WRITTEN TESTIMONY OF

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BEFORE THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HEARING ON: "CULTURE OF UNION FAVORITISM: RECENT ACTION OF THE NATIONAL LABOR RELATIONS BOARD"

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[1] I would like to thank my law partner, Halima Horton, and associate, Nancy Fonti, for all of their hard work in preparing this presentation. Moreover, I appreciate the help and comments of my law partners in the labor section of McGuireWoods LLP.

Chairman Kline and members of the Committee, thank you for inviting me here to testify today. My name is Curtis Mack. I am a partner with the law firm of McGuireWoods LLP, where I represent employers in the public and private sectors. I served as regional director of Region 10 of the National Labor Relations Board (hereinafter "the Board") from 1976 to 1981. I served as an NLRB trial attorney from 1970 to 1972 in Cleveland, Ohio. I would like to preface my remarks by stating that I am a life-long liberal Democrat and a loyal supporter of President Obama.

I appreciate the opportunity to appear before this Committee to address three (3) recent Board decisions, a proposal to change election procedures and a new rule requiring employers to post a notice purporting to advise employees of their rights under the National Labor Relations Act (hereinafter "the Act.") I believe these rules and decisions come at the expense of employees and emasculate Section 7 of the Act. They will interfere with employees' rights to decide for themselves whether to join a union or refrain from joining or supporting a union. These actions will also interfere with employers' rights to communicate with their employees regarding unionization issues. In short, the only beneficiaries of these new rules and decisions are unions.

It is no secret that the percentage of American workers participating in unions has declined steadily for years.[2] The Board is aware of that trend and is responding by setting an agenda of its own to reverse it. These changes will come at a cost to employers and to employees.

The rule regarding notice posting and the proposed rule to shorten the timeframe preceding the election completely ignore the fact that when enacting the Act, Congress conferred on working Americans not one, but two, rights: the right to support and form unions and the right to refrain from such activities. There is nothing in the Act which evidences any Congressional intent to give either

[2] In 2010, the percent of wage and salary workers who were members of a union fell to 11.9% from 12.3% percent a year earlier, according to the Bureau of Labor Statistics.
http://www.bls.gov/news.release/union2.nr0.htm

right any greater value than the other. It is beyond any doubt that neither right can be intelligently exercised without the employee having the opportunity to obtain appropriate information regarding the value and cost of unionization. Even more important, employees must have sufficient time to discuss and debate among themselves the pros and cons of unionization. The Board's proposed rules setting an arbitrary timeframe for holding an election after the filing of a petition eliminate this opportunity without offering any compelling justification.

Congress initially designed the Act to encourage unionization, but in 1947, it amended the Act to bring to the fore the right of employees to choose. Today, the Board is refusing to recognize Congressional action and is ignoring a Congressional mandate.

I. An Expedited Election Will Abrogate Employee Rights Under Section 7.

The Board has proposed accelerating the timeframe for a representation election. There is no justification for holding a secret ballot election in fourteen (14) days. Holding an election in fourteen (14) days is unfair to all parties. Currently, the Board strives to hold elections within forty-two (42) days after a petition is filed.[3] Other than the bald assertion that the proposed rule will shorten the process and eliminate pre-election litigation, the Board has failed to articulate any reason for fixing that which is not broken. Unions won 67.6% of representative elections in 2010 and have won more than half of all representative elections in each of the past fourteen (14) years, according to the Bureau of National Affairs. As discussed below, the Board's articulated reasons do not withstand scrutiny.

Shortening the process is a bad idea. The accelerated timeframe would sharply reduce the time for employees to weigh whether or not to support a union. Employees would have significantly less time to conduct independent research and debate the pros and cons of collective bargaining with co-workers, who may

[3] The Proposed Rule acknowledges that the median timeframe between a petition and an election is thirty-seven (37) to thirty-eight (38) days. 76 FR 36812, pg. 5.

work on different shifts and schedules. Employees are entitled to scrutinize the union and to converse with each other about joining or not joining a union. The Board should not cut short this valuable process. Unionization results in a significant change in the circumstances of an individual's employment. Monthly dues and possible strikes become realities. Once a union is voted in, employees no longer represent themselves.[4] Two or three weeks is simply not enough time for an employee to decide whether joining a union is the right choice.

Second, the accelerated election schedule would interfere with employers' right to discuss collective bargaining with employees and employees' right to discuss collective bargaining among themselves.[5] A union could campaign quietly for months, with the employer learning of the campaign only after the petition is filed with the Board and find itself facing a secret ballot election in just a few days. The Act gives employers the right to communicate facts about unionization and their beliefs to employees and employees to discuss unionization among themselves.[6] The employer has less time to

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[4] Steele v. Louisville & NR Co., 323 U.S. 192, 200 (1944) ("The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or *want of them*.").

[5] See ITT Industries v. NLRB, 413 F.3d 64 (D.C. Cir. 2005) (holding that the Act gave employees working at one facility the Section 7 right to visit another facility owned by their employer and appeal to their co-workers regarding the union), enforcing 341 NLRB 937, 941 (2004)(finding that security concerns did not justify the restriction of access to non-site employees, reasoning "… we are equally mindful of our responsibility to protect the statutory rights of employees at such times, and at all times"); NLRB v. Magnavox Co., 415 U.S. 322 (1974)(employees have Section 7 rights to oppose a union).

[6] NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941)(holding that neither the Act nor the Board can enjoin an employer from expressing its views regarding the union); NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)("an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board"); Gallup, Inc., 349 NLRB 1213, 1240-41 (2007)(chief executive may warn

respond to the union's misrepresentations.[7] The proposed rule shortening the time for the election would force employers to convey its position on unionization to employees in just a few days and stifle the employees' rights guaranteed under the Act.

Further, employees need to be fully informed about the realities of a strike, collective bargaining and even monthly union dues. Employees are unlikely to hear of the cold realities of collective bargaining from the union. Employees have a right to communicate their views to each other. If the timeframe is shortened to as little as fourteen (14) days, the Board will wipe out the employer's right to share important facts with the employees or respond to misrepresentations made by the union during the short campaign period.

Another problem with the Proposed Rule is that it postpones most challenges to the proposed bargaining unit until after the election[8]. In almost every campaign, there is debate about which employees should be in a bargaining unit. Unions have notions about

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employees unionization would put the company's future at risk without violating the Act); Action Mining/Sanner Energies, 318 NLRB 652, 657 (1995)(employer's comment that it did not know how customers would react once they learned of unionization was not unlawful); Airstream, 192 NLRB 868 (1971) ("Section 8(c) protects an employer's right to criticize a labor organization during a pre-election campaign"); NLRB v. Lampi, 240 F.3d 931, 936 (11th Cir. 2001)(executive's comment to a television reporter that the company "did not particularly like unions" and was "against them" was not evidence of a unfair labor practice).

[7] The following cases demonstrate the type of misleading statements made during campaigns. See Hollywood Ceramics Co., 140 NLRB 221 (NLRB 1962); Formco, Inc., 233 NLRB 61 (1977)(union distributed a letter that falsely reported the employer had been guilty of unfair labor practices); Purolator Prods., 270 NLRB 694 (1984)(union handbill incorrectly stated status of union's pending charge against employer by implying the employer had been found guilty of an unfair labor practice act).

[8] The proposed rule would defer eligibility questions "affecting no more than 20% of eligible voters." See 76 FR 36812, pgs. 20-21.

who should be in the bargaining unit, and generally try to keep the unit size as small as possible. Employers have ideas about who should be in the unit. Under the statute, the employees in a collective bargaining unit must share a "community of interest." There is almost always disagreement regarding which groups of employees share a "community of interest." Waiting until after the election to resolve these disputes denies employees the opportunity to make an informed choice before exercising their Section 7 rights. Employees may not want to be in a unit that includes particular job classifications. Importantly, the delayed decision has the potential of leaving large numbers of employees uncertain with regards to their interest in the election or how they will be affected by the outcome.

Postponing bargaining unit challenges is particularly problematic with respect to supervisors. If an employee is incorrectly classified as a supervisor and not allowed to vote in the election, he is disenfranchised. If a supervisor is improperly included and campaigns during the election for either side, the election is tainted and may be set aside.[9] Case law demonstrates that intimidation and coercion by supervisors have tainted elections in the past.[10] These

[9] NLRB v. Regional Home Care Servs., 237 F.3d 62, 68 (1st Cir. 2001)("A pro-union supervisor presents two possible scenarios which could interfere with a fair and free election. The first is confusion; the second is coercion. There may be confusion felt by employees about the message from management if one of management's own, a supervisor, urges the union upon employees. Or there may be a second effect, that a supervisor may explicitly or implicitly coerce employees into voting for the union."); Fall River Sav. Bank v. NLRB, 649 F.2d 50, 56 (1st Cir. 1981) ("The Board has found pro-union activity by supervisors objectionable on two possible grounds: first, it may lead employees to the false conclusion that their employer favors the union; and second, it may cause employees to support the union out of fear of retaliation by the particular supervisors rather than out of free choice.").

[10] The board and courts found that supervisors interfered with elections in the following cases: Millard Refrigerated Servs., 345 NLRB 1143, 1147 (2005)(setting aside an election when supervisors with broad authority over unit employees solicited authorization cards and warned employees "if the union does not get in, everyone will

issues should be resolved before the election, out of fairness to everyone.

II. The Notice Requirement Advising Them Of Their Rights Under The Act Is Unnecessary.

On August 30, 2011, the Board, without any justification or reasoned rational, decided to deviate from a longstanding practice and to require employers to post a notice to employees. The posting is not required by the Act and does not serve the purposes of the Act. The Board has existed for seventy-five (75) years but only now has found it necessary to require employers to post a notice advising them of their rights under the Act. Employees, whether through television, newspapers or other media sources, know about their rights to unionize. Information about the right to join a union or refrain from joining a union is freely available on the Board website. Requiring employers to post this notice presumes that employees are ignorant about unions and the Board, which, clearly, they are not.

The content of the notice, which employees are mandated to post effective November 14, 2011, is slanted in favor of unions. It emphasizes the right to join unions while relegating the equal right to not join a union as an aside. It suggests that employees need not remain members of a union but gives no hint about how to pursue that complicated option.

The first sentence informs employees of their right "to organize and bargain collectively with their employers and to engage in other protected concerted activity." It ignores employees' equal right to

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probably be fired"); Harborside Healthcare, Inc., 343 NLRB 906 (2004) (setting aside an election because a supervisor threatened employees with job loss if the union lost the election); SNE Enters., 344 N.LR.B. 673, 674 (2005)(finding that supervisors solicited authorization cards and remanding to regional director to determine if solicitation constituted objectionable conduct); National Gypsum Co., 215 NLRB 74 (1974)(finding that supervisors solicited authorization cards and controlled the distribution of cards and tainted the union's showing of interest).

communicate directly with their employer. The poster assumes that the right to join a union trumps the right not to join a union. It says nothing about employees' rights after a union is voted in.[11] Under the new rule, failing to post the notice qualifies as an independent Unfair Labor Practice. It would also toll the statute of limitations for ULPs filed against employers who fail to post the notice. This suggestion by the Board is in complete derogation of an express mandate by Congress that all Unfair Labor Practices must be filed within 180 days after the incident occurred.[12] The punitive nature of the rule demonstrates that its goal is not to notify employees but to further union efforts to gain traction at the expense of employee choice.

The poster also oversimplifies the Unfair Labor Practice (ULP) process. It discusses what the Board can do with the charge against an employer, but makes virtually no reference to charges filed against unions. It fails to tell them that, without a union, they can instead speak with their employer directly to get issues resolved. The poster does not discuss that the regional director may dismiss the charge, that the Board can find no merit to the charge and that it can take two or three years or more before a court of appeals ultimately dismisses

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[11] See Communications Workers of America v. Beck, 487 U.S. 735 (1988)(union cannot require workers to pay fees for its political activities or fees beyond the costs of negotiating a collective bargaining agreement).

[12] In its attempt to justify tolling of the statute of limitations, the Board incorrectly relies on a decision by the Third Circuit, Bonham v. Dresser Industries, 569 F.2d 187, 193 (3rd Cir. 1977) that interprets the Americans With Disabilities Act. In that case, according to the Board, the Third Circuit held that the ADEA posting requirements was undoubtedly created by Congress for the benefit of employees. There is a remarkable difference between Congress creating a posting requirement and the Board creating a posting requirement seventy-five (75) years after it began administering the Act. The Board decisions regarding the tolling of the statute makes no mention of Supreme Court jurisprudence articulated in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which held that the statute of limitation commences when a discrete act of discrimination occurs.

the charge. The poster makes no mention of monthly union dues or of the reality of strikes or of prolonged collective bargaining.

In short, the poster creates the impression that the Board favors unions and is not neutral. This is not the message the Board should be sending to American workers, who often need protection from unions as well as employers.

III. The Board Erroneously Overruled Dana And Has Violated Employees' Right to Vote For Or Against Collective Bargaining.

The Board returned to a rule barring elections for a "reasonable time" after an employer voluntarily recognizes a union in Lamons Gasket Co., 357 NLRB No. 72. The decision overrules Dana Corp., 351 NLRB 434 (2007) and creates a bad labor policy and does not effectuate the purpose of the Act. To put the Lamons decision in context, in Dana the board held that employees have the right to file a decertification petition after a voluntary recognition and then vote on union representation in a secret ballot election. Dana required the posting of an official Board notice informing employees of their employer's voluntary card-based recognition of a union bargaining representative and the employees' right within forty-five (45) days to test the union's claim of majority support through a Board-conducted secret-ballot election. If no petition is filed within that period, electoral challenges to the union's representative status would thereafter be barred for a reasonable period of time. This was a good policy because over the years, there have been many cases in which employees have been misled or coerced into signing authorization cards.[13]

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[13] Montgomery Ward & Co., 288 NLRB 126, 169,180 (1988)(some authorization cards invalidated because union solicitor told employees that authorization cards were only for the purpose of getting information about the union or for obtaining the election); NLRB v. Riviera Manor Nursing Home, Inc., 1972 U.S. App. LEXIS 8434, at * 3 (7th Cir. 1972)(finding that the union could not show that some authorization cards were signed by individuals employed at the time of the signing); Brookland, Inc., 221 NLRB 35,35-36 (NLRB 1975)(authorization cards invalid when the union solicitor told

Dana informed employees who were unaware of or who disagreed with voluntary recognition of their right to petition for a secret election. The secret ballot elections are the best way to resolve all questions concerning representation.[14]

In addition to insuring that employees had a right to vote on the union, Dana provided a safeguard against severe consequences of recognizing a union without majority support. The consequences of recognizing a minority union were described by the Board in McLaren Health Care:

> an employer who recognizes and bargains with a minority union, as the exclusive bargaining representative of a unit of its employees pursuant to Section 9(a), violates Section 8(a)(2) and (1), and the employer's knowledge or

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employees "the only thing the card was for was so that the Union could keep in touch with us through literature of what was going on in the union itself"); Serv-U-Stores Inc., 234 NLRB 1143, 1145-1147 (1978)(finding an authorization card invalid when union president told the employee it would only be used solely for the purposes of obtaining an election); Calplant Constructors, 279 NLRB 854 (NLRB 1986)(election set aside when union representative misled employees telling them "if you sign now you won't have to pay the initiation fees").

[14] McLaren Health Care Corp., 333 NLRB 256, 257 (2001)("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"), citing NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969); Levitz Furniture Co. of the Pacific, 333 NLRB 717, 723 (2001) ("Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"); Underground Service Alert, 315 NLRB 958, 960 (1994)(reasoning that a decertification election was superior to an employer's withdrawing recognition since elections "provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted").

> ignorance of the union's minority status is irrelevant to the question whether the recognition constitutes an unfair labor practice. Likewise, a union which accepts recognition as the exclusive bargaining representative of a unit of employees pursuant to Section 9(a), and bargains on behalf of those employees, without majority status, violates Section 8(b)(1)(A).

333 N.R.R.B. 256, 257 (NLRB. 2001).

A collective bargaining agreement is not always entered into immediately after voluntary recognition. In International Ladies' Garment Workers' v. NLRB, 366 U.S. 731 (1961), the employer and union entered into an agreement under which the employee voluntarily recognized the union based on the union's misrepresentation that it secured authorization cards from a majority of employees. Six weeks later, the two sides entered into a collective bargaining agreement. The Supreme Court found that a collective bargaining agreement executed by the parties failed because it was obtained based on an erroneous claim. The Court held that the employer activity violated the Act by interfering with and restraining employees' exercise of rights under Section 7. The Court found that the fact that petitioner and employees asserted good-faith beliefs in petitioner's majority status was not a defense because scienter was not an element of the statute.[15] The decertification process provided

[15] See also International Ass'n of Machinists v. NLRB, 362 U.S. 411, 425-226(U.S. 1960)(Bryan Manufacturing's agreement with a minority union required to remain in force since UPLs based on violation of the Act were barred by a six-month statute of limitations); See also NLRB v. Trosch, 321 F.2d 692 (4th Cir. 1963)(upholding a Board decision finding that employer violated the Act by entering into a CBA with a union that did not have majority support, reasoning "Maryland News recognized a minority union and negotiated a labor agreement with it. The facts that the employer's actions were taken in good faith and that a majority of the employees later signed the final version of the agreement do not help Maryland News"); Human Dev. Ass'n v. NLRB, 937 F.2d 657 (D.C. Cir. 1991)(employer violated act by recognizing a union with minority support); Regency Grande Nursing & Rehab. Ctr., 2009 NLRB LEXIS 167 (NLRB, May 28, 2009) (same);

for in Dana created a safeguard to ensure that a union has achieved voluntary majority support.

Nothing in Dana undermines the voluntary recognition process itself. However, it also serves as a safeguard against union manipulation of authorization cards and other misrepresentations that create a false picture of union support.[16]

The Board waxes on about the importance of remaining neutral. I can tell you, as a former regional director, the Board's role is not one of neutrality.[17] The Board's role, and I quote directly from its web site, is to "safeguard employees' rights." Giving the employees the opportunity to decertify a minority union is in keeping with safeguarding rights. In overruling Dana Corp. the Board has betrayed its mission, and it has taken a position that is incompatible with the statutory purpose of the Act. As the Supreme Court reasoned in NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322, 326 (1974), "it is the Board's function to strike a balance among 'conflicting legitimate interests' which will "effectuate national labor policy," including those who support versus those who oppose the union." Another August 2011 Board decision, UGL-UNICCO Serv. Co., 2011 NLRB LEXIS 488 (NLRB Aug. 26, 2011) also takes rights away from workers by barring decertification for up to one year following a sale or merger.

Dana allowed employees to exercise their right to decertify 17 unions voluntarily recognized by employers. The Board justified overturning Dana with the argument that this number is statistically insignificant. The Board's argument ignores the purpose of Dana and its own mission: to allow workers to exercise their rights.

Raymond Interior Sys., 2008 NLRB LEXIS 366 (NLRB Nov. 10, 2008).

[16] Dayton Hudson Dep't Store Co., Div. of Dayton Hudson Corp. v. NLRB, 987 F.2d 359 (6th Cir. 1993); NLRB v. Gormac Custom Mfg., Inc., 190 F.3d 742 (6th Cir. 1999).

[17] See SNE Enters., 344 NLRB 673, 674 (NLRB 2005)**(**"We recognize that setting aside a union victory in an election does represent a setback for the union. However, at bottom, it is employee free choice that is at issue, not the victory or loss of any particular party.").

IV. Specialty Healthcare Will Balkanize Businesses With Small Bargaining Units.

In Specialty Healthcare & Rehab. Ctr. of Mobile & USW, 2011 NLRB LEXIS 489 (NLRB Aug. 26, 2011), the Board decided that a regional director must find that any unit that the union petitions for is appropriate, if the employees performed the same task or earned the same or similar pay. This will wreak havoc on employers. Specialty Healthcare will give unions the ability to organize multiple small collective bargaining units within one facility, Balkanizing the business and making it impossible for an employer to make hiring, promotion and transfer decisions. Costs will increase as the employer is forced to deal with multiple unions. This ability to carve out small units will adversely affect or perhaps completely eliminate opportunities for employees to advance in the workplace or learn new skills. Moreover, I can tell you from my experience as a regional director, a regional director looking at a representation petition would be compelled to hold a representation election for any unit supported by the union.

In early cases the Board considered whether employees had a "community of interest" when defining units. The Board looked at job titles, salary, compensation, benefits and skills and considered how the employees with different job titles related to the integrated nature of the employer's work enterprise. We concede that the statute has never required the Board to select the most appropriate unit – the unit need only be an appropriate unit with a clear community of interest among the employees. With this approach, the Board avoided separating small groups of employees carved out only for the purpose of union organizing from other groups that performed related tasks for similar pay. The new test under Specialty Healthcare is a poor policy that serves no useful purpose other than to make it easy for unions to organize.

I believe that Specialty Healthcare, Lemons Gasket Co. and the proposed rules are the Board's response to the failure of the Employee Free Choice Act. That proposal would have bypassed secret ballot elections and required employers to recognize a union

on the basis of cards signed by employees publically. Congress appropriately refused to deny American workers their right to a secret ballot, but the Board's proposals and decision seems to be an attempt to salvage the heart of EFCA.

In conclusion, I want to thank you for the opportunity to appear before the Committee. I would be happy to answer any questions you might have.