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RE: RIN 3142-AA16; Representation-Case Procedures: Election Bars; Proof of Majority Status in Construction Industry Collective-Bargaining Relationships

The U.S. Chamber of Commerce ("the Chamber") is pleased to submit these comments to the National Labor Relations Board ("the Board" or "NLRB"), pursuant to its Notice of Proposed Rulemaking and Request for Comments regarding Representation-Case Procedures: Election Bars and Proof of Majority Status in the Construction Industry, 84 Fed. Reg. No. 155, 39930 (August 12, 2019) ("NPRM"). The Chamber believes the three proposals would benefit employers and employees because they promote free choice, majority-based decision-making and remove barriers to eliminating unwanted representation.

The Board's proposals provide welcome modifications for three aspects of case law developed under the Act that impede the right of employees to vote on the issue of union representation, and protect entrenched union representation that does not truly enjoy majority support of the employees. The Board's current blocking charge procedure particularly harms employees because in the RD petition setting, it can saddle them with union relationships they wish to end. Given the Board's revised election rules from 2014 that expedite the representation election process significantly, the blocking procedure unfairly allows unpopular unions to protect themselves by filing frivolous claims of employer misconduct. The Board's proposals regarding the voluntary recognition bar and recognition issues in the construction industry are also welcomed by the Chamber because they require reliable evidence of majority employee support, which is, and should be, the central tenant underlying union representation.

The Chamber encourages the Board to adopt the proposed rule changes because they promote the policy goals of the Act, allow employees to exert control over union representation and reduce the possibility that employers will unwillingly be forced into relationships with unions that lack the support of a majority of the employees they claim to represent.

1) The Proposed Change to the Blocking Charge Rule would Benefit Employees and Employers by Disincentivizing Stalling Tactics.

Under current Board policy, if an unfair labor practice charge is filed while an election petition is pending (most likely an RD petition), the petition can be "blocked." This allows an

election to be delayed until a full investigation of the charge is conducted. If merit is found, the election may be delayed until the violation is litigated or settled. This has allowed unions to manipulate the rules to hold off decertification based on the filing of unfair labor practice charges. Because the current policy can and often does result in significant delays in voting, it undermines the goal of the Act to promote employee free choice in the matter of representation, *which includes removing unwanted representation*.[1] It pits the obvious self-preservationist goals of unions against the rights of employees to decide for themselves.

The proposed rule change provides protection to employees because the vote-and-impound procedure permits them to express their views without delays caused by contested charges. Such delays can last years, saddling workers with an unwanted union and potentially forcing them to unwillingly pay union dues or fees.[2] But the vote-and-impound rule also protects unions. If actual, meaningful misconduct by an employer has occurred, just as in any election where the union is free to file objections and unfair labor practice charges following the election, the Board will set aside the election and either schedule a new election or issue a bargaining order.

The Chamber suggests that the Board should consider a change in the proposal, however. The change involves the impoundment of votes that are cast, and whether they should be counted rather than impounded. The Board should consider revising the rule to provide that the ballots will be counted, but the decertification withheld pending resolution of the unfair labor practice charge (if it is one that otherwise would have blocked the election).

The revision to the blocking charge rule will also increase consistency and uniformity for decertification procedures, regardless of the region in which they arise. As the NPRM points out, the current procedure allows Regional Directors to exercise significant discretion in postponing elections and processing unfair labor practices, but they rarely exercise it.[3] The 2014 revisions to the blocking charge rule, which required a party to present an offer of proof regarding its charge, did virtually nothing to prevent this potential inequity. Essentially, it is up to the Regional Director to determine whether a party presented enough proof to support its charge, and whether the charge would actually adversely affect the laboratory conditions required for an election. Then, if a region blocks the election, different regional practices will result in varying amounts of time to process the charge and decide whether or when an election may occur. The proposed rule would eliminate this variable because each Region would proceed with the set election schedule regardless of any pending unfair labor practices. The Regions would then be able to resolve the unfair labor practice charges at their own pace, without unfairly changing the conditions that gave rise to the decertification efforts.

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[1] *See* Berton B. Subrin, The NLRB's Blocking Charge Policy: Wisdom or Folly?, 39 LAB. L.J. 651(1988) (finding that blocking charges contribute to the vast majority of outlier elections that take longer than average to process).

[2] Samuel Estreicher, Improving the Administration of the National Labor Relations Act Without Statutory Change, 5 FIU L. Rev. 361, 369 (2010) (finding the median number of days from petition to election for a blocked petition to be 139 days, whereas unblocked petitions were processed in a median of 38 days).

[3] *See* Jeffrey M. Hirsch, NLRB Elections: Ambush or Anticlimax?, 64 Emory L.J. 1647, 1664 (2015).

The dissent suggests that the current blocking charge rule is beneficial because forestalling a decertification election to ensure the absence of impropriety promotes employee free-choice more effectively than holding an election under coercive conditions. But the problem with the current rule is that it prevents decertification elections even where no coercive conditions exist. It is surely better for employee free choice to hold a decertification election (and, as noted above, count the ballots) than not to hold an election.[4] For employees, the time it takes to resolve an unfair labor practice charge and hold a decertification election may be crucial in considering their career options, improving their benefits or otherwise ridding themselves of unwanted representation. The current, unpredictable standard that requires a mere offer of proof of wrongdoing is insufficient to protect these interests. The proposed rule ensures that employees will have the right to cast their ballot without undue administrative delay. Counting the ballots would only add to this positive outcome.

Finally, the dissent implies that the vote-and-impound procedure will result in numerous elections being held under egregiously coercive conditions. But that argument ignores reality. Employers would have the same incentive to behave properly under the proposed rule as they do under the current procedure. Even if a vote occurs, employers face the risk that any illegal conduct would result in a voided election. The only thing the vote-and-impound (or count) procedure encourages is the reduction of frivolous charges by unions and the protection of the right of employees to cast a timely, meaningful ballot.

Surely, some labor unions will continue to file unfair labor practices in hopes of preserving their representative status even after the vote-and-impound (or count) procedure. But others will more closely scrutinize their representative standing, assess their resources, and determine that it does not make sense to file a frivolous charge when it will not allow them the life-raft of additional time to try to persuade the bargaining unit members to change their minds and support the union anew. The reduction in frivolous proceedings benefits the Board, the Regions, and employees. The proposed revision to the blocking charge rule represents a reasonable and needed policy improvement and the Chamber supports the proposed rule.

2) The Proposed Change to the Voluntary Recognition Bar Benefits Employees without Significantly Affecting Bargaining.

Board precedent recognizes that a union may gain recognition through a representation election or voluntary recognition by an employer. The union's demand for recognition is usually supported by signed "authorization cards" from at least a majority of the group of employees the union seeks to represent. When presented with these cards, an employer may nevertheless demand a secret ballot election, or it may voluntarily recognize the union. An employer may chose voluntary recognition over an election for various reasons, including a desire to avoid the disruption of an election campaign.

[4] *See* Estreicher, supra n. 1 at n. 29 (arguing "[i]t is not always clear that the best response to alleged employer unlawful practices is deferring the holding of an election; it is hardly inconceivable that the relatively prompt convening of an election, coupled with broadened section 10(j) preliminary injunctive relief, provides a better cure").

But when employers rely on signature cards as a condition of voluntary recognition, the cards may not accurately indicate the desire of employees to be represented by a union. Employees may sign cards for a variety of reasons, including the belief that the card will merely be used to indicate interest in a private ballot election. Signature cards may also be obtained by harassment or coercion. The Board's current voluntary recognition bar, however, means that if cards are used to obtain recognition, employees cannot have a private ballot election. The proposal to reinstate the *Dana Corp*. precedent would make employees the ultimate arbiters of their own representation future, by restoring to the employees the opportunity to seek a private ballot election.[5]

The Board's precedent from *Dana Corp*., which lasted for several years, reflects a reasonable avenue for voluntary recognition to co-exist with employee free choice. As the Board noted in that decision, the condition placed on voluntary recognition by the *Dana Corp.* rule strikes the proper balance between "two important but often competing interests under the National Labor Relations Act: 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'"[6] Previous Board decisions have emphasized the importance of employee participation in the decision to choose a bargaining representative, and questioned how much the Board, unions or employers may limit the right of employees to vote in a private ballot election on a question of representation.[7] If an employer voluntarily recognizes a union, and a sufficient number of employees quickly voice their displeasure, or communicate with one another about their desire to reconsider collective representation, it is consistent with the Act to allow them to resolve the issue through a transparent, private ballot election process. In essence, the 45-day window to file a petition for an election allows employees to reflect and deliberate, and make a decision, on whether to seek an election.

The proposed rule is reasonable – it does not completely eliminate voluntary recognition or permanently tie-up collective bargaining because of the risk of decertification. The rule sets a reasonable time limit of 45 days to demonstrate interest in a private ballot election after receiving notice of voluntary union recognition. As a practical matter, it generally takes employers and unions a period of time, perhaps a few weeks, to begin the process of collective bargaining after a union recognition, so this limited period of potential uncertainty should have only a minor impact (if any at all) on the bargaining process.[8]

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[5] It should also be noted that card check recognition is sometimes used as a tactic to freeze out rival unions, removing the opportunity for the rival union petition for an election to represent the employees. The Board's proposal would also address this tactic.

[6] Dana Corp., 351 N.L.R.B. 434, 438 (2007).

[7] Shaws Supermarkets & United Food & Commercial Workers Union Local 791, Afl-Cio, 343 NLRB 963, 964 (2004) (finding "we have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election" and noting it clear that the Board's election process is the "preferred way" to resolve questions of representation).

[8] Thus, the delay in bargaining potentially imposed by the proposed rule is not comparable to the delay associated with a blocking charge, as discussed in Part I.

Any potential delay in bargaining is also an insignificant cost for a significant benefit. If employees gather a sufficient showing of interest to achieve a private ballot election, and then succeed in a decertification election, then the delay in the process will prevent unwanted union representatives, unsupported by a majority of employees as required by law, from making decisions that would affect the rights of the employees moving forward.[9] Even if this were a rare outcome, it is a worthy goal to protect employees from the potential injustice and illegality of a bargaining representative not chosen by a majority of the employees.

The dissent focuses on the Board's previous decision to overrule *Dana Corp.* and reinstate the recognition bar, but ignores the information gap that often exists when employees sign union authorization cards. As noted above, employees sign cards for a variety of reasons. Employees often believe that signing a union authorization card simply expresses their desire to learn more about a union, or they may sign a card based on social pressure from union organizers or other employees.[10] Experience suggests employees regularly request the return of their cards because they were misled about the effect of signing. The proposed rule provides another layer of protection for these employees, and removes one of the incentives for unions to provide misinformation about the purposes of these cards.

It is certainly true that the vast majority of employers would not recognize a union voluntarily if they did not have a clear showing of majority support. Nevertheless, one of the weaknesses of voluntary recognition over recognition after a private ballot election, is that misrepresentations or misunderstandings can happen. Thus, the rule will have utility in protecting employee rights and preventing unions from misleading employees or employers about their base of support. It also has intrinsic value simply because it protects the democratic goals of the Act. Because the potential delays associated with the reinstatement of *Dana Corp*. are minimal, and its potential benefits are significant, the Chamber urges the Board to enact its proposal.

3) Modification of the Construction Industry Exception to Section 9(a) Recognition is Consistent with the Goals of the Act and the Board's Other Changes.

Finally, for reasons similar to those expressed in support of the Board's first two proposals, the Chamber also supports the Board's proposed modification to the proof required to show majority support in the construction industry and "convert" an 8(f) agreement into a 9(a) agreement. The proposal addresses the same fundamental problem that arises with the voluntary recognition bar – the lack of employee input into the selection of their bargaining representative.

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[9] Christopher Hexter, Wesley Kennedy, Alexia Kulwiec, Peter Janus, Todd Sarver, & Steven Wheeless, Twenty-Five Years of Developments in the Law Under the National Labor Relations Act, 25 ABA J. Lab. & Emp. L. 299, 322 (2010) (noting that if the notice period results in decertification, then it stands to reason the notice period "actually allowed the employees to designate their chosen representative, which is required by the Act.")

[10] Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 Harv. L. Rev. 655, 669 (2010) (noting that the openness of the authorization card process presents "the possibility that employees may have signed authorization cards due to social pressure, misunderstanding, or outright coercion").

The process of converting Section 8(f) construction industry "pre-hire" agreements into binding 9(a) bargaining relationships is seriously flawed. In theory, employers could now require a union to actually provide evidence of majority support from a union before executing a contract that can be recognized under Section 9(a). But in practice, the pressures and realities of the construction industry, and the power of unions over employers with multiple operations and tight deadlines to submit bids and complete work, make it difficult for employers to challenge a union assertion that it has the support of a majority its employees. As a result, despite its good intentions, the Board's *Staunton Fuel* process to establish 9(a) bargaining status has become subject to abuse. And because 9(a) agreements can bar election petitions by employees for up to three years of the contract's duration, these agreements block any election petitions and significantly restrict employee rights to determine their bargaining representative.

The D.C. Circuit's decision in *Colorado Fire Sprinkler*, cited by the Board majority in its proposed rule, demonstrates the issue well.[11] In *Colorado Fire Sprinkler*, the employer continued to execute proposed union contracts that included the union's statement that it had proof of majority support from its members, which met necessary pre-requisite to create a 9(a) agreement under current procedures. But in fact, the union had no such evidence, and no way to demonstrate that a majority of employees actually wanted the union to represent them. As the D.C. Circuit held, that result was inconsistent with the core purpose of the Act to promote employee free choice in union representation, and allow union representation under Section 9(a) only if supported by a majority of the affected employees.

The Board's proposal to require extrinsic evidence, in addition to mere contract language, in order to convert a construction industry 8(f) agreement into a conventional 9(a) agreement makes legal and logical sense. Congress enacted Section 8(f) for the particular circumstances of the construction industry, including the need for a ready supply of skilled craft workers, cost-certainty needs and the short duration of individual projects.[12] Even with the enactment of the proposed rule, Section 8(f) can continue to serve that limited purpose. On the other hand, Section 9(a) was developed with majoritarian principles in mind. The proposed rule's requirement of extrinsic evidence will ensure that Section 9(a) agreements continue to require such a showing. In short, both unique agreements can serve their particular roles, and if an employer and union wish to convert an 8(f) agreement into a 9(a) agreement, they can do so easily, as long as there is conclusive, extrinsic evidence that a majority of the affected employees agree.

The dissent argues that the Proposed Rule is not needed because challenges to 9(a) status of a "converted" 8(f) agreement generally arise from employers, not employees. But it does not matter whether the employer or an employee raises the challenge – what matters is whether a majority of the employees actually support the incumbent union.

[11] Colorado Fire Sprinkler, Inc. v. Nat'l Labor Relations Bd., 891 F.3d 1031 (D.C. Cir. 2018).

[12] Richard Murphy, Pre-Hire Agreements and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability, 50 Fordham L. Rev. 1014 (1982).

One additional matter should be considered regarding the 9(a) relationship. It is not clear from the Proposed Rule whether a voluntary recognition based on the evidence required by the proposed construction-industry rule would also be subject to the 45-day *Dana Corp*. window period. The Board should clarify whether or not construction industry employees will have the same 45-day period to file a decertification petition.

4) The Board Should Adopt the Proposed Rules.

For the foregoing reasons, the Chamber urges the Board to adopt each element of its Proposed Rule to encourage employee free-choice in the representation process and eliminate unnecessary and anti-democratic rules that lock labor unions into power despite the will of the employees. The Board should also consider (1) counting ballots in an election with an unfair labor practice pending, rather than impounding them; and (2) clarifying whether converted agreements under the new construction-industry rule will also be subject to the *Dana Corp*. window period.

The Proposed Rule is necessary to maintain a fair playing field for employers and unions in certification and decertification proceedings, and for employees to have the central and most important voice in selecting their representative. The blocking charge changes represent a significant improvement in the Board's election process, and the accompanying proposals are logical additions to further the same goals.

Respectfully submitted,

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