times—to union organizers, with no effective limitation upon to whom the information could be passed. This not only gives union organizers an advantage in campaigning among workers but also places workers in danger of harassment or worse.

Third, the new rules have allowed elections to proceed without settling disputes over the bargaining unit's scope if less than 20% of its composition is contested. This makes employees vote without knowing exactly who is in the

[37] 79 Fed. Reg. at 74,430.
[38] *Id.*

proposed unit. It also violates the requirement of NLRA § 9 that the Board determine the scope of the bargaining unit before the election occurs.[39]

That the real purpose of the revised rules is to facilitate monopoly union representation is given away by the fact that the new rules did *not* eliminate the Board's policy that union unfair labor practice charges brought against employers block decertification elections sought by workers while the charges are pending.[40] As the dissenting Board Members pointed out, that policy "impedes the expeditious resolution of questions concerning representation more than any of the processes substantially altered by the Final Rule."[41] Yet, in the Final Rule . . . the blocking charge policy is . . . retained—with the most minimal modifications—and it is [now] embedded in the Final Rule itself" for the first time.[42]

The Foundation's staff attorneys know from decades of experience that the first reaction of almost every union facing a worker's decertification petition is to file a "blocking charge," no matter how frivolous. Indeed, even the Board majority conceded in adopting the new rules that "at times, incumbent unions may abuse the

[39] *See* 29 U.S.C. § 9(a)-(c).
[40] Prior to the new rules the policy was set out in Section 11730 of the Board's Casehandling Manual for Representation Proceedings.
[41] 79 Fed. Reg. at 74,432.
[42] *Id.* at 74,455.

policy by filing meritless charges in order to delay decertification elections."[43] That practice continues under the revised rules.[44]

Gerrymandering bargaining units to ensure union election victories.

During election proceedings the NLRA protects employees' Section 7 right to refrain from union representation by mandating that the Board, when deciding an appropriate bargaining unit, must "assure employees the fullest freedom in exercising the[ir] rights,"[45] and must consider "the extent to which the employees have organized . . . *not* [to] be controlling."[46]

Yet, in *Specialty Healthcare & Rehabilitation Center*,[47] the Obama Board adopted a new test for determining an appropriate bargaining unit. The new test is that if a union requests a unit of "employees readily identifiable as a group who share a community of interest," the Board will find that unit appropriate unless the employer "demonstrate[s] that the excluded employees share an overwhelming community of interest with the included employees."[48] As Board Member Hayes noted in his dissent, under this standard, the Board will "find almost any

[43] *Id*. at 74,419.
[44] *See, e.g.*, Order Denying Review at 2 n.1, *Cablevision Sys. Corp.*, 29 RD-138839 (NLRB June 30, 2016) (opinion of Member Miscimmara).
[45] 29 U.S.C. § 159(b).
[46] *Id*. § 159(c)(5) (emphasis added).
[47] 357 N.L.R.B. 934 (2011) (3-1 decision), *enforced sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
[48] *Id*. at 934

petitioned-for unit appropriate," thus "encourage[ing] union organizing in units as small as possible,"[49] i.e., what are popularly referred to as "micro-units."

Member Hayes' prediction was prophetic. In 2014 the United Auto Workers lost a plant-wide certification election at the Chattanooga, Tennessee, Volkswagen facility by a wide margin.[50] It later petitioned for and won an election in a small unit consisting only of "maintenance employees" [51] that was upheld by the Board based on *Specialty Healthcare*.[52] Thanks to the UAW and Obama Board's gerrymandering of a micro-unit, dozens of VW employees who voted against the UAW are forced to accept a mandatory agent they do not want and cannot control.

The Board majority in *Specialty Healthcare* predicated its ruling on the proposition that the "first and central right set forth in Section 7 of the Act is employees' 'right to self-organization.'"[53] It ignored employees' equally important "right to refrain from any or all of such activities."[54] The *Specialty Healthcare* majority thus wrongfully elevated employees' right to unionize above employees' equal right to oppose unionization.

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[49] *Id.* at 952.
[50] VW Plant Workers Vote Down Union In Blow To Big Labor, *Law360*, https://www.law360.com/articles/510505 (Feb. 17, 2014).
[51] UAW Wins Vote at VW Chattanooga Plant as Some Workers Vote to Unionize, *The Wall Street Journal*, https://www.wsj.com/articles/uaw-wins-victory-at-vw-chattanooga-plant-as-workers-vote-to-unionize-1449283820?tesla=y Dec. 7, 2015).
[52] Order Denying Review, *VW Group of America, Inc.*, No. 10-RC-16530 (NLRB Apr. 13, 2016) (2-1 decision).
[53] 357 N.L.R.B. at 941 (quoting 29 U.S.C. § 157).
[54] 29 U.S.C. § 157.

Worse, the *Specialty Healthcare* majority reasoned that "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude," and thus "[t]he statute commands that we assure employees the fullest freedom in exercising all these rights, including the right to choose whom to associate with, when we determine whether their proposed unit is an appropriate one."[55] That rationale not only ignored employees' Section 7 right to refrain from self-organization and the Board's Section 9(b) duty "to assure to employees the fullest freedom in exercising" that right, but also ignored Section 9(c)(5)'s statutory command that the extent of union organizing is *not* controlling.

Recommendations for Restoring Balance and Fairness to the NLRB

1) As soon as possible, President Trump should nominate and the U.S. Senate should confirm nominees to fill the two existing vacancies on the NLRB with individuals who respect the rights of workers to refrain from union support.
2) Congress should pass the National Right to Work Act (H.R. 785), which would eliminate the need to depend on the NLRB to enforce the right of workers not to subsidize union political and other nonbargaining activities.

[55] 357 N.L.R.B. at 941 n.18.

3) NLRA Section 9 should be amended to provide that unions may become exclusive bargaining representatives only through Board-conducted secret-ballot elections.
4) NLRA Section 9(c)(3) should be amended to specify that decertification petitions are barred only within one year of a Board-conducted election.
5) The NLRA should be amended to specify a period, sufficient to allow workers to obtain information about the pros and cons of unionization, that must pass after the filing of an election petition before the balloting can occur.
6) The NLRA should be amended to provide that unfair labor practice charges will not block decertification elections, but instead will be considered (if deemed sufficiently meritorious by the NLRB General Counsel) in conjunction with any objections to an election after the ballots have been cast.
7) NLRA Sections 9(b) and 9(c)(5) should be amended to authorize the Board to determine only the "most appropriate" bargaining unit.