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April 14, 2014

Gary Shinners, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

RE: RIN 3142—AA08; Representation—Case Procedures; Notice of Proposed Rulemaking

Dear Mr. Shinners:

These responsive comments are submitted by the U.S. Chamber of Commerce ("Chamber"), in accordance with the schedule published in the Notice of Proposed Rule Making ("NPRM") by the National Labor Relations Board ("NLRB" or "Board") published at 79 Fed. Reg. 7318 (Feb. 6, 2014). They supplement the Chamber's previous comments on the current NPRM and the NPRM issued in 2011. The proposed rules would radically amend the Board's representation case procedures under the National Labor Relations Act ("Act").

Preliminary Statement

In its responsive comments to the 2011 NPRM, the Chamber noted the concerns with analyzing over 50,000 comments in the space of fourteen days for a responsive comment. These concerns have only been amplified by the current process. Instead of providing fourteen days to provide responsive comments, the NLRB granted only seven. Furthermore, the NLRB is holding two days of hearings during the seven-day response period. These time constraints create a practical impossibility for a proper review and response of the many additional comments that

have been filed on the current NPRM. Thus, the Chamber will focus its comments on the supplemental comments made by two of the largest labor groups, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Service Employees International Union ("SEIU").

Response to Comments of the AFL-CIO

Survey of Attorneys Who Have Represented Unions in Proceedings Before the NLRB

The AFL-CIO's comment includes an Appendix that summarizes a survey conducted via email between March 18, 2014 and April 3, 2014. The survey received 57 responses, which are summarized in the Appendix. The AFL-CIO makes reference to the results of the survey throughout its comments. The Chamber thinks it is important to note the significant limitations on this survey method and the questions and conclusions the AFL-CIO draws from the survey.

The Email Question

For example, the AFL-CIO states, "[i]n our survey of union-side labor lawyers, over half of those who responded . . . stated that they were aware of instances in which employers had used e-mail to communicate with employees about union representation and almost 30% . . . knew of employers communicating with employees about union representation using phone or text messages." AFL-CIO Comment at 9-10. The AFL-CIO uses this data point to urge that the Board require the inclusion of telephone numbers, including cell phone numbers, and e-mail addresses on the voter eligibility list. *Id.* at 10.

The conclusion the AFL-CIO's wishes the Board to draw is that 40% of employers communicate with employees about union representation via email and 30% of employers communicate with employees about union representation using phone or text messages. But such a conclusion would be false. The survey questions show that the true number must be far lower.

Questions 1 and 2 of the survey ask how many initial organizing drives the lawyer was involved in during the last 2 years (Question 1) and during the last 5 years (Question 2). The answers ranged from a low of 1 to a high of 100. AFL-CIO Comment at App. 1. The survey then asked (Question 4): "In the organizing drives you have been involved in, did the employer use e-mail to communicate its position to employees?" The problem with formulation of this last question is that it does not identify in *how many* organizing drives the employer used e-mail to communicate with employees. We don't know – and the survey respondents didn't know, whether the question was asking "In *any* of the organizing drives you have been involved with . . . "; or was it asking "In <u>*all*</u> organizing drives you have been involved with . . ."? This ambiguity makes it impossible to draw any valid conclusions from the AFL-CIO survey. For example, the union lawyer who has handled 100 organizing drives over the past five years could answer "yes", even if s/he had only seen employers using email in as few as two organizing drives. Because the question does not ask what *percentage* of organizing drives employers used email, the question has a strong tendency to overstate the amount of email usage by employers. Accordingly, the "results" set forth by the AFL-CIO in response to this particular question are not probative of the issue and should, therefore, be discounted by the Board as it proceeds through the rule making process.

The "Did the Employer Ever" Questions

Other sections of the survey suffer from similar problems. The survey section on pre-election hearing procedures (Questions 11-19) asks the union-side lawyers whether in any of their representation cases an employer "ever" took a particular action. *See, e.g.,* AFL-CIO Comment at App. 4 (Question 11. "Did the employer ever not identify the issues it intended to raise prior to going on the record?"); (Question 13: "Did the employer ever not take a position

on the overall appropriateness of the unit?"). The survey reveals, however, that the attorneys had, in some instances, handled over 100 representation cases. *See id.* at App. 3 (Questions 5 and 6). Thus, a union-side lawyer with 100 representation cases in which an employer in only one of those cases had engaged in the conduct described could have answered "Yes" to Questions 11-19, even though that activity represented only one percent of the lawyer's experiences. Again, a badly formulated set of questions has resulted in information that is useless in evaluating the Board's NPRM.

The Lack of Information Question

The AFL-CIO also attempts to support the NPRM's proposed requirement that "as part of their Statement of Position, employers file and serve, by no later than the opening of the pre-election hearing, a list of employees in the proposed unit, including their names, classifications, work locations, and shifts." AFL-CIO Comment at 19. In its attempt to support this proposal, the AFL-CIO turns to its flawed survey and states: "Among the experienced labor lawyers who responded to our survey, 87% indicated they lacked access to this information prior to or at the start of a pre-election hearing." AFL-CIO Comment at 19.

The survey question referred to was Question 8, which asks: "Prior to or at the start of *the* hearing, did you lack access to a complete list of employees in the proposed unit and any employees the employer proposed to add to the unit, together with information on their classification, shift and work location." AFL-CIO Comment and App. 3. (Emphasis added.) This question was posed to attorneys who had handled between one and one-hundred representation cases. Eighty-seven percent of the 53 attorneys who responded answered this question said "Yes."

But, once again, the question was badly formulated. It asks about "the" hearing – but which hearing is it talking about? "The" hearing in each of the 1 to 100 election cases each attorney had handled? "The" hearing in only one those cases? "The" hearing in more than one but less than all of those cases? All we know from the survey is that 87% of the respondents had at least one case in which the specified information was not provided before "the" hearing. But it simply cannot be concluded –as the AFL-CIO wishes the Board to do – that in 87% of representation cases the union lacked this information.

Further, Question 8 could also be answered in the affirmative if an employer provided a complete list of employees and their classification, but did not provide their shift and work location. In other words, if the employer failed to provide even one of the types of information specified, the binary "yes" or "no" format requires an answer that can be used to misleadingly suggest that none of the information was provided. Again, the question is poorly formulated and invites a significant over reporting of the prevalence of purported concerns about employers' supposed failure to provide information.

In sum, the Chamber submits that the AFL-CIO's survey and its results do not support the proposed regulations and may not rationally be relied upon by the Board as support for the NPRM.

Work Email Addresses and Telephone Numbers Should Not Be Required On Voter or Other Lists as Proposed by the Board

The AFL-CIO suggests that – to the extent the proposed regulations mandate that email addresses and telephone numbers be provided on voter and other lists made available to the union or the Board – the employees' *personal* addresses and numbers (but not work addresses and numbers) be provided. AFL-CIO Comments at 7-8. Only if the proposed regulations are adopted with an email address and telephone number requirement would the Chamber agree that

it should be the employees' personal, not work, email address and telephone number that is disclosed. However, as argued in its April 7 comments, the Chamber generally opposes issuance of the proposed regulations and specifically opposes *any* requirement that email addresses or telephone numbers be furnished, whether business or personal. Chamber Comments at 33-36.[1] The Chamber disagrees with the AFL-CIO's claim that there "is no serious privacy-based objection to including phone numbers and e-mail addresses on the *Excelsior* list." AFL-CIO Comment at 12. As described in the Chamber's April 7 comment, potential privacy concerns are raised by an employer provided information of that type. Chamber Comment at 33-34.

The Time for Preparation and Submission of the Voter List is Insufficient

The AFL-CIO supports shortening the time for the preparation and submission of the voter list. AFL-CIO Comment at 13-15. However, as made clear in the Chamber's April 7 comments, it is a myth that employers have either the time or the technological ability to generate a list with the information and in the format required by the Board's proposal in only two days. Chamber Comments at 32-33.[2] The Chamber submits that – even in the comparatively leisure days of 1966 when the *Excelsior* rule was first adopted, but particularly today – a two-day turnaround for a voter list would place considerable strain on a manager who was also simultaneously preparing for an election and continuing to manage the business. Especially in the case of small employers, who predominate in the Board's representation case proceedings, the record is replete with testimony that they have neither the time, the staff nor the other resources to turn around the voter list in such a short period.

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[1] The Chamber also opposed furnishing such information to the Region as a part of the Statement of Position. *Id.* at p. 25.

[2] *See also* July 18-19 Transcript at 66-67, 147-148, 183-184, 194-195, 209-211, 250-252, 272-274, 277-278, 307-308, 319, 323-325, 363, 366, 406, 412.

Statement of Position Requirements

The AFL-CIO supports the NPRM's proposal of a binding Statement of Position and would make that requirement even more stringent. The AFL-CIO proposes modifying the rule to require an employer, in its position statement, to "identify[ ] any employees who the employer contends must be included in or excluded from the proposed unit, together with a list of all employees in the proposed unit and who the employer contends should be added to the proposed unit." AFL-CIO Comment at 32. This proposal is unworkable and impractical.

As the Chamber has already explained in great detail, both in its written and oral comments, there are serious problems with requiring a binding Statement of Position in which the employer has to set out *all* of its positions or else waive them. For this issue in particular, the *Specialty Healthcare* decision further complicates the analysis an employer would have to make to comply with the AFL-CIO's proposed requirement. Chamber Comment at 22-23, 26-28. The AFL-CIO's suggestion would only add to the employer's burden and increase the risk that the parties will not be able to reach agreement on pre-election issues. Accordingly, the AFL-CIO's proposed change should be rejected.

Discretionary Board Review of Post-Election Disputes

The AFL-CIO supports the proposed removal of mandatory Board review of post-election disputes. AFL-CIO Comment at 41. The Chamber disagrees. As was explained in the Chamber's written comments, that proposal runs afoul of Section 3(b) of the NLRA, which provides for Board review of Regional Director's decisions. It will also disserve the Board's long-term interests, as it will provide an incentive for employers to obtain Board review through a technical Section 8(a)(5) violation, delaying the resolution of important bargaining issues between the employer and the union. Chamber Comment at 38-41.

Response to Comments of the SEIU

Expanded Excelsior List

The SEIU proposes a significant broadening of the *Excelsior* list by requiring employers to provide "employee email addresses and phone numbers, as well as any additional social media contact information, also known as 'social media identifiers,' such as Facebook user names (www.facebook.com/NLRBpage), Twitter handles, (@NLRB) or YouTube channels (www.youtube.com/user/NLRB), or other methods of communication an employer has within its possession." SEIU Comment at 1-2. Essentially, the SEIU wants an employer to disclose "all contact information for employees that they have within their possession." SEIU Comment 2. The Chamber strongly opposes this suggestion, as it heightens the privacy concerns that have already been expressed. It also discourages employees from providing various contact information to employers, for fear that the employer cannot limit the distribution of that information.

In any event, the Chamber believes that few, if any, employers maintain these types of contact information about their employees. Moreover, given the privacy concerns we have already expressed (Chamber Comments at 33-36), employers generally do not want to have possession of such information, and they certainly do not want to be in the position of having to collect it or turn it over to third parties. The SEIU's proposal – even though it does not require the employer to collect the information – does start down the slippery slope of requiring such employer actions, and the Chamber strongly opposes the SEIU's proposal on that ground as well.

Similarly, the SEIU proposes that the Board require that "employers provide eligibility lists in a form that is searchable via email directly to the Board and the petitioner." SEIU Comment at 8. Given the significant burdens that employers would face given the time frame under the proposed rules to compile the proposed list (which may have to be done by hand for

employers with paper-based personnel files), this added burden may simply be impractical for some employers. The Board should continue to allow flexibility for the employers for the format in which *Excelsior* lists are provided.

Conclusion

Once again, the Board's NPRM is unwarranted. The Board has completely ignored over 60,000 comments received in 2011 and has instead simply reproposed without any change the same 2011 NPRM. This rulemaking has been pursued through a rushed and flawed administrative process. It proceeds not because of any evidence the current Board procedures are not working fairly and efficiently, but because union adherents and their allies in academia want it to proceed. To the extent there is delay in a small minority constituting less than 10% of all representation cases, the Board has neither identified its cause nor proposed a solution for the delay in those cases.

Instead, the Board has undertaken a wholesale revision of procedures which have served the Board and its stakeholders well. The revision the Board has undertaken entails severe time limits and crabbed administrative processes, forfeitures and waivers for failure to adhere to them, limits on the review of administrative action, uncertainty on important substantive and procedural matters, denial of free speech and due process rights of employers and employees, and a likelihood of increased, not decreased, litigation and delay in the resolution of questions concerning representation.

The U.S. Chamber of Commerce objects to the proposed rules and submits that the NPRM should be withdrawn.

Respectfully submitted,

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