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BEFORE THE
EDUCATION AND THE WORKFORCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

HEARING ON
"RUSHING UNION ELECTIONS: PROTECTING THE INTERESTS OF BIG LABOR AT THE EXPENSE OF WORKERS' FREE CHOICE"

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Good morning, Mr. Chairman and Members of the Education and the Workforce Committee. I would like to thank Chairman Kline and Members of the Committee for inviting me to testify here today.

Counseling Employers to Communicate Openly and Honestly with their Employees

My name is Michael J. Lotito. I am a member of the nationwide labor and employment law firm of Jackson Lewis LLP. The Law Firm represents thousands of employers in a wide array of matters, including many in proceedings before the National Labor Relations Board (NLRB or the Board). I am a partner in the firm's San Francisco, California, office. I have been practicing labor law for thirty-seven years. I have represented numerous employers in representation cases before the NLRB and have counseled many others in connection with union petitions for representation elections and related Board proceedings.

Nearly 40 years ago, the founding partners of our Firm (then known as Jackson, Lewis, Schnitzler & Krupman), Louis Jackson and

Robert Lewis, authored "Winning NLRB Elections: Management's Strategy and Preventive Programs" (Practising Law institute: New York, 1972), a guide for employers' counsel on responding lawfully to union organizing. It was unique in its time and would go through several printings and editions. The authors observed that the ability of employers to communicate with their employees was central to NLRB elections. In a chapter entitled, "The Employer Speaks Up," they wrote (at page 37):

> By now, a significant aspect of union organizing may have become apparent. In most cases, the employee has not had the benefit of the employer's point of view before signing a [union authorization] card. Yet, if industrial democracy is to be meaningful, the choice which the employee must make – between individual and collective representation – should be an informed one.
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> Only after hearing both sides, can employees be reasonably certain that their decision is the correct one. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market…" [quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)]. The obligation of giving employees the other side of the story falls upon the employer.

Time has not diminished the truth of these words. Nevertheless, the Nation is presented today with a proposal from a majority of the Members of the National Labor Relations Board that, if adopted, would largely preclude employers from speaking to employees about unionization when it matters most — in the period leading up to an NLRB election.

The Proposed Rule Undermines Employees' Rights to Information

Workers would have to make decisions on representation based only on what, if anything, the union or fellow workers told them. Such information would be incomplete at best, misleading at worst. Not only that, by deferring resolution of many difficult representation case issues until after an election, if then, the proposal would not only leave employees without critical facts of union representation, but would deny them the right to know at the time they cast their ballots which employees would be included in their collective bargaining unit. This denial of responsibility undermines any stability in labor relations that an election result is intended to confer. I refer to the NLRB's Notice of Proposed Rulemaking, 76 F.R. 36812 (June 22, 2011).

I will not address all the problems raised by the NLRB rulemaking. I will address the overarching postulate of the proposal and why the rulemaking is against our national labor policy celebrating employee free choice. I will also speak to some particularly vexing practical problems arising out of the Board's intention to postpone difficult and perhaps time-consuming decisions until a time when their resolution may have little consequence.

Employers Have An Important Role in NLRB Elections

The Board's proposed rule assumes employers have no role to play in NLRB representation elections. This is the long-held view of one member of the Board who sits without benefit of Senate confirmation. In his opinion, employers should stand aside and keep quiet. That being so, the NLRB reasons, there is no hardship in mandating a "quickie election" perhaps within 10 days of a petition being filed as another member of the Board has suggested recently. That this all but shuts the door on employers' providing critical information to employees about the petitioning union, collective bargaining and potential strikes is of no moment. Of course the Board majority says nothing has really changed with election speech. The technical rules may remain the same…there is just no time for the employers to

inform their employees. *The NLRA Guarantees Employers' Rights to Communicate with Employees*

First, the National Labor Relations Act makes clear employers have an important role to play as part of the union selection process. Section 8(c) of the Act (included in 1947) rejected the concept of "employer neutrality" in NLRB elections. It expressly guarantees employers the right to communicate with workers about union representation and other issues. It says, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 159(c). Congress would not have taken pains to end employer neutrality and exempt noncoercive employer speech from arguable violations if it did not intend employers to exercise that right — and exercise it vigorously. The Supreme Court has recognized as much. In *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), the Court wrote:

> From one vantage, §8(c) "merely implements the First Amendment," NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80-105, pt. 2 pp. 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NRLB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word … has been expressly

> fostered by Congress and approved by the NLRB." Letter Carriers v. Austin, 418 U.S. 264, 272-73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Id. at 67-68. *Brown* is particularly pertinent, for there, the Court was dealing with a state law that also would have restricted employers' (state contractors') right to communicate with employees on unionization. The Court struck it down as preempted by the NLRA. It relied on Section 8(c) to reach that result.

In its proposed rule, the NLRB resurrects the same discredited contention not by withholding funds, but by withholding the time necessary to allow for employees to make an informed choice from all available information.

Workers Need to Hear the Other Side

Second, as the Court's decision in *Brown* suggests, the employer's guarantee of free speech really is intended to assure that employees are able to hear all points of view before casting their ballots. By depriving employees of views that are likely to be very different from the union's, and information about the union that the union may be reluctant to divulge, the NLRB would impinge on employees' right to make a free and informed choice.

The NLRA in Section 7 safeguards employees' right to reject unionization as well as to embrace it. While Congress gave employees 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," it also gave employees the corollary right "to refrain from any or all such activities." 29 U.S.C. 157.

The Board has long held in a variety of contexts that knowledge is necessary to make an informed choice.

In its background statement to its December 2010 Notice of Proposed Rulemaking (NPRM) mandating a regulation requiring employers to post notices informing their employees of their rights under the NLRA, the Board quoted a commentator who observed: "American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights. … In sum, lack of notice of their rights disempowers employees." Peter D. DeChiara, "The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act," 32 Harv. J. on Legis. 431, 433-434 (1995) (footnotes omitted). The Board explained that its intent with the proposed notice posting was "to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions." NLRB's Notice of Proposed Rulemaking, 75 F.R. 80410 (December 22, 2010). Ironically, the Board on the one hand wants employers to post a notice to educate employees but, on the other hand, wants to do everything it can to minimize such education before an election.

Employers are in a position to supply information needed by employees to weigh the pros and cons of union representation and make a reasoned choice. Cutting off that source of information interferes with the accomplishment of the NLRA's objectives and emasculates Section 8(c) of the Act. Employees need to hear both sides of the story and to evaluate the information for themselves, as the Board has recognized. Under the Board's suggested approach, unions will have unlimited time to engage in organizing and then pick the unit for which the union feels it can prevail in an election. The employer, on the other hand, has virtually no time to respond. The employees are victimized as they are less informed—if truly informed at all.

Problems with Mystery Bargaining Units

Third, the proposed procedural amendments also contribute to the impairment of employee Section 7 rights. Implicit in Section 7 is the right of employees to know who they are acting in concert with to form a union. But under the Board proposal, employees would not be certain which of their co-workers would share collective representation with them if the union were selected. The Board's proposed rule requires the employer, in particular, to identify any issues it has with the union's petition. These issues frequently involve the scope and composition of the unit — which groups or individuals are eligible for inclusion because they share a community of interest with other petitioned-for employees or are ineligible because they are supervisors or managerial employees, and similar issues.

The NLRB's current rules provide the parties with a right to litigate all the issues before an election is conducted, 29 CFR 102.66, see *Barre National, Inc.*, 316 NLRB 877 (1995), with some limitations, see *Bennett Industries, Inc.*, 313 NLRB 1363 (1994). The proposed rule, however, would severely abridge this right. The NLRB Hearing Officer would determine where the parties were in disagreement and limit evidence to those issues. But if the disagreement concerned the eligibility of employees who did not constitute at least 20 percent of the bargaining unit, the matter could not be litigated pre-election. This exception has the potential for much mischief.

Legal Compliance Will be Difficult if Supervisory Status is not Determined Pre-Election

The supervisory status of many individuals — charge nurses, assistant supervisors, assistant managers, team leaders, and many others — may be in issue, but fail to meet the 20 percent threshold for consideration. Other individuals and groups whose eligibility status is in doubt also will fail to make the cut. Singly and together, however, they may count for much in any prospective bargaining unit.

Employees will be asked to vote on collective bargaining in a unit "to be named later."

Employers communicate with employees most often through front line supervisors. But how does the employer identify these supervisors when their status is contested and the NLRB refuses to make a decision before the election? If the employer determines incorrectly who are supervisors, and treats them as such, and the union loses the election, the employer risks objections to the election (which, if sustained, can result in a new election), unfair labor practices for interfering with the rights employees, and possibly, sanctions under the Labor-Management Reporting and Disclosure Act (LMRDA) for engaging in "persuader activities" regarding these individuals. But if the employer treats these individuals as rank and file employees, and it turns out they are supervisors, it may also face objections and unfair labor practices on account of their participation in union meetings or appearance at the polling place during balloting. Either way, the employer is at risk. How does the employer exercise its Section 8(c) right to communicate when it matters most? Faced with a Board that evades its decision-making responsibility, the answer is: with great difficulty.

The chilling effect is manifest. Employers will be inhibited from engaging in the vigorous debate the NLRA envisions and depends upon. Employees will be the worse off. They will have to vote without benefit of the core Section 7 right of access to needed information and argument from their employer. Furthermore, because of the uncertainty surrounding the disputed individuals' roles, the employer may forego training these workers on avoiding unfair labor practices and objectionable conduct. If they threaten, interrogate, make promises to or surveil unit employees, their misconduct as supervisors may be imputed to the employer, even if the company was entirely unaware it was taking place. While the employer faces

further Board proceedings, the rights of employees will have been compromised unnecessarily by supervisors who were uneducated and untrained in Board law.

Beyond this, there remains the quandary employees face in voting on representation when they cannot tell who will share the bargaining unit with them. Can employees make a rational, informed choice on collective representation when the unit is indeterminate, and may not be decided for months after the election, if at all? I think not. The composition of a bargaining unit is a weighty factor in employee voting decisions in NLRB elections; employees often choose or reject representation based on who will be with them. Unit scope and composition may also influence a union's interest in representing employees. Frankly, I fail to see how employees may be expected to make the choices section 7 affords them on collective representation, or how the Board can comply with its responsibility under section 9, in this state of affairs.

The Board suggests the parties might work these issues out in first-contract negotiations after the union prevails in the election and is certified. This is far too Pollyannaish for my taste. Statutory rights cannot be treated so lightly. Even if the Board can delegate (slough off, might be a better term) its statutory responsibilities to private parties, which we doubt, these unresolved issues over groups and individuals are far more likely to lead to further discord, stalled negotiations and agency proceedings than dissolve in the comforting embrace of labor-management amicability.

The proposed rule sows the seeds for further organizing in the event the current union attempt is unsuccessful and might impose an "easement" on employer electronic communications systems. It requires employers, before and after the pre-election hearing (beginning only 1 week after the petition is filed), to provide detailed information regarding the identities and contact information, for all employees who would be (or might be) covered by the petitioned-for

unit, or any unit the employer suggests as an alternative. The post-hearing requirement that the employer provide the necessary information within 2 days after the Regional Director issues a decision and direction of election includes e-mail addresses. We find it especially worrisome. The proposal is unclear whether the Board is referring only to employees' private e-mail addresses or their business e-mail addresses, as well. If the latter, the rule would represent an unexplained retrenchment from the NLRB's decision in *Register Guard*, 351 NLRB 1110 (2007), enforced in part and remanded in part, 571 F.3d 53 (D.C. Cir. 2009), where the agency held an employer need not permit the use of its private e-mail system for union-related activity.

This sets the stage for further problems. Can the union send e-mails during employees' work time? How often can they access the e-mail system? How many e-mails can they send? What kind of e-mails can they send? Will they include lengthy attachments? Do they include videos? What if they contain offensive content? What protection will the employer be afforded against viruses transmitted by the union, interference with normal business traffic, or malicious attempts to crash the system? Also, what safeguards can the Board offer to make sure that a union that loses the election will not avail itself of e-mail addresses to continue to communicate with employees — an action that very well could run afoul of *Register Guard*? The Board may yet consider this issue, among others, for which it has invited comment.

Tradition and Prudent Judgment Counsel Caution While Board Membership is in Flux

Board Chairman Wilma Liebman has cautioned elsewhere that Board Members serving interim appointments (such as Member Craig Becker) and those approaching the end of their term of office (as is the Chairman herself), should be wary of making significant changes in the law made by earlier Boards. We note, too, that one seat on the

Board already is vacant. We think the Board would be wise to heed the Chairman's advice, about the proposal generally. The panel should not advance such a major change in the Board's administration of Section 9(c)(1)and its attendant de facto amendments to Section 9, Section 7 and Section 8(c) with the NLRB as presently constituted. If and when a full Board consisting of confirmed members determines change is needed and those changes comply with the Board's Section 6 rule making authority rather than usurp the prerogative of the legislature, that will be time enough. That the current proposal would work changes not unlike those Congress refused to approve in the ill-named Employee Free Choice Act, makes forbearance all the more compelling.

Labor Department Proposal Also Targets Employer Speech

The Board's proposal does not appear in isolation. One day before the NLRB published its proposed rules in the Federal Register, the Department of Labor issued it proposed regulations for revamping its "advice" exception to the LMRDA. 76 F.R. 36178 (June 21, 2011). Those proposed rules would define much essential legal advice an attorney renders to an employer-client in an election context (to avoid interfering with employee rights), and many directions an employer gives to its supervisors about the election issues, as "persuader activity" requiring compliance with the financial reporting requirements of LMRDA. While the Labor Department's action is not the subject of today's hearing, the NLRB and Labor Department proposals, if adopted, would effectively nullify Section 8(c).

The Proposed Rule Purports to Solve Problems that do not Exist

The Board justifies its proposed rule changes by saying they "are designed to fix flaws in the Board's current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communications technologies." The Board's arguments, however, make sense only if one starts with the proposition that the Board's role is to facilitate the certification of

unions, rather than to vindicate employee free choice by an informed electorate in secret ballot elections.

That the parties cannot predict with certainty when a pre- or post-election hearing will take place, because practices vary by Region, is not a major problem. That the Board has lacked discovery, such as that available in the federal courts blinks at the fact that the Board has consistently spurned efforts to apply the Federal Rules of Civil Procedure to its proceedings; and in any event, nowhere in federal court practice is complete discovery and refinement of issues required routinely within seven (7) days after a complaint is filed, upon pain of waiver and preclusion!

The Board also scores pre-election litigation over voter-eligibility issues that are "unnecessary" and may not affect the outcome of the election. The Board says parties should wait until the election is over, then worry about them. But as we have shown above, the Board's procedural "simplification" is ill-considered and will do more harm than good to the protection of employee Section 7 rights. Kicking the can of unresolved issues down the road in the expectation it will disappear down a storm drain is no way to conduct agency business.

Providing lists of voters by name before an election is unnecessary to the identification and resolution of eligibility issues; the proposal merely facilitates further organizing by unions, during the same campaign or in a later one. The elimination of pre-election Board review of regional determinations permits uncertainty to persist through the balloting, and fosters contested results. Respect for Board elections will suffer. It is far better to promote certainty than uncertainty. Employers may be pressured unfairly to abandon their post-election arguments based on a union victory, even though they are substantial. Further, there will be an inevitable tendency to sustain the outcome of the election, regardless of the merits of post-election contests.

The asserted current 25-30 day "delay" the Board complains of to allow parties to seek review of Regional Director rulings does little harm, since it runs concurrently with the current 17 day period for providing and allowing the union access to the eligibility list and the posting of the pre–election notice. It merely permits the employees, with the unit now generally defined to consider countervailing facts and arguments for union representation.

The agency also criticizes the current arrangement whereby it is required to decide most post-election disputes; instead, it would prefer discretion to deny review of post-election rulings that, one suspects, it would invoke liberally. The Board should avoid performing necessary duties. Regional officials, unfortunately, have a tendency to sustain the results of elections they have conducted for the understandable, if not wholly satisfactory, reason of avoiding the administrative burden of scheduling another election. Board review is an important safeguard for aggrieved parties. Finally, there is no need to hurry the provision of names and addresses and other information to the Board and union after an election is directed, whether in electronic form or otherwise. Many employers will have difficulty in assembling the necessary information within second (2) days, especially with the uncertainty attending Regional Directors' decisions under the proposal. The Board has not even assured that the current mandatory 10-day period for providing employees with critical information following receipt of an *Excelsior* list will be continued. The information is intended to foster the communication of information to employees; it is not for the union's benefit or for the union to waive.

Conclusion

All this is calculated to hold elections before employees have an opportunity to think twice or perhaps even once..

The Board's arguments do not persuade. They are, as Abraham Lincoln said of an argument by Senator Stephen Douglas

during their 1858 debates, “as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death.” They do not warrant infringing on employee and employer statutory rights of expression, and the constitutional rights to free speech and assembly undergirding them. They prescribe a remedy for a disease that does not afflict anyone. Board elections already are held promptly. The median time for conducting Board elections is a little over five weeks from the time a petition is filed. Ninety-five percent of all elections are conducted within 56 days. Unions do not appear to be suffering at the current pace. They succeed in nearly two-thirds of all Board elections in which they participate. This data hardly suggests the need for radical change. Further haste serves no good purpose. And it would exact a terrible cost.

The House of Representatives should consider steps to assure that the Board does not lose sight of its responsibilities under the Act. Legislation providing further guidance on Section 9(c) might be appropriate. It could direct the NLRB to resolve all substantial issues affecting the bargaining unit and eligibility prior to a Decision and Direction of Election, specify a minimum period after the filing of a petition before an election may be directed, among other issues. The rights of employees and employers must be safeguarded by preserving the intent of the National Labor Relations Act so that right of employee not only to make a choice but to make an informed choice will be preserved.

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