UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-09-ABJ
	)	Judge Amy Berman Jackson
NATIONAL LABOR RELATIONS BOARD, et al.,	)	
Defendants.	)	

AMICUS BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION FOUNDATION, INC., IN SUPPORT OF PLAINTIFFS

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I. Introduction

The National Labor Relations Board ("NLRB" or "Board") has adopted new rules for speeding up the conduct of union certification elections ("Election Rule," 79 Fed. Reg. 74,308 (Dec. 15, 2014)). The Election Rule acknowledges that "the regional director must always decide on the appropriateness of the unit before directing or conducting an election." 79 Fed. Reg. at 74,392. This is because § 9(b) of the National Labor Relations Act ("NLRA" or "Act") requires that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b).

Nevertheless, directly contravening § 9(b)'s mandate, the Election Rule provides that the Board need *not* determine the composition of roughly one-fifth of a proposed bargaining unit in election proceedings. New NLRB Rule 102.64(a) provides that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted," 79 Fed. Reg. at 74,482. Moreover, the Board "strongly believe[s]" that under the new rule regional directors should typically not resolve "pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit." *Id.* at 74,388 n.373. Perhaps even more egregious, if the votes of individuals

in disputed job classifications will not change the election's outcome, the Board will never decide, even after the election, whether the disputed classifications are properly part of a bargaining unit under new NLRB Rule 102.69(b). 79 Fed. Reg. at 74,487. The Board will instead leave unresolved the parameters of up to 20% of the unit. *Id*.

Consequently, if there is any dispute as to whether individual employees or particular classifications are in the bargaining unit, employees will be left in the dark as to exactly who is in the unit about which they must vote. Under those circumstances, employees may not be able to intelligently decide how to vote.

It would be absurd for a redistricting commission to assert that it properly defined a congressional district while leaving unresolved whether one-fifth of adjacent counties are in or out of the district. So too is it absurd for the Board to claim it is defining an appropriate bargaining unit while leaving unresolved whether one-fifth of job positions are in that unit. Being up to 20% wrong about the proper scope of a unit is simply not "close enough for government work." Under NLRA § 9(b), the Board must define the scope of the bargaining unit in each case. The Board's willful abdication of that statutory responsibility in the Election Rule renders the rule invalid.[1]

[1] The Election Rule is fundamentally flawed for a number of other reasons, such as those set forth in amicus Foundation's comments submitted to the Board and those stated by the two dissenting Board Members. However, this brief only focuses on this flaw and the invasion of employee privacy it facilitates, discussed below, because these are the most glaring deficiencies and do the greatest harm to employee rights to choose or reject unionization.

II. The Board Has a Statutory Duty in Election Proceedings to Determine the Scope of the Bargaining Unit.

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). This includes a statutory duty under NLRA § 9(b) to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Two aspects of § 9(b) are noteworthy.

First, the Board's duty to establish an appropriate bargaining unit is mandatory in every election, as § 9(b) requires that "[t]he Board *shall decide* in *each case* whether . . ." *Id*. (emphasis added). The Board has no leeway to shirk this duty in order to haphazardly facilitate its pursuit of another goal: certifying union representatives as fast as possible without regard to the consequences for up to 20% of the employees who may wrongfully be forced into a union and lose their right to bargain for themselves.

Second, the Board must decide who is in a bargaining unit "in order to assure *to employees* the *fullest freedom* in exercising the rights guaranteed by this subchapter." *Id*. (emphasis added). This means the rights guaranteed employees by § 7 of the NLRA "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and "the right to refrain from any or

all of such activities." 29 U.S.C. § 157. These rights are "inviolate," as "[o]ne of the principal protections of the NLRA is the right of employees to bargain collectively through representatives of their own choosing *or* to refrain from such activity." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).

If the Board fails or refuses to perform its duty under NLRA § 9(b), employees will be voting whether or not to be represented by a union without knowing exactly who will be in the collective over which the union will have monopoly bargaining power.

Moreover, unsuspecting employees may get wrongfully lumped into a unionized bargaining unit after the fact, thereby severely and negatively impacting their right to refrain from unionization. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-88 (11th Cir. 2010) (employee suffers cognizable injury if he is "thrust unwillingly into an agency relationship, where the union is his 'exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment' under § 9(a)"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the congressional grant of power to a union to act as exclusive collective bargaining representative" necessarily results in a "corresponding reduction in the individual rights of the employees so represented"). Employees should not have their individual rights "reduced" simply because the Board refuses to perform its vital role of determining with specificity the individuals and job classifications to be included in or excluded from a bargaining unit.

III. Under the Election Rule, the Board Empowers Itself to *Not* Determine Whether Classifications of Employees Are in a Bargaining Unit.

A. The Election Rule allows the Board to shirk its duty to establish the scope of a bargaining unit, for the sole purpose of giving unions lightning fast electoral victories before employers and employees opposed to unionization know what hit them. As the dissenting Board members aptly stated, "the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure," and "the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues." 79 Fed. Reg. at 74,432 (emphasis added). The "device[s]" for rushing union certification elections are two provisions of the Election Rule that require NLRB regional directors *not* to determine whether disputed classifications of workers are in a bargaining unit, either before or after an election.

The new rule against determining the exact composition of a bargaining unit prior to an election is NLRB Rule 102.64(a), which states that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." 79 Fed. Reg. at 74,482.[2]

[2] Perversely, the Election Rule also provides that, if a party does not attempt to litigate inclusion issues at the pre-election hearing, then the party is precluded from *ever* disputing the appropriateness of the bargaining unit. *See* NLRB Rule 102.66(d); 79 Fed. Reg. at 74,484. Thus, the Election Rule simultaneously provides that the composition of the unit is not a litigable issue before the election, but parties will be punished with a draconian "waiver" if they don't try to litigate that issue anyway.

That includes disputes concerning whether entire classifications of workers are part of a petitioned-for bargaining unit. *See id.* at 74,384.[3] The Board advises that regional directors *not* resolve who is in a proposed bargaining unit if less than 20% of the proposed unit is in dispute. *Id.* at 74,388 n.373. The status of disputed individuals is to remain unresolved during the election, and the disputed individuals may be allowed to vote subject to challenge.

> If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

NLRB Rule 102.67(b); 79 Fed. Reg. at 74,485.

The Board's new rule against determining whether disputed individuals or work groups are properly part of a bargaining unit, if their votes do not affect the election's outcome, is expressed at NLRB Rules 102.69(b), which states:

> *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a) of this section, <u>if the challenged ballots are insufficient in number to affect the results of the election</u>, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certifica-

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[3] As an example, the Board majority stated that, in a proposed unit of "production employees," a regional director will not decide "[w]hether production foremen are supervisors," or "whether workers who perform quality control functions are production employees." 79 Fed. Reg. at 74,384. Those employees are cast into the abyss throughout the entire election process, not knowing whether to vote or whether their ballot, if cast, will ever be counted. And, all employees who do vote will not know exactly who will be in the unit if the union wins the election.

> tion of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

Id. (italics in original, underlining added); 79 Fed. Reg. at 74,487. In other words, if a union wins an election by a margin greater than the number of disputed individuals, the Board will certify the union as exclusive representative of a so-called "unit" of employees, but it will not resolve the status of disputed classifications of employees. The certification order will include a gratuitous "footnote to the effect that they are neither included nor excluded" in the bargaining unit. 79 Fed. Reg. at 74,413. The Board intends to allow the employer and union to decide for themselves, *after* the election, whether those individuals are part of the unionized unit. *Id*.

Taken together, new NLRB Rules 102.64 and 102.69(b) announce a policy under which the Board may never determine whether as many as 20% of workers are (or are not) part of a unionized bargaining unit. According to the Board majority, "deferral of up to 20% of eligible voters would have left the challenged ballots non-determinative in more than 70% of all representation elections conducted in FY 2013." 79 Fed. Reg. at 74,390 n. 388. The Board has thus embraced the proposition that it will not decide the composition of a bargaining unit in about 70% of contested representation elections. That is a dereliction of the Board's duty under NLRA § 9, with broad and deleterious ramifications for employees' right to free choice.

B. To illustrate how these rules would work in practice, consider a simple example. A union petitions for an election in a bargaining unit of "production employees" that it claims has 100 job positions. The employer asserts that 15 of

those job positions are not part of the unit because 10 "system analyst" positions are technical in nature and 5 "foremen" positions are supervisors (under NLRA § 2(11), 29 U.S.C. § 152(11), "supervisors" are not "employees," but agents of the employer).

Under new NLRB Rule 102.64, the Board will not determine before the election whether these fifteen job positions are part of the proposed unit. Those individuals, their co-workers, and the employer will proceed through the election without knowing whether they are in the unit, or even if some of them are statutory supervisors. Those individuals will not know whether to participate in the election campaign. If the foremen turn out to be supervisors, their participation in the campaign will likely be illegal and taint the entire election process. *See, e.g.*, *Dejana Indus., Inc.*, 336 NLRB 1202 (2001) ("if a supervisor directly solicits authorization cards, those cards are tainted"); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) (actions of pro-union supervisors taint the election process). Moreover, other employees who might not want to be in a unit with system analysts or foremen will be voting in the dark.

And, if the union wins the election by more than fifteen votes, the Board will certify it as the representative of a bargaining unit of "production employees" pursuant to NLRB Rule 102.69(b) without ever determining whether that unit includes those fifteen system analysts and foremen. Their status, and thus the scope of the unit, will simply be left unresolved. It is akin to a mayoral election in

which it is unknown, either before or after the election, whether 15% of the potential voters are inside city limits.

IV. The Election Rule Is Invalid Because the Board Will Not Establish an Appropriate Unit Either Before or After an Election.

A. The Board concedes that "the regional director must always decide on the appropriateness of the unit before directing or conducting an election." 79 Fed. Reg. at 74,392. This result is required not only by NLRA § 9(b), but also by NLRA § 9(c)(1), which mandates that the Board "provide for an appropriate hearing," and "find[ ] upon the record of such hearing that such a question of representation exists," before it "direct[s] an election by secret ballot and . . . certif[ies] the results thereof." 29 U.S.C. § 159(c)(1).

Nonetheless, as discussed above, the Election Rule allows the Board *not* to establish the scope of up to 20% of a bargaining unit either before an election or after, as long as resolution of the dispute will not change the election's outcome. That is incompatible with NLRA §§ 9(b) and 9(c)(1). As the Board stated when it proposed the Election Rule, "[t]he unit's scope *must always* be established and found to be appropriate prior to the election." 79 Fed. Reg. 7318, 7331 (Feb. 6, 2014) (emphasis added).

The Board attempts to reconcile the irreconcilable by claiming that establishing an "appropriate unit" does not necessitate resolving "inclusion issues," *i.e.*, deciding which employees are in a bargaining unit. *See id.* at 7330-31; 79 Fed. Reg. at 74,384. According to the Board, "[g]enerally, individual eligibility and inclusion

issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory exclusion and cannot be in the unit." *Id*. at 74,384.

> For example, if the petition calls for a unit including "production employees" and excluding the typical "professional employees, guards and supervisors as defined in the Act," then the following would all be eligibility or inclusion questions: (1) whether production foremen are supervisors, *see, e.g., United States Gypsum Co*., 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, *see, e.g., PECO Energy Co*.,322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, *see, e.g., Lundy Packing Co*., 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, *see, e.g., Allegany Aggregates, Inc*., 327 NLRB 658 (1999).

Id.

The distinction between "unit determinations" and "inclusion determinations" the Board posits does not exist with respect to whether job classifications are part of a unit.[4] Bargaining units *are composed* of job classifications. If the Board does not decide what job classifications are included in a unit, then the Board has not decided the composition of the bargaining unit as NLRA § 9(b) requires.

The NLRB's function of making unit determinations is analogous to the function of redistricting commissions many states use to draw congressional and

[4] A dispute concerning whether a particular individual is employed in a job classification – unit placement – is a different matter, as that dispute does not affect the parameters of the unit. For example, if an employer and union dispute whether "press operator" positions are part of a unit, that dispute affects the scope of the unit. But, if the parties agree that press operator positions are in a bargaining unit, but dispute whether laid-off employee John Smith is still employed as a press operator, that eligibility question does not affect the unit's scope.

legislative districts.[5] No one would say that a redistricting commission fulfills its function of defining a congressional district if it does not determine whether particular counties or towns are in that district. The reason, of course, is that a congressional district is the sum of its geographic parts. Similarly here, a bargaining unit is the sum of its job classifications. The Board cannot fulfill its statutory function of establishing the scope of a bargaining unit if it does not resolve whether the unit includes or excludes particular job classifications.

B. In addition to making logical sense, the text of NLRA § 9(b) makes clear that unit determinations require resolving so-called "inclusion" issues. Section 9(b) states that "[t]he Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or *subdivision thereof*." 29 U.S.C. § 159(b) (emphasis added). The term "subdivision thereof" indicates Congress' intent that the Board decide, as part of its unit determination, which subdivisions of employees – *i.e.*, which job classifications – are included in the unit.

NLRA § 9(b) also requires that the Board decide an appropriate bargaining unit "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]." 29 U.S.C. § 159(b) (emphasis added). All employees who vote in a representation election when the Board refuses to resolve whether a

[5] *See* National Conference of State Legislatures, *Redistricting Commissions: Redistricting Plans*, available at http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (last visited Jan. 29, 2015).

disputed job classification is in the unit are not exercising their section 7 right to choose whether to be represented with the full information necessary to a free and intelligent decision, because how they vote may be affected by what classifications are in the unit.

Moreover, the Board particularly fails to protect, much less effectuate, the rights of employees in disputed job classifications if it refuses to resolve whether they are properly part of a bargaining unit. To begin with, they do not know whether they should vote or not, because they do not know whether their vote will be counted and whether they will be in the unit if the union wins the election.

Then, when a union is certified as the result of an election, the problem is compounded. If unresolved job classifications rightfully should be part of the unionized unit, the Board has failed to effectuate the § 7 rights of employees in the disputed classifications who support the union if the employer and union agree after the election to exclude them. Conversely, and more likely, if unresolved job classifications are not properly part of the unionized unit, but the employer and union agree after the election to include them, the Board has failed to protect the § 7 rights of such employees who oppose the union not to be subjected to forced unionization. Either way, the Board is not assuring to employees in disputed job classifications "the fullest freedom in exercising the rights guaranteed by [the NLRA]." 29 U.S.C. § 159(b).

NLRA § 9(b)'s exceptions for "professionals" and "guards" further prove Congress' intention that defining an appropriate unit includes deciding which job

classifications are in that unit. Sections 9(b)(1) and (3) state in relevant part that, when making unit determinations:

> [T]he Board shall not:
>
> (1) decide that any unit is appropriate for such purposes *if such unit includes both professional employees* and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or
> . . .
> (3) decide that any unit is appropriate for such purposes *if it includes, together with other employees, any individual employed* as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . .

29 U.S.C. §§159(b)(1),(3) (emphasis added); *see Leedom v. Kyne*, 358 U.S. 184 (1958) (Board improperly included both professional and nonprofessional employees in a bargaining unit it found appropriate, despite § 9(b)(1)'s commands). These sections demonstrate that there is no principled distinction between deciding an appropriate unit and deciding which employees are included in that unit. Congress envisioned that the former includes the latter.

Nevertheless, the Election Rule provides that, unless a union actually lists professionals as being part of a unit in its election petition, the new standard rules will apply, and the regional director need not decide whether a unit includes professionals or guards. 79 Fed. Reg. 74,384-85 n.357. However, to find a unit appropriate if it mixes professional and guard employees with other employees is incompatible with the Board's statutory duty under § 9(b) of the Act.

C. The Board's position that it need not determine *who* is included in order to define an appropriate unit also is inconsistent with NLRA § 9(a), which defines exclusive representation as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of *all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (emphasis added). The reference to "all the employees in such unit" indicates that Congress envisioned that, when determining an appropriate unit, the Board would decide the identity of "all the employees in such unit."

The Election Rule is inconsistent not only with NLRA § 9(a)'s text, but also with its purpose, which is to define the parameters of collective bargaining. Under § 9(a), an employer's obligation to bargain with a union "extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes' that the union represents." *Allied Chemical Workers, Local 1 vs. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971) (quoting 29 U.S.C. § 159(a)); *see also Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002) (terms for recognizing a union as the representative of employees in a different bargaining unit is not a mandatory subject of bargaining). In other words, the scope of the unit controls the scope of bargaining. The Board's decision *not* to resolve whether a union represents individuals in certain job classifications undermines the bargaining process, as the Board itself has acknowledged:

> Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

The Board's refusal to determine exactly whom a union represents is particularly problematic given that unions owe a duty of fair representation to all employees they exclusively represent under NLRA § 9(a). *E.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A union's "duty of fair representation is . . . akin to the duty owed by other fiduciaries to their beneficiaries," such as the "duty a trustee owes to trust beneficiaries," or the relationship "between attorney and client." *ALPA v. O'Neill,* 499 U.S. 65, 74 (1991). The Election Rule threatens to leave a union uncertain as to whom it owes a fiduciary duty, and employees uncertain as to whether any duty is owed to them. It is akin to an attorney not knowing whether he represents a defendant in a court proceeding, and the client not knowing if the attorney actually represents him.

D. The Board's artificial distinction between unit determinations and inclusion determinations finds no basis in its case law, which employs the same basic legal standard for making both determinations. "[I]n defining bargaining units, [the Board's] focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc*., 469 U.S. 490, 494 (1985); *see Blue Man*

Vegas, LLC v. NLRB, 529 F.3d 417, 421-22 (D.C. Cir. 2008). The Board uses a similar community of interest standard when deciding if a petitioned-for unit is appropriate prior to an election,[6] as it does in deciding whether challenged classifications are in the unit after an election.[7] The Board's new notion that these are different inquiries makes little sense given that they pose the same basic legal question, and have an equal effect on employees' rights.

Indeed, prior to the Election Rule the Board actively policed and decided both unit scope and inclusion issues. In *Boeing Co.*, 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units in this way:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the par-

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[6] *See, e.g.*, *Blue Man Vegas,* 529 F.3d at 420-22 (community of interest standard used to resolve appropriateness of larger unit of stagehands that excluded musical instrument technicians); *Macy's, Inc.*, 361 NLRB No. 4, at * 7-8 (2014) (modified community of interest standard used to resolve whether unit composed of only Macy's cosmetic department employees, and no others, is an appropriate unit); *Specialty Healthcare & Rehab. Ctr.*, 357 NLRB No. 83, at * 14-16 (2011) (modified community of interest standard used to resolve whether unit composed only of certified nursing assistants, and not hospital's other employees, is an appropriate unit); *United Operations, Inc.*, 338 NLRB 123, 125 (2002) (community of interest standard used to resolve whether unit composed of only HVAC employees, but not an employer's other employees, is an appropriate unit); *Omni-Dunfey Hotels, Inc.*, 283 NLRB 475, 476 (1987) (community of interest standard used to resolve whether unit composed of only engineering department employees, and not a hotel's other employees, is appropriate).

[7] *See, e.g.*, *Speedrack Products Grp., Ltd. v. NLRB*, 114 F.3d 1276, 1278-79 (D.C. Cir. 1997) (community of interest standard used to resolve challenge to inclusion of work-release employees in a bargaining unit); *Lundy Packing Co., Inc.*, 314 NLRB at 1043-44 (community of interest standard used to resolve challenge to inclusion of quality control job positions in a production employees' unit).

> ties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

The Election Rule disregards much of this precedent and past practice, as shown by the Board majority's overruling of the decision in *Barre National, Inc.*, 316 NLRB 877 (1995). *See* 79 Fed. Reg. at 74,386. In *Barre National*, the Board held that § 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and to raise questions regarding supervisory status, among other things. There, a hearing officer refused to permit evidence regarding an employee's supervisory status. The Board found the refusal "did not meet the requirements of the Act," even though the hearing officer—like the Election Rule—would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status. 316 NLRB at 878-89; *see North Manchester Foundry, Inc.,* 328 NLRB 372 (1999) (recognizing that § 9(c)(1) of the Act requires an appropriate pre-election hearing on eligibility issues). Rejecting this settled practice that found its roots in the Act itself, the current Board majority overrules *Barre National* and disregards its own prior interpretations of what Section 9(c)(1) "requires."

Similarly, in overseeing the Board's power to certify unions as representatives of clearly defined units, federal courts have refused to enforce Board orders when there is an appreciable difference between the scope of the unit during the election and that ultimately certified. *See NLRB v. Parsons Sch. of Design*, 793 F.2d

503, 506-08 (2d Cir. 1986) (units differed by 10%); *NLRB v. Beverly Health & Rehab. Servs, Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpublished) (unit differed by 20%); *NLRB v. Lorimar Prods, Inc.*, 771 F.2d 1294 (9th Cir. 1985) (units differed by one-third); *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir.1984) (units differed by more than one-half).

The Board possesses no power to deviate from these principles.[8]

E. Finally, the Board majority's position that the status of *20 percent* of a bargaining unit can be a so-called inclusion issue, as opposed to a unit determination issue, *see* 79 Fed. Reg. at 74,388 n. 373, is simply unreasonable as a quantitative matter. Congress mandated in NLRA § 9(b) that the "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining . . . ." It is inconceivable that Congress envisioned that this duty would be fulfilled if the Board left unresolved whether one-in-five employees is properly part of a certified unit. In short, the Election Rule undermines Congress' explicit statutory commands to the Board and, therefore, cannot stand.

[8] *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), does not save the Election Rule, as the Board erroneously claims, *see, e.g.,* 79 Fed Reg. at 74,425. *A.J. Tower* upheld a Board rule that barred employers from challenging a ballot post-election if they had not made a pre-election ballot challenge. 329 U.S. at 325-26. That is not the situation here. The Election Rule *precludes* regional directors from determining whether individuals are properly part of a bargaining unit even if their inclusion or exclusion is disputed pre-election. *See* NLRB Rule 102.69(b).

V. The Board Cannot Leave It to Employers and Unions to Decide the Representational Preferences of Employees.

The Board justifies its refusal to decide the exact scope of a bargaining unit, when its decision purportedly would not change an election's outcome, by claiming that the employer and union can work it out between themselves, either through bargaining or through filing a petition for unit clarification. 79 Fed. Reg. at 74,393, 74,413. This excuse is untenable given NLRA § 9(b)'s requirement that "[t]he Board shall decide *in each case* . . . the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). The Board cannot shirk its duty on the grounds that it may decide the inclusion issues in a later-filed unit clarification case if the employer and union cannot do so themselves. The Board itself has a statutory obligation to determine who is in (or out) of a unionized bargaining unit in *each* representation case.

Moreover, letting self-interested employers and unions decide whether individuals or groups of employees are properly part of a union-represented bargaining unit is inconsistent with the Board's responsibility to make unit determinations "in order to assure *to employees* the fullest freedom in exercising the rights guaranteed by [the NLRA]." *Id*. (emphasis added). That would turn the Act's primary purpose – protecting employee rights *from* employers and unions – on its head. *See* NLRA §§ 8(a) & (b), 29 U.S.C. §§158(a) & (b) (delineating employer and union unfair labor practices).

Employers and unions, if allowed to themselves decide whether employees are part of a bargaining unit, will necessarily make those decisions based on their own self-interests, and not on the actual merits of the employees' status or desires. Employees will become little more than bargaining chips in negotiations between the employer and union.

It is largely for this reason that the Supreme Court warned decades ago against deferring to even ostensibly "good faith" employer and union beliefs about employee preferences, because it "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act – that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 738-39 (1961); *see Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (finding "nothing unreasonable in giving a *short leash* to the employer as vindicator of its employees' organizational freedom") (emphasis added); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003) (overruling Board decision to defer to agreement between an employer and union regarding whether employees wanted union representation because, "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee Section 7 rights. . . .").[9] *Id.* at 532. The Board simply

[9] The concern that self-interested unions and employers will gerrymander units or grant recognition within inappropriate units regardless of employees' representational preferences is not speculative or theoretical. In *Service Employees Int'l Union UHW-West & Local 121-RN and Los Robles Hospital & Medical Center*, Cases 31-

cannot delegate to self-interested employers and unions its statutory duty to decide which employees are in a proper bargaining unit.

VI. The Election Rule Severely Undermines Employees' Privacy Rights.

A. The Election Rule contains a new "voter information" requirement, by which employers must quickly turn over to petitioning unions employees' personal e-mail addresses, personal cell phone numbers and other private information, without the individual employees' knowledge or consent. *See* 79 Fed. Reg. at 74,301.[10] In issuing that requirement, the Board cavalierly brushed aside all concerns for employee privacy and personal security, refusing to permit employees to opt out or put themselves on a "do not call" list, 79 Fed. Reg. at 74,341-52, despite the well-known abuse every citizen faces from identity theft and solicitors' misuse of personal information. *See* FTC Do-Not-Call Rule, 16 CFR part 310; CAN-SPAM Act, 15 U.S.C. § 7701 *et seq*. (protecting individuals from receiving unsolicited e-mail communications).

CB-105004 *et alia* and 31-CA-105045 *et alia*, two unions and a hospital forced unionization onto two newly acquired units of nurses and service employees without their knowledge or consent. After unfair labor practice charges were filed in 2013, the unions and hospital settled by withdrawing the unlawful recognition.

[10] 79 Fed. Reg. at 74,301 states:

> Within 2 business days of the direction of election, employers must electronically transmit to the other parties and the regional director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations.

The Board's only response to these legitimate privacy concerns is a weak warning to unions not to use the information "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." 79 Fed. Reg. at 74,336. However, the Board does not define "related matters," leaving a gaping hole regarding the use of employees' personal data. More importantly, the Board specifies no sanctions for misuse of employees' information, dangling only the vague notion that it will provide an "appropriate remedy" under the Act "if misconduct is proven and it is within the Board's statutory power to do so." 79 Fed Reg. at 74,360. This nebulous and toothless promise that the Board might sanction unions that misuse employees' personal information rings hollow.

In any event, the Board cannot prevent misuse of employees' personal information. Once a union shares employees' personal information with its officers, agents, organizers and supporters, it: (1) cannot control how these individuals will use the information; (2) cannot control with whom they will share the information; and (3) cannot take the information back if it is misused. Once information is disseminated, the Board cannot put the "cat" back in the proverbial "bag."

B. Worse, what about employees who are *not* properly part of a bargaining unit but whose status is not resolved prior to the election? Under the Election Rule, employers are obligated to provide these individuals' personal information to the union, even though they may be supervisors, or employed in jobs outside of the unit.

It is arbitrary and capricious for the Board to compel the disclosure of personal information about individuals the union has no right to represent.

For example, assume that an employer claims that 10 individuals in a petitioned for unit of 100 individuals are not "employees" under the NLRA, but are statutory supervisors the union has no legal right to represent. Assume further that the employer is correct. Nonetheless, under the Election Rule, the Board will not decide whether individuals are supervisors prior to the election, and will force the employer to disclose to the union the home addresses, personal e-mail addresses, and cell phone numbers of these supervisors. The Board has no legitimate reason for compelling the disclosure of that information. Thus, when taken together with the Board's rule against determining exactly who is in a bargaining unit, these disclosure requirements are arbitrary and capricious.

C. Finally, as a general matter, most employees would be appalled to learn that a government agency contemplates compulsory disclosure of their personal cell phone numbers and e-mails to a special interest group *for the purpose* of making it easier for that group to cajole, induce or harass them to support its agenda. Over 93% of private sector employees have chosen *not* to associate themselves with unions.[11] Many workers have unfavorable views of unions.[12] Many workers do not

[11] *See* Dep't of Labor, Bureau of Labor Statistics Econ. News Release, *Union Member Summary*, USDL-15-0072 (Jan. 23, 2015) (6.9% of private sector employees were union member), available at http://www.bls.gov/news.release/union2.nr0.htm.

[12] *See* Pew Research Center Poll (Mar. 3, 2011) (unions viewed favorably by 47% of public, unfavorable by 39%), http://people-press.org/2011/03/03/section-4-opinions-of-labor-unions/.

support the political agenda that union officials aggressively advance.[13] For a federal agency to compel disclosure of individuals' personal information to these unpopular and politicized special interest groups is indefensible, and little different from the federal government requiring disclosure of citizens' information to ACORN, Greenpeace or the National Rifle Association to facilitate those organizations' abilities to advance their political agendas. This is especially true when the worker whose personal information is compulsorily disclosed may not even be in the bargaining unit under consideration.

CONCLUSION

"[T]he premise of the Act . . . [is] to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies' Garment Workers*, 366 U.S. at 739. Congress, in enacting § 9 of the Act, gave the Board a statutory duty to determine with precision the size and composition of a proper bargaining unit. That determination helps ensure employee free choice. The Board cannot neglect its duties and declare that anything within a 20% margin of error is "close

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[13] *See, e.g.*, http://www.teachersunionexposed.com/dues.cfm.

enough for government work," thereby rushing elections for the sole benefit of union officials seeking more forced dues payors.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 6th day of February, 2015, a true and correct copy of the foregoing Brief Amicus Curiae on behalf of the National Right to Work Legal Defense & Education Foundation, Inc., was electronically filed with the Clerk of the Court using the CM/ECF system, and thereby a copy of said Brief Amicus Curiae was served on counsel for all parties, who are all on the ECF system.

/s/ Glenn M. Taubman