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February 2, 2023

SUBMITTED VIA REGULATIONS.GOV

The Honorable Lauren McFerran
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

RE: RIN 3142-AA22, Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships

Dear Chairman McFerran:

I write in opposition to the National Labor Relations Board's (NLRB or Board) proposed rule titled "Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,"[1] which would rescind the Board's 2020 election protection rule.[2] The proposed rule seeks to reimpose arbitrary, Board-created rules that limit access to secret ballot elections and impede employees' rights under the *National Labor Relations Act* (NLRA) to choose whether or not to form or join a union. The proposed rule flips the NLRA on its head by empowering unions to entrench themselves as employee representatives regardless of worker preference. Codifying the proposed rule would contradict one of the principal protections of the NLRA that "the employees pick the union; the union does not pick the employees."[3]

Prior to the 2020 election protection rule, Board case law permitted labor unions to delay holding representation elections indefinitely, limited workers' ability to exercise their statutory right to petition for a secret-ballot election, and allowed employers and unions in the construction

[1] Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 87 Fed. Reg. 66,890 (proposed Nov. 4, 2022).
[2] Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366 (Apr. 1, 2020).
[3] Colorado Fire Sprinkler, Inc. v. NLRB, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

industry to force union representation on workers without clear evidence employees independently selected a representative. Rescinding the 2020 election protection rule would represent a significant step backward and undermine a key premise of the NLRA: "to assure freedom of choice and majority rule in employee selection of representatives."[4]

Blocking Charges Unnecessarily Delay Representation Elections

The proposed rule would replace the current vote-and-impound procedure with the previous "blocking charge" policy. Reviving the blocking charge policy would weaken workers' statutory right to petition for a vote to remove unwanted union representation. These blocking charges permit a party—almost always a union in response to a decertification petition—to delay an election indefinitely by filing frivolous unfair labor practice charges.

The Board's current vote-and-impound procedures better protect employee free choice. Current procedures allow workers to vote on the issue of representation with the ballots impounded until the charges are resolved. This allows workers to exercise their right to make decisions about representation while the NLRB investigates the merits of the charges. If the charges are without merit, the election result stands, and there are no unnecessary delays. Alternatively, when an unfair labor practice charge is found to have merit, the election results are discarded, and the NLRB remedies the wrongdoing and ensures proper conditions of a re-vote. This approach properly balances the rights of employees to have a fair and expeditious election and the Board's requirement to hold elections in "laboratory" conditions.[5]

The Committee on Education and the Workforce has examined this issue and has held hearings with testimony from witnesses detailing the harm done to workers by blocking charges. During the 113th Congress, the Committee held a hearing on legislation to reform the NLRA where we heard testimony about the unfairness of the NLRB's blocking charge policy, which the current Board is seeking to revive, and how it deprives workers of free choice in representation issues. Glenn Taubman testified on behalf of the National Right to Work Legal Defense Foundation regarding blocking charges:

> Chris Hastings is employed by Scott Brothers Dairy in Chino, California. On August 17, 2010, he filed for a decertification election with Region 31 of the NLRB, in Case No. 31-RD-1611. He was immediately met with a series of union "blocking charges" that the NLRB used to automatically delay his election, just as the union knew the Board would.
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> ….
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> [S]uch blocking charges are regularly misused by union officials, who know that the NLRB will permit them to delay – or cancel – the decertification election. Using these tricks to "game the system," union officials can remain as the employees' exclusive bargaining representative even if the vast majority of employees want them out. Even worse, the NLRB recently ruled in WKYC-TV,

[4] Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 739 (1961).
[5] General Shoe Corp., 77 NLRB 124, 127 (1948).

> 359 NLRB No. 30 (Dec. 12, 2012), that compulsory dues must continue to flow to the union even after the collective bargaining contract has expired, giving union officials even more incentive to "game the system" and block decertification elections. Indeed, union officials' desire to block decertification elections is predictable, as which incumbent would ever want to face the voters (and see his income cut off) if he didn't have to?
>
> In Mr. Hastings' case, the Teamsters were able to "game the system" and delay the decertification election – with the NLRB's approval – for a full year. When the election was finally held after one year of delay, in August 2011, the union lost by a vote of 54-20. In effect, by filing "blocking charges," the Teamsters bought themselves an extra year of power and forced dues privileges with the connivance of the NLRB.[6]

The above example is one of many instances where a group of employees had their voices stifled and their right to petition for a decertification election unnecessarily postponed. The Board should retain the 2020 election protection rule's "vote-and-impound" procedure because it prevents unions from interfering with employee free choice on questions of representation.

Restoring the Voluntary Recognition Bar

The proposed rule would also rescind another important reform that protects employee rights to a free choice in accepting or rejecting union representation. The 2020 election protection rule restored the Board's 2007 *Dana Corp.* decision mandating that employees have a 45-day window to file an election petition following an employer's voluntary recognition of a union.[7] The standard under *Dana* properly balanced the NLRA's goals of protecting employee free choice and promoting the stability of bargaining relationships. Reinstating the voluntary recognition bar would prevent workers from voicing their opinion on union representation in a secret-ballot election and would bar a decertification petition or a petition for a rival union for a period of time, in some cases up to four years.[8]

Eliminating the 45-day window following voluntary recognition would encourage organizing via card check instead of secret ballot elections to determine representation questions. Currently, unions may organize via card check by collecting authorization cards from more than half of bargaining unit employees stating they wish to be represented by a union, at which point the employer may voluntarily recognize the union. While currently lawful, this organizing method runs contrary to the longstanding Board preference for Board-conducted secret ballot elections.[9]

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[6] *Legislative Hearing on H.R. 2346, Secret Ballot Protection Act, and H.R. 2347, Representation Fairness Restoration Act, Before the Subcomm. on Health, Emp., Lab., & Pensions of the H. Comm. on Educ. & the Workforce*, 113th Cong. 30-31 (2013) (statement of Glenn Taubman, Att'y, Nat'l Right to Work Legal Def. Found.).
[7] Dana Corp., 351 NLRB 434 (2007), *overruled by* Lamons Gasket Co., 357 NLRB 739 (2011).
[8] *See* Lamons Gasket Co., 357 NLRB 739 (2011).
[9] *See* NLRB, CASEHANDLING MANUAL PT. 2: REPRESENTATION PROCEEDINGS § 11301.2 ("Manual or Mail Ballot Election: Determination"), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf.

Furthermore, the U.S. Supreme Court has acknowledged that the so-called card-check process is "admittedly inferior to the election process" for determining representation because "there have been [card solicitation] abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[10]

The Committee has heard testimony from employees who have been misled and harassed by union officials during card check organizing campaigns. For example, Ms. Karen Mayhew, an employee of Kaiser Permanente, testified that she and her colleagues were misled about the purpose of signing an authorization card, with SEIU officials telling Kaiser employees that "signing the card only meant that the employee was expressing interest in receiving more information about the union, or to have an election to decide whether or not to bring the union in."[11]

The Committee has also received testimony from Ms. Jen Jason, a former UNITE HERE organizer, about the underhanded tactics used during card check organizing campaigns:

> When the union is allowed to implement the "card check" strategy, the decision about whether or not an individual employee would choose to join a union is reduced to a crisis decision. This situation is created by the organizer and places the worker into a high pressure sales situation. Furthermore, my experience is that in jurisdictions in which "card check" was actually legislated, organizers tended to be even more willing to harass, lie and use fear tactics to intimidate workers into signing cards. I have personally heard from workers that they signed the union card simply to get the organizer to leave their home and not harass them further. At no point during a "card check" campaign, is the opportunity created or fostered for employees to seriously consider their working lives and to think about possible solutions to any problems.[12]

Allowing employers to recognize a union voluntarily without providing employees the right to petition for a secret ballot election subverts the intent of the NLRA. The NLRA is intended to protect the right of workers to organize or refrain from doing so in conditions free of interference, not to permit an employer to anoint a union as the employee representative. History and experience have shown that the secret ballot election is the most reliable method of assessing whether a majority of employees support union representation, while the card check process is notorious for its lack of privacy and invites intimidation and coercion of workers.

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[10] NLRB v. Gissel Packing Co., 395 U.S. 575, 603-604 (1969).
[11] *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ. & Lab.*, 110th Cong. 5 (2007) (statement of Karen Mayhew, employee of Kaiser Permanente).
[12] *Id.* at 32 (statement of Jen Jason, former UNITE-HERE organizer).

The Contract Bar in the Construction Industry

The proposed rule rescinds the provision in the 2020 election protection rule prohibiting contract language alone from creating a Section 9(a) bargaining relationship. This change fails to balance the unique needs of the construction industry and employee free choice.

Under the NLRA, a union must be designated as the exclusive representative by a majority of employees. The only exception is Section 8(f), which allows employers in the construction industry to enter into "pre-hire" agreements that designate a union as the bargaining representative and set the terms and conditions of employment regardless of whether employees have chosen it. Congress amended the NLRA in 1959 to allow for pre-hire agreements in the construction industry due to the short duration of construction jobs, the need for reliable skilled employees, and the need for employers to know their labor costs before bidding on a job.

There are key differences between Section 8(f) and Section 9(a) bargaining relationships. As noted above, Section 8(f) bargaining relationships allow construction employers and unions to sign pre-hire agreements before employees are even hired and without the union demonstrating majority support. In contrast, under Section 9, a majority of employees must affirmatively choose union representation. Given these differences, employers who enter into Section 8(f) relationships have fewer bargaining responsibilities and unions receive fewer privileges. For example, pre-hire agreements do not bar employees or a rival union from filing a representation petition, and the employer has no duty to bargain for a new agreement after the termination of a pre-hire agreement.

Reinstating the Board's decision in the *Staunton Fuel* case, as the proposed rule would, allows construction employers and unions to collude at the expense of employee free choice. *Staunton Fuel* enabled construction employers and unions to convert an 8(f) bargaining relationship into a 9(a) relationship by contract language alone. The Board's rationale for this decision rests on shaky legal doctrine and disregards the majoritarian principles of the NLRA. As noted by the Board members' dissent to the proposed rule, "[T]he Court of Appeals for the District of Columbia Circuit has rejected *Staunton Fuel*, repeatedly and emphatically."[13] The D.C. Circuit has noted that reliance on contract language alone "would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids."[14] The special nature of the construction industry is no excuse to deprive workers of a vote on union representation.

The Board should keep the 2020 election protection rule in place which codifies the reasonable duty for unions to provide evidence that they have majority support to convert an 8(f) relationship to a 9(a) relationship. The right to organize does not take away the right of workers to choose freely whether or not to be represented by a union, and this right should be protected and respected. Employers and unions should not be given the unliteral authority to assume workers' interests.

[13] Representation-Case Procedures, 87 Fed. Reg. at 66,925.
[14] Colorado Fire Sprinkler, Inc., 891 F.3d at 1040.

Conclusion

Congress enacted and amended the NLRA to balance the interests of workers, employers, and unions. The NLRB's proposed rule flagrantly disregards the intent of Congress to ensure this balance. Under President Biden, the Board has increased the power of labor unions at the expense of employee free choice. I urge the Board to withdraw the proposed rule.

Respectfully submitted,

Virginia Foxx
Chairwoman, Committee on Education and the Workforce