IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

EXHIBIT 10 IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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April 7, 2014

VIA ELECTRONIC FILING (http://www.regulations.gov)
AND HAND DELIVERY

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

Re: Representation-Case Procedures; RIN 3142-AA08 (Docket No. NLRB—2011-0002)

Dear Mr. Shinners:

On behalf of the National Retail Federation (NRF), we hereby submit the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced Notice of Proposed Rulemaking (NPRM) published in the Federal Register on February 6, 2014 at 79 Fed. Reg. 7318.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's This is Retail campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

Based on decades of experience with labor issues, NRF believes that the NLRB's reinstituted proposals would harm NRF's members, their employees, and ultimately consumers. The current labor system fairly balances the interests of retailers and employees in a system that has worked efficiently for many decades. The NLRB's proposals, however, would eviscerate that balance. The proposals would raise costs for retailers (and ultimately consumers) and harm employees in a myriad of ways, such as by denying them necessary information and threatening their right to privacy.

Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
Docket ID No. NLRB 2011-0002
April 7, 2014

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I. Background

On June 22, 2011, the NLRB issued a Notice of Proposed Rulemaking that would have made substantial, unnecessary and harmful changes to its long-standing union representation election procedures.
After receiving over 65,000 comments on the proposal, including comments from the NRF, on December 22, 2011 the Board issued its final regulation. The rule was modified from the originally proposed rule, eliminating several of the rule's more controversial provisions, presumably to enable its issuance prior to the expiration of then-Member Craig Becker's recess appointment which would have reduced the Board below a quorum of votes necessary to act. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace, of which the NRF is a member, immediately challenged the final rule in court. On May 14, 2012, the U.S. District Court for the District of Columbia struck down the rule because the Board lacked the quorum necessary to issue the final rule. *Chamber of Commerce of the U.S. v. National Labor Relations Board*, Civil Action No. 11-2262 (D.D.C. May 14, 2012)

The NLRB eventually withdrew the 2011 rule, but on February 6, 2014 re-issued a new NPRM which, sadly, is virtually identical to its original June 2011 proposal without even a single modification resulting from its earlier rulemaking. While NLRB Chairman Pearce has indicated he does not want re-introduction of comments filed in response to the original 2011 NPRM, NRF notes our objections are equally valid now as they were then.

The NLRB majority has failed to provide any reasonable justification why, after receiving and presumably considering over 65,000 comments, it adopts no changes nor even answered the legitimate questions raised by NRF and others designed to clarify the rule during the original rulemaking. The NLRB has not addressed why the current election procedures, and the current election time frames, need to be overhauled.

The current system works efficiently with elections conducted within a median time of 38 days and unions win over 60% of elections. As the dissent noted "there is no connection of other new data relevant to assess whether the NPRM is necessary at this time or whether alternative measures might more effectively address whatever election issues might be genuine issues for concern." Id. at 7338.

As stated in the dissent to the current NPRM, Members Miscimarra and Johnson observed:

> among other things, the NPRM would impermissibly conduct expedited elections before a hearing was held regarding fundamental questions such as who is actually eligible to vote, thereby resulting in an election now, hearing later. The NPRM would improperly shorten the time needed for employees to

> understand relevant issues, compelling them to vote now, understand later. It would also curtail the right of employers, unions and employees to engage in protected speech.

Id.

The dissent by current Board Members echoes the dissent written by former-Board Member Brian Hayes regarding the Board's 2011 NPRM in which he stated "make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." 76 *Fed. Reg.* No 120 at 36831 (June 22, 2011). Hayes further noted the Board's lack of demonstrated need for the changes, the confusion that will be created especially among small employers confronted with a myriad of "legal arcania" such as appropriate unit, contract bar, statutory supervisory status and voter eligibility, and confusion among employees voting blindly as to the composition of the bargaining unit and voter eligibility.

For these and other reasons, the National Retail Federation attaches its original comments filed in 2011 and incorporates them by reference. Of the Board Members who considered the original 2011 NPRM, only Chairman Pearce remains and there are four new Members for whom these and other comments will be a matter of first impression.

Moreover, we submit additional comments below which arise because of recent application of other decisions by the Board, such as *Specialty Healthcare*, and other actions proposed by the U.S. Department of Labor, such as revisions to the "advice exemption" from the LMRDA's "persuader activity" regulation. The net effect of these actions would add technical questions of Board law relating to appropriate bargaining units unresolved during the substantially reduced time between a union's filing of a petition for election with the Board and the election itself. The proposed rules would also make the employer's ability to respond to the petition and its statutory and constitutional right to communicate lawfully with its employees, even more difficult.

II. ARGUMENT

The proposed rules contemplate many technical changes to the Board's well established union representation election procedures, the core result of which is that employers will have virtually no time to prepare a considered response to a representation petition or to effectively help employees gather information they need to make an informed decision.

Some of the significant proposed amendments, discussed more fully below, are:

- Permitting electronic filing of election petitions, and potentially electronic showing of interest (in other words, dispensing with employee signatures on union cards);[1]
- Requiring pre-election hearings be held in as few as seven days after a hearing notice is served;[2]
- Requiring employers draft a "Statement of Position" to be presented by the start of the pre-election hearing , which sets forth their position on all relevant legal issues, including offers of proof in support, while waiving forever any issue not addressed in the Statement;[3]
- Limiting the issues that may be litigated prior to an election, such as determining which employees are eligible to vote, including whether certain employees qualify as supervisors;[4]
- Requiring employers provide a preliminary voter list with employees' names, work location, shift, and job classification by the start of the pre-election hearing;[5]
- Affording Regional Directors the authority to determine that where disputed individuals constitute less than 20 percent of the bargaining unit those individuals are to vote subject to challenge, which may be resolved post-election;[6]
- Requiring employers to provide a final eligibility list, including employees' telephone numbers and, where available, email addresses with unit employees' names and

[1] 79 Fed. Reg. 7325.
[2] Id. at 7328
[3] Id. at 7326, 7329, 7330
[4] Id. at 7331
[5] Id. at 7326.
[6] Id. at 7332

addresses, to the NLRB and Union within two days of a stipulated election agreement or decision and direction of election;[7]

- Expanding the authority of hearing officers to limit the presentation of evidence on issues that are not directly related to the existence of a question concerning representation or the scope of the bargaining unit;[8] and
- Eliminating pre-election Board review of a Regional Director's decision.[9]

The Board's above- proposed rules would: 1) substantially reduce employers' ability to have meaningful input regarding the size and scope of the bargaining unit; 2) delay resolving most disputes about voter eligibility until after the election; 3) impose upon employers new onerous filing requirements; 4) unnecessarily shorten the time between the filing of the petition and the election; and 5) significantly reduce the due process typically afforded employers in the pre-election stage, thus creating an environment in which employees will be required to vote without being fully informed of the critical facts such as critical knowledge about the pros and cons of union representation or even the right to know in advance of voting the composition of the bargaining unit.

The above-proposed rules would place employers in the untenable position of having to be prepared to respond within seven calendar days (in reality, five working days) to complex issues of unit determination and other pre-election issues which must be raised in a position statement or forever waived. The proposed rules would authorize hearing officers to determine what evidence to include or exclude based on his or her assessment of the position statement. In addition, the hearing officer could demand prior to commencement of the hearing that the employer submit an offer of proof as to any assertions made in a position statement. Thereafter, the hearing officer would be authorized to make a determination whether the employer's assertion(s) raised a "genuine issue as to any material fact."

We also reiterate our serious concerns with the requirement that employers must disclose private employee information, within two (2) working days of the direction of an election, which raises substantial privacy issues. The Board has ignored the question which we and others raised in our comments filed in 2011 whether the employees' email addresses and phone numbers sought are personal home numbers or work related. Either way the requirement raises privacy, security, and productivity issues. Is the required information personal or business related? If the latter, the rule will be perceived by employees as an unwarranted invasion of personal privacy. Retailers'

[7] Id. at 7327
[8] Id. at 7329, 7330
[9] Id. at 7333.

concerns are heightened by recent examples of personal and security breaches by hackers that have become a well-publicized problem for retailers How should retail employers inform their employees that they are required by the federal government to disclose their employees' personal information at the same time as they are assuring customers that their personal identities will be protected? What changes to an employer's no-solicitation/no distribution policies will be required with union electioneering via email at work? What effect will disclosure of work related information such as shifts and work schedules have on productivity? Will the mandated information disrupt an employer's business?

In summary, the proposed changes are wholly unnecessary, unfairly burdensome on employers, and certain to interfere with the ability of employees to understand their rights and the many complex issues involved in deciding whether to vote for union representation. Indeed, it would appear that the proposed rules are designed to come as close as possible to denying employers a voice. As former-Board Member Craig Becker once dreamed:

> "Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct. Because employers have no right to vote, they cast no ballots the significance of which can be diluted by the inclusion of ineligible employees....Because employers lack the formal status either of candidates vying to represent employees or voters, they should not be entitled to charge that unions disobeyed the rules governing voter eligibility or campaign conduct. On the questions of unit determination, voter eligibility, and campaign conduct, only the employee constituency and their potential union representatives should be heard."[10]

Sadly, by providing very limited time for employers to be heard, and even then only after an election, these rules would come close to fulfilling former-Member Becker's dream of denying employers a meaningful role in the representation election process. Instead, the rules would ensure, to the extent possible, that employers are denied the opportunity to exercise their statutory and constitutional free speech rights, and that employees hear only the union side of election campaign issues. For these and the reasons expressed below, we urge the Board to withdraw the NPRM.

[10] Craig Becker, "Democracy in the Workplace: Union Representation, Elections and Federal Labor Law," 77 Univ. of Minnesota Law Review, 495 at 587-588 (1993).

III. ADDITIONAL ARGUMENTS

A. The Proposed Rule in the Context of the Board's Application of *Specialty Healthcare*

The Board's actions in approving fractured single job description bargaining units over the employers' objections in *Specialty Healthcare*, and as the Specialty Healthcare doctrine has been applied in the Board's *Bergdorf Goodman* and *Macy's* retail industry decisions, present a new and major complicating factor in challenging petitioned-for bargaining units as part of pre-representation election procedures. Under *Specialty Healthcare* the heavy burden is on employers to prove that employees excluded from the petitioned-for unit share an "overwhelming" community of interests with employees in the petitioned-for unit.

Under the Board's proposed revisions to the representation case rules, employers would have a total of seven calendar days, or five working days, to analyze the proposed bargaining unit, assess whether a more inclusive or less inclusive unit would be appropriate, gather the list of common factors demonstrating an "overwhelming" community of interests, assemble the evidence to support its arguments, and prepare a comprehensive position statement which would waive anything left out. All of that would be at the same time as the employer is forced to articulate all other arguments for the position statement. Factor in that most employers are unaware of Board law and representation election procedures, what constitutes an appropriate bargaining unit, or the complex "community of interest" factors, much less what constitutes an "overwhelming" community of interests in light of *Specialty Healthcare.*

This problem would be especially true in the retail industry which consists of a multitude of job descriptions and shared interests. The store-wide bargaining unit standard in the retail industry has been discarded under *Specialty Healthcare*.

As the Board indicated in *Specialty Healthcare,* its decision was not meant to disturb long-established special industry presumptions and occupational rules. 357 NLRB No. 83 at fn. 29 (2011). There is a longstanding presumption in the retail industry that the optimum appropriate unit is store-wide. See, e.g., *Sol's,* 272 NLRB 621 (1984); *Kermit Super Valu*, 245 NLRB 1077, 1082 (1979); *May Department Stores*, 97 NLRB 1007, 1008 (1952); *Sears, Roebuck & Co.*, 76 NLRB 167 (1948).

However, while recognizing industry presumptions must still be followed after *Specialty Healthcare*, the regional directors in *Bergdorf Goodman* and *Macy's* rejected the retail industry presumption. Instead, the regional directors in those cases relied upon isolated retail cases, including those with stipulated units and those finding that appropriate units consisted of all salespersons, as opposed to only those who sell particular merchandise. Thus, as long as an exception allowing a smaller petitioned-for unit can be identified in a particular industry, such as

retail, even by voluntary approval employers may not be able to successfully rely on long-established industry practice to successfully challenge a proposed fragmented unit.

In *Bergdorf Goodman*, for example, the Regional Director for Region 2 applied the Board's holding in *Specialty Healthcare* in determining the petitioned for unit of women's shoes associates in the second floor Designer Shoes Department and in the fifth floor Contemporary Shoes Department, excluding all other sales associates (including the men's shoes associates) was presumptively appropriate, which the employer did not rebut by a showing of an "overwhelming" community of interest.

More recently, in *Macy's*, the Regional Director for Region 1 applied the Board's holding in *Specialty Healthcare* in determining the petitioned for unit consisting solely of employees in Macy's cosmetics and fragrances department was appropriate, and the employer failed to rebut by showing of an "overwhelming" community of interest among other employees.

This important change in the law is still not well understood by most small employers in retail and elsewhere, much less what employers must demonstrate to meet their heavy burden of proving an "overwhelming" community of interest. This significant change, further complicates the fact that under the proposed rules hearing officers, who are often non-attorney regional office field examiners, will be vested with authority to decide based on vague legal standards regarding what evidence to include or exclude on a host of fundamental issues, including, for example, voter eligibility and supervisory status.

Specialty Healthcare and its progeny contribute to the notion among retailers of being "ambushed" by the proposed election rules. The perception is that unions will be able to organize small, fractured units of single department or single job description employees through a "stealth campaign" of which the employer is unaware, then file a petition when the union reaches its peak of support which amounts to the extent of the union's ability to organize, followed by a 7-day period for submitting a binding Statement of Position on complex election issues such as the new *Specialty Healthcare* standard of proving an "overwhelming" community of interests, if that is even allowed at the discretion of the hearing officer, then immediately followed by a slap-dash rush to election within 10-21 days, where unit questions are unclear and unresolved until after the election and employees are uninformed and confused.

This "rush to judgment" which is further complicated by *Specialty Healthcare* is hardly a model of fairness and due process for any democratic election, much less a union representation election.

B. The Proposed Rule in the Context of the Labor Department's Proposed Restrictions on Outside Legal and Labor Relations "Advice" under the LMRDA's Persuader Activity Rules

The proposed representation rules become an even more insurmountable burden for un-counseled employers. It is clear that the NLRB is operating hand-in-glove with the Department of Labor whenever counsel files a notice of appearance in an R-Case with the NLRB. Soon thereafter, both the employer and its outside legal counsel receives a letter from the Department of Labor's Office of Labor-Management Standards warning about the consequences of failing to report under the LMRDA's persuader activity regulations, including the threat of potential criminal prosecution for those who fail to report.

Under the proposed revisions to the persuader activity regulations, the list of reportable activities is expanded beyond the current bright-line requirement which has been enforced for over 50 years. Under current rules, outside consultants and lawyers are only required to report when they communicate directly with employees to persuade them regarding their rights to form or join a union. The proposed rule not only expands the list of common activities which must be reported to include advice even where there is no direct communication between the consultant and employees, it also eviscerates the "advice" exemption from reporting and disclosure which has stood for over 50 years. Lawyers and law firms would be discouraged from providing legal advice and services to clients during union organizing campaigns and representation elections because to do so would trigger the obligation to report "all labor relations advice and services" for all clients, even those clients for whom the lawyer or law firm provides no "persuader" services. By disclosing client confidences as required by the revised persuader reporting regulation, lawyers and law firms could be subject to state bar discipline, including disbarment from the practice of law, for violating Rule 1.6 of the ABA's Model Rules of Professional Responsibility , which have been adopted by most states, prohibiting disclosure of client-attorney confidences. The effect of the rule will be to interfere with the attorney-client relationship, and impair the ability of employers to consult legal counsel when they most need it. For that reason, the American Bar Association and numerous state attorneys general and state bar associations have opposed the evisceration of the "advice" exemption under LMRDA's "persuader activity" regulations. Over 50 national trade associations, including NRF, recently wrote to Labor Secretary Perez urging him to withdraw the proposed rule.

All of this means it will be more difficult for employers to easily or quickly find outside legal counsel during a union organizing campaign and representation election, especially during the pressure-filled shortened time between filing of a petition and the date of an election. The NLRB must take into account the efficacy of advancing rules which, combined with the Labor Department's new "persuader activity" rules, will result in more unfair labor practices by

employers pushed into hasty, uncounseled actions as a result of dramatically shortened election campaigns..

IV. Reasons Previously Expressed for Opposing the Proposed Representation Election Rules

As NRF discussed in great detail its initial August 2011 comments (attached), NRF objects to the proposed rule changes because they:

- fail to address the fact that by its own admission elections already occur quickly and fairly. (i.e. from the time a petition is filed, the average time for an election is 31 days and the median time is 38 days. Elections occur within 56 days more than 95 percent of the time.);
- impose substantial costs on retailers, the vast majority of whom have only one store outlet employing less than 100 workers, forcing these small businesses to waste money and perhaps reduce their hiring of new employees.
- create great confusion and uncertainty regarding who could vote in a union representation campaign.
- deny employees the opportunity to cast a fully-informed vote by needlessly compressing the process within 10 to 21 days and, in effect, creating "quickie elections."
- undercut the free speech rights guaranteed under Section 8(c) of the National Labor Relations Act at precisely the time when such rights are most needed—following filing of a union petition for election thus forcing employees to vote without being fully informed and with unanswered questions concerning the bargaining unit they will be joining.
- constitute a deprivation of the fundamental rights to due process normally afforded in adversarial proceedings.
- defer most issues concerning unit composition until after an election has been held, especially if an issue involves 20 percent or less of the total employees in the unit which will cause harm not only to retailers, but also to the individuals they employ (e.g. to the extent the unit issues may involve supervisory status, the impact can be even more serious and could easily result in an increase, rather than decrease, in unfair labor practice charges and challenges to the election.
- leave employees to speculate regarding the practical impact of their vote to be or not to be represented by a union, and whose interests will and will not be represented in contract negotiations.
- eviscerate existing law regarding voter eligibility lists requiring employers to disclose available email addresses and telephone numbers of potential bargaining unit employees as part of the voter eligibility lists creating the possibility of abuse and invasion of privacy.

V. Where's the Problem?

What has generated this combination of regulatory actions? Where's the problem that would justify an overhaul of the representation election process? Union density continues to decline as it has over the past 50 years. Is the cause of that decline "delayed" secret ballot elections, where the median time is 38 days between filing of an election petition and the vote, and when substantial delays occur in only a tiny fraction of elections? Is the problem more informed voters with knowledge of the advantages and disadvantages of union membership or the record of a particular union prior to the election?

Unions already win well over 60% of NLRB supervised secret ballot elections. Does that not suggest the problem of declining union density is not with the process but perhaps with too few elections, too small units, or perhaps something more endemic among unions themselves - too few organizing campaigns and a message which simply does not resonate with many, if not most, employees?

It's not the responsibility of the NLRB to guarantee union success in representation elections, but rather to ensure the election process is conducted under "laboratory conditions" after what the Act demands and Congress and the courts have endorsed as "full, open and robust debate."

It is not the fault of the NLRB's election rules if a petitioning union cannot hold its majority support (if it ever had it) for a mere 38 days through to a secret ballot election. It merely underscores the "inherent unreliability" of signed union authorization cards as a means of testing true employee sentiment for representation and the far more reliable gauge of true employee sentiment through an NLRB secret ballot election.

Rather than overhauling the representation –case election rules which work in all but the tiniest minority of cases, the Board should more closely examine the root cause of delay in those few cases where delay is a problem, and propose alternative, less drastic rule changes depending upon the outcome of its study.

CONCLUSION

A rush to judgment is almost never the best course for ensuring fairness and due process in any democratic election. Unions control the timing for filing representation election petitions, often after an extensive underground "stealth campaign" until they reach peak strength of signed union authorization cards. Thereafter, the NLRB should protect employees from objectionable conduct by management or unions and fulfill its statutory mandates (1) to determine the unit appropriate for bargaining in each case and (2) ensure an adequate opportunity for free speech in a reasonable period of time so employees may cast a fully informed vote (informed by both labor

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and management). Sadly, the proposed revisions to the NLRB's representation election rules undermine both statutory mandates and, therefore, should be withdrawn.

Respectfully submitted,

NATIONAL RETAIL FEDERATION

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Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
Docket ID No. NLRB 2011-0002
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 7, 2014, the foregoing Comments on the Notice of Proposed Rulemaking were filed electronically with regulations.gov and by sending them via Federal Express, to:

Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

I declare that the statements above are true to the best of my information, knowledge and belief.

Christopher R. Coxson

Dated: April 7, 2014

ATTACHMENT

COMMENTS ON THE NLRB'S PROPOSED RULES REGARDING REPRESENTATION CASE PROCEDURES

(29 CFR Parts 101, 102, and 103, RIN 3142–AA08)

Submitted by the
NATIONAL RETAIL FEDERATION
www.nrf.com

August 22, 2011

As the world's largest retail trade association, the National Retail Federation (NRF) includes retailers of all sizes, formats and channels of distribution, as well as chain restaurants and industry partners. In the United States, NRF represents more than 3.6 million establishments which directly and indirectly account for 42 million jobs—one in four United States jobs. The total domestic GDP impact of retail is $2.5 trillion annually.

Based on decades of experience with labor issues, NRF believes that the NLRB's proposals would harm NRF's members, their employees, and ultimately consumers. The current labor system fairly balances the interests of retailers and employees in a system that has worked efficiently for many decades. The NLRB's proposals, however, would eviscerate that balance. The proposals would raise costs for retailers (and ultimately consumers) and harm employees in a myriad of ways, such as by denying them necessary information and threatening their right to privacy.

As an initial matter, the current system works well for retailers and employees. Elections already occur quickly and fairly. According to the NLRB itself, from the time a petition is filed, the average time for an election is 31 days and the median time is 38 days. Elections occur within 56 days more than 95 percent of the time. The NLRB has failed to provide any evidence, and NRF is aware of none, suggesting any need to further shorten these time periods. For the small minority of matters that linger beyond a few months, the NLRB could take less drastic action to ensure that those elections take place more quickly.

Instead, by shaving off time at the beginning of the election process, the Board proposes "quickie" elections, 10-21 days from the date of the union's filing of the election petition. The proposed rules would defer unit composition and voter eligibility questions until after the election is held, votes are cast and impounded, leaving employees in the dark on critical issues. Thereafter, if the employer is dissatisfied with the decisions of the regional Director, the employer would no longer be assured of review by the full Board.

Although the NLRB's proposals would not redress a pressing need, they would impose substantial costs on retailers and employees during these precarious economic times. By any measure, retailers are predominantly small businesses. More than 95 percent of all retailers have only one store outlet, and more than 98 percent of all retail

companies employ less than 100 workers. As in other industries, the economic climate has harmed retailers and their employees. During the past few years, many retailers have been forced to shutter their doors or downsize, and with consumer confidence sagging, many retailers are still struggling.

The NLRB's proposals would force these small businesses to waste money and perhaps reduce their hiring of new employees. For example, the proposals would require extensive, ongoing education to all employees about the value or lack thereof of unionization. Currently, retailers educate employees after learning of union activity. In such instances, retailers spend about two weeks educating employees on unions, their organizational structure, the collective bargaining process, and the dues and fee structure of unions. Under the proposals' expedited procedures, however, retailers would have to preemptively educate their employees on an ongoing basis—in some cases at numerous locations each year. Such measures take time and money. This preemptive education could impose new costs in the range of $6 to 9 million annually. These needless costs would harm retailers and consumers, and ultimately could lead to retailers hiring fewer employees. Someone has to pay for such training.

Moreover, the NLRB's proposals would create great confusion and uncertainty regarding who could vote in a union representation campaign. This uncertainty flows from the unique nature of the retail workforce. Retailing provides employment opportunities for individuals who prefer to, or must, work part-time. In 2010, over one-third of total retail employees worked part-time. This aspect particularly affects women, who account for over 60 percent of the retail industry's part-time workforce. In addition, many retail workers are seasonal. During the months of November and December, the traditional holiday shopping season, retail employment peaks. In 2010, retail employment grew by 483,500 workers over these two months. Holiday-related employment opportunities are particularly significant in certain segments of retailing. For example, holiday employment increased 11.9 percent at clothing and clothing accessories stores in 2010; 11.0 percent at department stores; and 9.3 percent at sporting goods, hobby, book, and music stores. The NLRB's proposals would leave hundreds of thousands of these employees uncertain as to their eligibility to vote in union elections.

Furthermore, the NLRB's proposals would effectively deny many employees the opportunity to cast a fully-informed vote. By needlessly compressing the process within 10 to 21 days and, in effect, creating "quickie elections," the NLRB would hinder employees from hearing from their employer, and their fellow employees, regarding the consequences of voting in favor of, or against, unionization. These proposals would especially harm employees in the retail industry, many of whom are part-time or seasonal. Because unions control pre-petition activities, including the timing of petitions, a small minority of employees could effectively garner the ability to impose their preferences on their colleagues.

The shortened time periods would also harm small retailers. The proposed rules require retailers to submit a formal Statement of Position within 7 days from the union petition for election, stating all issues or forever waiving them. Many small retailers are unfamiliar with unions and union elections. A union could spend 6 months trying to influence employees, and then request an election the Wednesday before Thanksgiving. That would start the clock on a potential 10-day time frame for a vote. For retailers, this could be the worst possible time because of the craziness of "Black Friday," which heralds the start of holiday shopping—one of the most crucial times of the year for retailers. In addition, with most other businesses closed the Friday after Thanksgiving, it would be hard to reach a lawyer or consultant.

The rush-to-judgment "quickie" elections would severely undercut the free speech rights guaranteed under Section 8(c) of the National Labor Relations Act at precisely the time when such rights are most needed—following the filing of a union petition for election. Section 8(c) provides:

> 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 any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

However, in order for free speech to have any meaning, there first must be an adequate opportunity to speak. The United States Supreme Court has characterized the Congressional policy as "favoring uninhibited, robust, and wide-open debate" of matters concerning union representation, so long as that does not include unlawful speech or conduct. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). Limiting the reasonable *opportunity* for such uninhibited, robust and wide-open speech is the equivalent to denying it altogether.

Thus, the ultimate victim of the new "quickie" election rules will be employees themselves, who will be forced to vote without being fully informed and with unanswered questions concerning the bargaining unit they will be joining.

The unjust burden placed upon retailers by the shortened time frame for elections, particularly smaller retailers, is no better demonstrated than by the proposal to require employers to submit a Statement of Position within 7 days from the date of the union petition for election. In reality, within 5 working days, a retailer, who may have no specific working knowledge of the issues involved in an election campaign, will be required to disclose its complete theory of the case, including the appropriateness of the petitioned-for unit, any proposed exclusions from the petitioned-for unit, and the existence of any bar to the proposed election. While the pressures and expense associated with identifying such issues within such a short time-frame alone would constitute a justified objection, the manifest, unjust burden placed upon employers by the

proposed rules is compounded by the fact that if, in the rush to complete its Statement of Position, a retailer fails to raise a particular issue in its filing, than it would be *precluded from presenting further evidence on this issue during hearing.*

The explanation that accompanies the proposed rules indicates that the Statement of Position provisions are modeled on Rule 26(a) of the Federal Rules of Civil Procedure. However, the fact is that the proposed rules do not allow for amendment of issues or introduction of newly discovered evidence in the same way that is contemplated by the rules governing civil litigation. Instead, the proposed rules bring the concept of "trial by ambush" to a level never previously contemplated. Within civil litigation, the purpose of the Federal Rules of Civil Procedure is to allow for discovery that will enable a party to learn of the other side's position and evidence, and to raise additional issues within the proper context as they are identified. Under the proposed amendments to the Board's rules, a party's statement of position may not be prepared or obtained until the first day of the hearing, leaving the other party or parties unable to clearly identify or appreciate the issues to be presented until it is too late. By the time the Statements of Positions are filed and disclosed, a party has already waived its right to respond accordingly. As such, because they do not sufficiently allow the parties to explore all potential issues that may be associated with a particular election and modify their positions accordingly, the proposed rules constitute a severe deprivation of the fundamental rights to due process normally afforded in adversarial proceedings.

Equally objectionable is the fact that the proposed rules choose to defer most issues concerning unit composition until *after* an election has been held, especially if an issue involves 20 percent or less of the total employees in the unit. This is clearly not a viable solution, and will cause harm not only to retailers, but also to the individuals they employ. With respect to retailers, the 20-percent rule artificially and naively puts numerosity over all other interests and issues. The inclusion or exclusion of a single classification, or in some cases even a single individual, could easily influence the outcome of a representation election. To the extent the unit issues may involve supervisory status, the impact can be even more serious and could easily result in an increase, rather than decrease, in unfair labor practice charges and challenges to the election.

From the employee perspective, with unit issues unresolved before the election, employees will be left to speculate regarding the practical impact of their vote to be or not to be represented by a union, and whose interests will and will not be represented in contract negotiations. As explained earlier, this is particularly so in the retail environment where such a large percentage of the workforce is temporary, part-time or seasonal. Reality dictates that employees often make their choices regarding representation based upon who is and who is not to be included in the proposed unit. Delaying the fundamental question of unit composition until after the election deprives employees of the ability to make an informed decision on the impact of voting for or against representation.

Finally, the NRF cannot overstate its objection (and those of its members) to the proposed rules' near evisceration of existing law regarding voter eligibility lists. The contemplated requirement on employers to disclose available email addresses and telephone numbers of potential bargaining unit employees as part of the voter eligibility lists creates the possibility of abuse and invasion of privacy that cannot be justified under any rationale. This is particularly so since the proposed rules do not identify any statutory mandate for intrusion into this sensitive area.

Currently, the proposed rule is unclear as to whether it will require the disclosure of business email addresses and phone numbers, but such disclosures should absolutely be precluded. Already, the nation's retailers are often subjected to union "shame on you" campaigns and other tactics that are designed to do nothing other than disrupt business operations. By giving unions almost unlimited access to the electronic communication systems maintained by employers, the ability to disrupt the free flow of commerce is expanded immeasurably: Unions will be able to harass employees while they are working; they will be able to "flood" and slow down systems that should be dedicated to an employer's business, not to union organizing; and they will be able to circumvent the Board's longstanding rules regarding an employer's ability to place lawful restrictions on non-employee access to an employer's premises and business equipment.

Even more objectionable is any requirement that employers disclose the *personal* email address and phone numbers of employees. The proposed rules indicate that the disclosure requirements are somehow necessary given the current "evolution" in electronic communication. However, that very "evolution" actually cuts against the Board's proposed rules, not in favor of them. As employee communication by cell phone, emails and texts evolves, so does employee concerns regarding privacy, abuse, harassment and identity theft. These concerns have led to a bevy of federal and state legislation *protecting* the electronic privacy of individuals, and yet the Board would rather allow for the indiscriminate disclosure of such information. A very real potential for abuse if personal cell phone numbers are disclosed is the ability of union organizers to be able to send direct text messages to employees, regardless of whether they have a text plan as part of their phone service or not. If an employee does not have such a plan, then they may be subjected to their own personal expense, all for the "privilege" of being organized. The mandates of the proposed rules, in reality, constitute a violation of the sanctity of the home, and it subjects employees to potentially harassing communications without their consent or even knowledge. The Supreme Court has recognized that, even though the disclosure of personal email addresses may facilitate union communications, employees nevertheless enjoy a right not to be bothered in their personal environment with work-related matters.[1] The Board should also recognize that right rather than discard it.

In short, the NRF believes that a number of the Board's proposed rules, if adopted, would do serious, irreparable harm to the nation's retailers and to the working

[1] *See U.S. Dept. of Defense v. FLRA*, 510 U.S. 487, 501 (1993).

men and women they employ. In addition, the proposed rules would severely undermine public confidence in the Board's neutrality in labor relations matters. In all, the rules disrupt what is otherwise a level playing field. Unions are given unfettered access to potential unit members; however, employees are effectively denied the opportunity to hear from their employer, and even other employees, regarding the certain and uncertain consequences of voting in favor of, or against, unionization. Most importantly, the proposed rules will require NRF members to assume additional costs and expenses, and face disruption of their business, at the very time they are striving to recover from this country's recent economic recession and high unemployment.

As stated earlier, all employers, especially smaller employers, will be victimized as a result of these rules. But the real victims will be employees whose privacy has been invaded, forced into hasty voting before being fully informed on the issues, and voting in bargaining units where the composition and appropriateness are uncertain. Quicker is not always better.

NRF strongly encourages the Board to delay enactment of the proposed rules until a broader assessment of their potential impact can be made. Such drastic alterations to an effective process that has been in place for decades should only be undertaken following a national conversation that includes input from all sectors of commerce—employers, unions, employees and the like—as was done during the Board's nearly two-year consideration of its health care bargaining unit rulemaking in the late-1980s on much less significant issues affecting only one part of a single industry—rather than rushing through R-case rules which affect every employer covered by the National Labor Relations Act.

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