

Statement of Michael J. Hunter

Before

**Committee on Education and the Workforce
United States House of Representatives**

October 12, 2011

H.R. 3094

“Workforce Democracy and Fairness Act”

Chairman Kline, Ranking Member Miller and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today. My name is Michael Hunter. I am a partner in the Columbus, Ohio based law firm of Hunter, Carnahan, Shoub, Byard & Harshman. My law practice consists almost exclusively in representing unions and workers. A significant part of that representation involves representing unions assisting workers to gain collective bargaining rights through proceedings before the National Labor Relations Board and a number of its regions.

I began practicing union side labor law after graduating from Capital University Law School in 1985. Prior to that time, I worked as a union organizer from 1977-1982. I first became a member of a union in 1970. I participated in my first representation case hearing before the NLRB in 1978.

H.R. 3094, the matter subject to today’s hearing, is entitled the “Workforce Democracy and Fairness Act.” In my judgment, the proposed legislation promotes neither fairness nor democracy, and is aimed at aiding not the workforce but those who, without the presence of union representation, exercise largely unfettered control over it.

The Bill proposes to amend the National Labor Relations Act by adding four broad mandates: 1) the total uprooting of the current methodology of determining the permissible composition of bargaining units; 2) the timing and scope of a representation hearing; 3) the timing of an election and the requirement that every conceivable issue be resolved before an election is held;

and 4) the timing, content and provision to the petitioning union of lists of eligible voters through which workers have access to information about collective bargaining and union representation.

The first proposal is apparently in reaction to a single Board decision that constitutes one of those periodic incremental adjustments to the methodology for determining bargaining units under the Act. The other three are in apparent reaction to proposed amendments to the Board's rules for which thousands of comments have been received, which have not been implemented, and for which there is no current information available as to when, in what form, or even whether such rules will be implemented.

1. Bargaining Unit Determination

As noted by the Supreme Court, when Congress enacted Section 9(a) of the Act, it granted workers the right to take the initiative in organizing themselves into a unit. It hardly promotes workforce “democracy and fairness” to take that right away from workers.

In *American Hospital Association v. NLRB*, 499 US 606, 610 (1991), the Supreme Court, noted:

Section 9(a) of the Act provides that the representative “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 bargaining representative for all the employees in that unit. § 159(a). This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize “a unit” that is “appropriate”—not necessarily *the* single most appropriate unit.

(Emphasis in original).

In addition to taking away this important worker right, the proposed Bill will result in the the wholesale disruption of 75 years of Board experience in configuring appropriate bargaining units. This all comes about in apparent response to the August 26, 2011 decision of the Board in *Specialty Healthcare*,

357 NLRB No. 83 (2011). The *Specialty Healthcare* decision involved whether non-acute healthcare facilities such as nursing homes, which are not subject to the bargaining unit rules adopted by the Board for acute-care facilities, should be subject to the same standards for evaluating appropriate bargaining units that apply to all other industries, or whether they should continue to be governed by an arcane and confusing “empirical community of interest” test that had been established by the Board for non-acute healthcare facilities in *Park Manor Care Center*, 305 NLRB 872 (1991).

In *Specialty Healthcare*, the Board overruled its 1991 *Park Manor Care Center* standard and decided to apply to non-acute healthcare facilities the same community of interest standards that it applies in determining the appropriateness of bargaining units in other industries. In the *Specialty Healthcare* case, the Board found that a unit of certified nursing assistants (CNA’s) constituted an appropriate unit. It noted that once it is established that a petitioned-for unit consists of a readily identifiable group of employees who share a community of interest, the burden shifts to the employer to demonstrate that excluded employees that it claims should be included share an overwhelming community of interest with the employees for whom a union has petitioned. This analytical framework for ascertaining an appropriate unit is the same as that applied by the Board in a non-healthcare context and which was endorsed by the D.C. Circuit in *Blue Man Vegas v. NLRB*, 529 F3d 417 (D.C.Cir. 2008).

In apparent response to this adjustment eliminating an arcane test that applied to a discreet portion of the employer community, and moving it into the mainstream, the Bill proposes to turn on its ear 75 years of experience and stability in the determination of bargaining units.

In the first instance, the Bill proposes to eliminate the following language which has been included in subsection 9(b) of the Act, 29 USC § 159(b) since its inception in 1935:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(Emphasis added).¹ The Bill then goes on to mandate a set-in-stone, one size fits all test for determining whether employees in a proposed unit share a community of interest:

In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry.

(Bill, p.2. lines 10-20).

While items listed in the above formulation have certainly been among the useful tools utilized in evaluating the appropriateness of bargaining units, it is unclear whether this precise formulation has even been used in determining a community of interest.

Limiting the analytical tools that can be used in evaluating an appropriate bargaining unit makes no more sense than establishing a set number of tools that can be used in approaching any job. One does not change a tire with a screwdriver or adjust a carburetor with a shovel. As noted in the *Developing Labor Law*, (5th Ed. BNA), a compendium developed by the ABA's Committee on the Development of Labor Law:

Community of interest is not susceptible to precise definition or to mechanical application. As illustrated by the cases discussed throughout this chapter, the ultimate determination much more often depends on detailed factual analysis on a case-by-case basis than on the application of rules of law.

¹ This analysis assumes that the drafters of the Bill considered the "first sentence" of 9(b) to end with the colon preceding its proviso, and does not intend to eliminate the proviso language.

Id. at 643-644. Numerous other analytical tools have been used in analyzing the appropriateness of a bargaining unit depending on the nature of the industry. A few examples include similarities or differences in product,² geographical proximity,³ desires of employees,⁴ area bargaining patterns and practices,⁵ and, while not by itself controlling, extent of organization.⁶

Adoption of the unit determination formula set forth in the Bill would wreak havoc on labor relations stability. For example, for twenty years, employers and unions in the acute care hospital industry have relied upon the certainty that organizing in that industry would involve the units established by the rulemaking process and set out at Section 103.30 of the Board's Rules.⁷ It is clear, however, that those Rules were not adopted pursuant to the standard that would be dictated by the Bill. The standards and considerations taken into account in promulgating the Rule are set out in 53 FR No. 170, at 33900-33935. As those Rules were not adopted pursuant to the standard required by the Bill, its enactment into law would again require a case by case adjudication from scratch as to the appropriateness of any new unit in the acute care hospital industry, depriving the parties of the stability, certainty and predictability that they have enjoyed for twenty years.

While the Bill would leave intact the proviso to Section 9(b) of the Act that indicates that a prior determination that a larger unit was appropriate is not in itself a ground for deciding that a craft unit is inappropriate, it dictates as to the factors to be taken into consideration in determining a bargaining unit will deprive the Board of the analytical tools that it has used for over 40 years in evaluating the appropriateness of craft severance.⁸

The Bill continues with provisions that result, as a practical matter, in a dictate that there can be only one appropriate unit for any category of employees. The Bill states, commencing at line 21 of page 2, that:

² *General Electric Co.*, 170 NLRB 1272 (1968); *Bedford Shoe Co.*, 117 NLRB 259 (1957).

³ *Pacific Maritime Assn.*, 185 NLRB 780 (1970).

⁴ *NLRB v. Ideal Laundry & Dry Cleaning*, 330 F2d. 712 (10th Cir. 1964).

⁵ *RN Market, Inc.*, 190 NLRB 292 (1971).

⁶ *NLRB v. Metropolitan Life Ins. Co.*, 380 US. 438 (1965).

⁷ The Board's authority to promulgate those rules was challenged and ultimately upheld in *American Hospital Association, supra*.

⁸ *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967).

To avoid the proliferation of fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Avoidance of “proliferation” of bargaining units has never been a factor in the general field of NLRB jurisprudence. In the passage of the 1974 healthcare amendments to the Act, reference was made in the House and Senate Reports regarding due consideration of preventing the proliferation of bargaining units in the health care industry.⁹ Two circuits, the Ninth and the Tenth, found that the legislative history of the health care amendments required application of a “disparity of interest” analysis of units in the acute health care industry,¹⁰ while other circuits specifically rejected this test.¹¹ Any application of that test was superseded by the promulgation of the Board’s acute care bargaining unit rules and their subsequent approval by the Supreme Court in *American Hospital Association v. NLRB*, *supra*. The Bill would now enshrine a test required by only two federal Circuit courts 20 years ago for the acute-care hospital industry into the statute and apply it to all industries.

It then goes a step further by permitting an employer to add to a proposed bargaining unit any category of employees who share a community of interest with the unit proposed by a petitioning union. Beginning at line 2 of page 3, the Bill provides that:

Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest.

This runs contrary to 75 years of NLRB jurisprudence, and essentially mandates that there can be only one appropriate bargaining unit for any category of employee.

⁹ S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974).

¹⁰ *NLRB v. HMO International*, 678 F2d 806 (9th Cir. 1982); *Southwest Community Health Services v. NLRB*, 726 F2d. 611 (10th Cir. 1984).

¹¹ *IBEW Local 474 v. NLRB*, 814 F2d 697 (D.C. Cir. 1987).

Again, as emphasized by the Supreme Court in *American Hospital Association v. NLRB*, *supra*:

[Section 9(a) of the Act] implies that **the initiative** in selecting an appropriate unit **resides with the employees**. Moreover, the language suggests that **employees may seek to organize “a unit” that is “appropriate”—not necessarily *the* single most appropriate unit**.

Id. at 610. (Bolded emphasis added; italics in original). It has always been the case that in a petition filed with the NLRB on behalf of workers is not required to seek representation in the most comprehensive appropriate grouping unless an appropriate unit compatible with the one requested does not exist.¹²

As emphasized by the Supreme Court, when Congress enacted Section 9(a) of the Act, it granted workers the right to take the initiative in organizing themselves into a unit. It hardly promotes workforce “democracy and fairness” to take that initiative away from workers. It is respectfully submitted that the Bill’s proposed changes to subsection 9(b) of the Act should be rejected.

2. Timing and Scope of Representation Hearings

The Bill’s provisions in regard to the timing and scope of representation hearings are in apparent reaction to the Board’s Notice of Proposed Rulemaking contained at 76 FR No. 20 at 36812 et., seq.

The proposed rule amendments would provide at Rule 102.63(a) that a regional director would ordinarily, absent special circumstances, set a representation hearing to commence seven days after the notice of hearing.¹³ The comments to the proposed rule amendments note that this is already the current practice in some regions, and one which the Board wishes to make uniform. 76 F.R. No. 20 at 36821. Back in 1998 “best practices” provided for a hearing within ten to fourteen¹⁴ days. With modern access to relevant unit information through computers and with advances in communication technology, including electronic mail and overnight/express mail, it is not

¹² *P. Ballantine & Sons*, 141 NLRB 1103 (1963).

¹³ Almost a decade ago, in *Croft Metal, Inc.*, 337 NLRB 688, 688 (2002), the Board held that a hearing should be conducted “not less than 5 days” after notice of the hearing “absent unusual circumstances.”

¹⁴ “Representation Cases Best Practices Report,” Gen. Couns. Mem. 98-1, at 2 (Jan. 26, 1998).

surprising that the Board, in many of its regions, has achieved hearings after seven days.

It is in apparent reaction to the potential memorialization by rule of the seven day timeframe currently in effect in many regions that the Bill proposes to enshrine in the statute a requirement that a representation hearing may in no circumstances “take place less than 14 days after the filing of a petition.” Bill, page 3, lines 14-16. It is respectfully submitted that this is the sort of matter that, under Section 6 of the Act, is appropriately addressed by Rule so that evolving circumstances and changes in the workplace and workforce can be examined and adapted to.

The Board’s proposed rule amendments propose a methodology for early and thorough identification of issues in representation case matters, and for devoting the resources of the Agency and the parties to those issues which are material and which are in dispute. Proposed Rules, Sections 102.63; 102.64. There are currently, as will be noted below, limitations on what can properly be presented in a representation hearing. In apparent reaction to the proposed rule amendments that would further promote issue-identification and avoid needless and costly proceedings while still promoting the development of a full record on all material issues, the Bill proposes the addition of the following language in subsection (c)(1) of the Act:

An Appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any pre-election issues and thereafter making a full record thereon. Pre-election issues shall include, in addition to unit appropriateness, the Board’s jurisdiction and any other issue the resolution of which may make an election unnecessary or which may reasonably be expected to impact the election’s outcome. Parties may raise independently any issue or assert any position at any time prior to the close of the hearing.

(Bill, page 3 line 18 through page 4 line 5). This language would allow virtually any issue to be litigated in a representation case proceeding. Hearings could literally be marathon endeavors, with randomly changing positions, new issues inserted at various stages along the way, and no concern for the resulting extraordinary costs to the Agency.

It should be noted that under the current state of the law, there are limitations upon what may be introduced at a representation case hearing. Thus, for example, in *Bennett Industries*, 313 NLRB 1363 (1994) a unanimous Board found that a party that refuses to take a position regarding the supervisory status of employees or employee classifications is precluded from presenting testimony about the matter.

It has always been the case that unfair labor practice issues may not be litigated in a representation case hearing.¹⁵ The same is the case with a petitioner's showing of interest which is considered confidential.¹⁶ When parties are free to raise not only any issue which may affect an election's outcome, but to raise *any* issue or assert any position in a non-adversarial proceeding, such a proceeding is subject to precisely the type of constitutional infirmity that was found not to exist when the hearing is limited to determining whether a question of representation exists.¹⁷ Allowing introduction in a representation case proceeding of evidence regarding any issue that could "affect the outcome" of any election would reduce the proceeding to a carnival atmosphere, and allowing parties to additionally introduce anything else whatsoever would reduce to the hearing to absurdity.

As a consequence, it is respectfully submitted that the Bill's proposed strictures regarding the time and scope of a representation case hearing should be rejected.

3. Timing of Elections

In apparent response to the Board's proposed rule that would eliminate the current discretionary pre-election review by the Board¹⁸ the Bill proposes, at lines 7 and 8 of page 4, to make pre-election review mandatory and to require that no election be held until such a review is made.

Section 3(b) of the Act authorizes the Board to delegate to the regional directors its power under Section 9 to determine appropriate units, to hold hearings, to determine if a question of representation exists, and to direct an election. It provides that the Board may review any action of a regional

¹⁵ *Guide for Hearing Offices in NLRB Representation Proceedings* at 27.

¹⁶ *Id.*

¹⁷ *Utica Mutual Ins. Co. v. Vincent, Regional Director*, 375 F2d. 129 (2d. Cir. 1967).

¹⁸ Proposed Rule 102.67.

director, but that such action, unless ordered by the Board, will not stay an action of the regional director. Since 1961, the Board's rules have made such review discretionary,¹⁹ and that procedure was subsequently upheld by the Supreme Court.²⁰

The language proposed in lines 7-9 of page 4 of the Bill would result in the last sentence of subsection 9(c) (1) of the Act reading in pertinent part as follows:

If the Board finds upon the record of such hearing **and a review of post-hearing appeals** that such a question of representation exists, it shall direct an election...

(Emphasis added). The language that would be added by the Bill forbids a direction of election until a review is completed of post-hearing appeals. As a consequence, the language in Section 3(b) of the Act which provides that Board review of a regional director's actions does not act as a stay would become irrelevant to the timing of an election because, under the Bill, a direction of election cannot issue at all until a review has been made of any appeal.

As a consequence, elections could be held up for years based upon the most frivolous appeal for review. Because the Board will lose its discretion and will be required to conduct a review in all cases, its processes would be even slower. Unlike the current process in which pre-election Board review is discretionary, and unlike the proposed rules under which Board review would consolidated into one post-election review process, the Bill would mandate pre-election Board in every case, regardless of relevance, materiality, or merit. The Board's caseload would dramatically increase and its timelines would correspondingly lengthen.

The end result would be to deny to employees indefinitely the "fairness and democracy" they seek when attempting to organize. They would file a petition to have an election to choose whether to have union representation and watch their efforts evaporate in a morass of legalese and litigation.

¹⁹ 29 CFR 102.67 (1961).

²⁰ *Magnesium Casting Co. v. NLRB*, 401 US 137 (1971).

Lines 10 through 14 of page four of the Bill would mandate that no election could take place in less than 35 calendar days following the filing of a petition. This would apply even where the union and employer are willing to stipulate to an earlier date. Other than facilitating an employer in ramping up an anti-union campaign, it does not appear to have any meaningful purpose.

It is respectfully submitted that these provisions of the Bill should be rejected.

4. Lists of Eligible Voters

The initial requirement of a list of eligible voters was established in 1966 through Board adjudication in *Excelsior Underwear Inc.*,²¹ where the Board established a prospective requirement that within seven days after direction of an election or approval of an election agreement, the employer must file with the Regional Director, “an election eligibility list, containing the names and addresses of all the eligible voters.” The Board, in *Excelsior*, recognized that rules governing elections cannot remain in stasis, but should change with times:

The rules governing representation elections are not, however, “fixed and immutable. They have been changed and refined, generally in the direction of higher standards.”²²

Id. at 767. The Supreme Court upheld the authority of the Board to require such information, in *NLRB v. Wyman Gordon Company*, 394 US 759 (1969). Therein, the Court noted:

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. [citations omitted] The disclosure requirement furthers this objective by an informed employee electorate and by allowing unions the right of access to employees that management already possess. It is for the Board and not for this Court to weigh against this interest the asserted interest of

²¹ 156 NLRB 1236 (1966).

²² 156 NLRB at 1239, quoting *Sewall Mfg. Co.*, 138 NLRB 66 (1962).

employees in avoiding the problems that union solicitation may present.

The same privacy and similar arguments as were presented over 50 years ago are still being raised in response to the Board's proposed rule amendments. The proposed rules would change the procedures with respect to production of voter lists by requiring that the list contain available telephone numbers and e-mail addresses for each voter. 76 Fed. Reg. at 36820, § 102.67(j).

In apparent response to the Board's proposed rule amendments; the Bill proposes, at lines 15 to 24 of page 4, to insert the following language into the statute:

“Not earlier than 7 days after final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all eligible voters to be made available to all parties, which shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing.”

This provision requires a giant leap backward from what has been the state of Board procedure for over 50 years. It provides that “not earlier” than seven days after a final determination of a bargaining unit by the Board, an employer will provide to the Board one form of employee contact authorized in writing by the employee.

The Bill does not even require that this truncated information be in turn provided to a petitioning union. It requires that this information never be provided so long as there remains outstanding a question of the inclusion of even a single employee in a bargaining unit.

Employers have access to all of this information with which to bombard employees with anti-union propaganda on top of their full-time, in-person access to employees in the worksite.

There can be little argument that providing an effective means of communicating with workers would enable information-sharing and a more

informed electorate. Yet, the Bill is aimed at less communication, and particularly at less worker-union communication. Workers are denied the ability to obtain information from the union while at work and the union has no independent means of learning workers' addresses, phone numbers or emails.

It is also remarkably telling what the Bill does not mandate. It does require the "contact information ... chosen by the employee in writing" be made private and remain confidential from their supervisors and employers. It does not provide employees with a means to limit communications from the employer. It does not protect employees from being required, under pain of discharge, from attending and listening to all manner of employer communications at any time during their workday. Almost 90% of companies in which workers want to form a union require workers to attend such captive audience meetings.²³ Workers who presumably are being protected from union communications are still being forced to give attention to mandatory employer communications or be fired.

The language of the Bill in this regard is not comprehensible in the context of workforce fairness and democracy.

Conclusion

It is respectfully submitted that the so-called "Workplace Democracy and Fairness Act" is anti-democratic and grossly unfair. It is another attack on workers' rights. It should be rejected in its entirety.

²³ Bronfenbrenner, Kate, "No Holds Barred: The Intensification of Employer Opposition to Organizing," EPPI Briefing Paper #235 (2009); available at: http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf