NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160•(703) 321-8510

GLENN M. TAUBMAN
Staff Attorney
Admitted in GA, NY & DC only.

FAX: (703) 321-9319
WEB: www.nrtw.org
E-MAIL: gmt@nrtw.org

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VIA Hand Delivery

Mr. Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N. W.
Washington, D.C. 20570

Re: Comments concerning Joint Petitions for Certification Consenting to an Election, Proposed Rulemaking of 29 CFR Parts 101 and 102.

Dear Mr. Heltzer:

On February 26, 2008, the National Labor Relations Board filed a Notice of Proposed Rulemaking concerning Joint Petitions for Certification Consenting to an Election. These comments in opposition to the proposed rules are submitted on behalf of the National Right to Work Legal Defense Foundation, Inc., and individual employees Clarice Atherholt, Sherwood Cox and Mike Ivey.

I. Parties: The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. The Foundation was formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from collective activity.

The Foundation's staff attorneys have served as counsel for individual employees in many Supreme Court, federal court and NLRB cases involving employees' rights to refrain from joining or supporting labor organizations, and thereby helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include Communications Workers v. Beck, 487 U.S. 735 (1988); Lee v. NLRB, 393 F.3d 491 (4th Cir. 2005); Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Lucas v. NLRB, 333 F.3d 927 (9th Cir. 2003); Saint-Gobain Abrasives, 342 NLRB 434 (2004); and Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007). The Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality agreements." See Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007); Patterson v. Heartland Industrial Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004); Heartland Industrial Partners, 348 NLRB No. 72 (2006).

Clarice Atherholt was formerly an employee of Dana Corporation, an employer that entered into a neutrality agreement with the UAW. Ms. Atherholt was subjected to a coercive union organizing drive conducted under the auspices of a neutrality agreement, and was the Petitioner in Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007). Ms. Atherholt has witnessed first hand the harassing and coercive conduct of union organizers armed with special powers provided by a neutrality agreement.

Sherwood Cox is a registered nurse employed by the Western Medical Center, Santa Ana, California. Western Medical Center entered into a neutrality agreement with the California Nurses Association (CNA). Mr. Cox filed a number of successful unfair labor practice charges and spearheaded employee opposition to this neutrality agreement and to representation by the CNA. Mr. Cox has also witnessed first hand the harassing and coercive conduct of union organizers, and has himself been subjected to harassment and coercion as a result of his views and activities.

Mike Ivey is an employee of Freightliner Custom Chassis Corp., a subsidiary of the Chrysler Corporation, in Gaffney, South Carolina. Mr. Ivey's employer entered into a neutrality agreement with the UAW. Mr. Ivey has filed a number of successful unfair labor practice charges and spearheaded employee opposition to this neutrality agreement and to representation by the UAW. Mr. Ivey has also witnessed first hand the harassing and coercive conduct of union organizers armed with special powers provided by a neutrality agreement, and has himself been subjected to harassment and coercion as a result of his views and activities.

II. Summary: The Foundation and employees Atherholt, Cox, and Ivey oppose the NLRB's proposed rules and object to both specific provisions of the rules and to the general effect that they will have on labor relations.

The proposed rules are objectionable because they give control over the election process to union officials and employers, and then apply a rubberstamp of federal

government approval. Employers and their preferred unions are given the power to jointly: (1) schedule rapid-fire elections at will, with no showing of interest that even a single employee desires the union's representation; (2) gerrymander the bargaining unit; (3) refrain from giving advance notice to employees that the election will be conducted, since the notice requirement is inherently unenforceable; and (4) engage in wrongful conduct to coerce employees to support the union, as blocking charges are inapplicable and employees are not parties to the post-election proceedings.

The proposed rules are generally objectionable because they remove the Board from effectively policing the election process. They instead delegate almost all authority to colluding union officials and employers. If adopted, the proposed rules will do little more than give Board approval to a host of abusive top-down union organizing methods. The Board should not "rent out" its representational machinery for these purposes.

III. Specific Objections: The Foundation and employees Atherholt, Cox and Ivey object to the following provisions of the NLRB's proposed rules.

1. "The petition will provide the date on which the parties have agreed for an election, not to exceed 28 days from the date of filing of the petition."

This rule gives union officials and employers almost complete control over the date, place and hours of the election, subject to only "extraordinary circumstances." The rule is tailor-made for abuse, as union officials and employers can manipulate the schedule to ensure that the election results in union officials gaining exclusive bargaining

privileges over employees. For example, an election can be timed to make it more difficult for a shift of employees opposed to union representation to vote. Or, union officials could use a tactic they commonly use in contract ratification votes—schedule the election at an inconvenient time and location so that only union militants participate.

2. "The petition will provide a description of the bargaining unit that the parties claim to be appropriate."

This rule gives union officials and employers almost complete control over the composition of the bargaining unit. This permits union officials and employers to gerrymander bargaining units to ensure union victory in ways that the Board would not allow if it were conducting a full and open certification election. Units of employees with no community of interest can (and most likely will) be lumped together into gerrymandered units. The proposed rules provide no procedure for the employees to challenge the composition of the unit into which they are forced.

3. "No showing of interest is required to be filed with the petition."

This rule gives union officials and employers complete control over whether an election will be conducted, irrespective of the wishes of employees. Union agents and employers can conspire to thrust union representation onto employees via a rapid-fire election, even though not a single employee has sought or desires such representation.

This is a severe abuse of the Board's traditional election processes, which have always required a showing of interest. In Dana Corp., 351 NLRB No. 28 (2007), the

Board rejected the General Counsel's argument that employees seeking a decertification should have to make a 50% showing of interest. The Board reiterated its 30% showing of interest standard as fair to all parties. Yet here, the proposed rule scraps that standard, and substitutes nothing more than the discretion and collusion of self-interested union officials and employers as the equivalent of a "showing of interest."

The inequity of this proposal is highlighted by the fact that any intervenors wishing to get on the ballot must meet the Board's traditional showing of interest standards in less than fourteen (14) days. Coupled with the rapid-fire nature of this election process and the fact that notice of the election may never reach the employees in a timely fashion, it is difficult to imagine that any other union or group of employees could muster themselves in time to meet the standard "showing of interest" requirement to get on the ballot. In essence, the Board is giving a free pass for an employer to choose a specific union for its employees, with no practical opportunity for employees to voice even a modicum of dissent or organize themselves against the anointed union.

In any event, an election petition without any showing of employee interest is impermissible under the plain language of § 9(c)(1)(A) of the Act, 29 U.S.C. § 159(c)(1)(A), which requires that a "substantial number of employees . . . wish to be represented for collective bargaining." While the Board has discretion to interpret the NLRA, it cannot adopt a rule under which "substantial number of employees" is construed to mean no employees whatsoever.

4. "Notice must be posted by the employer," but "failure to post these notices" shall be grounds for setting aside the election" only when "proper and timely objections are filed under the provisions of Sec. 102.69(a)."

This rule permits employers and union officials to have elections conducted without any advance notice to employees whatsoever, because the notice posting "requirement" is inherently unenforceable and illusory. Failure to post a notice is only grounds for setting aside an election if an employer or union objects to the lack of the notice.[1] Of course, union officials and employers that collude to force a rapid-fire election are not going to object to their own failure to post a notice. For all practical purposes, the notice requirement in the proposed rule may as well not exist.

5. "Any motion to intervene . . . must be filed within 14 days from the docketing of the petition" and "the Board's traditional intervention policies" will be applicable.

Rival unions or groups of employees will be unable to organize themselves in fourteen (14) short days to get themselves on the ballot after an "RJ Petition" is filed. This is particularly true considering the total control that the employer and its preferred union have over the timing of the election, and the fact that the notice posting requirement is illusory.

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[1] As noted above, the only parties that can file an objection to the rapid-fire elections proposed in this rule are the union and employer. See NLRB Rules and Regulations, §§ 102.8 and 102.69(a).

This rule serves only to ensure that employees will be represented by the union of their employer's choice. For example, as these comments are being written, the SEIU and the California Nurses Association (CNA) are fighting over employees of the Catholic Healthcare Partners in Ohio, where the CNA (with much justification) has accused SEIU and the employer of signing an illicit secret deal to conduct rapid-fire consent elections and thereby cut out of the process all other interested unions and employee groups. See Daily Labor Reporter (BNA), SEIU, Ohio Hospitals Cancel Elections Following Campaign by CNA/NNOC, (Mar. 12, 2008); Daily Labor Reporter (BNA), CNA/NNOC Campaign Could Derail Elections for 7,700 Hospital Workers in Ohio, (Mar. 11, 2008). If the Board adopts these proposed rules, the new face of American labor law will be this: secret deals between employers and their chosen unions that preclude other unions or groups of individual employees from asserting their rights or stating their preferences.

6. "Unfair labor practice charges . . . will not serve to block the election or cause the ballots cast in the election to be impounded."

This rule is inequitable because it will squash only unfair labor practice charges filed by *employees* or rival labor organizations. It is extremely unlikely that an employer and union that file an "RJ Petition" will also file blocking charges against one another, as these entities are already working together. The only ULP charges likely to be filed will come from employees or rival unions alleging that the employer is unlawfully supporting the union in violation of § 8(a)(2), or that the employer and union officials are coercing

employees to support the union. It is only these ULP charges that will be deemed inadequate to block a Board election.

This result is particularly perverse since the principal problem with blocking charges concerns *unions'* efforts to block employees' decertification petitions with frivolous ULP charges. Saint-Gobain Abrasives, 342 NLRB 434 (2004). Yet, the Board does not propose to rescind the blocking charge policy in this circumstance. The Board only seeks to do away with blocking charges – and ensure rapid-fire elections – in the one situation where both the employer and union officials collude to unionize the employees.

Blocking charges should be done away with in *all* elections, not just in the rapid-fire elections proposed under these rules. To only exempt joint employer-union petitions from the blocking charge rule—and thus effectively make only employee unfair labor practice charges incapable of blocking an election—is inequitable and contrary to the purposes of the Act.

7. "Unfair labor practice charges . . . will be handled in conjunction with any post-election proceedings," and "all election and post-election proceedings will be resolved with finality by the Regional Director."

This provision rewrites § 10(b) of the Act, 29 U.S.C. § 160(b), and cuts the full Board and the federal courts out of the election process in favor of unappealable rulings by Regional Directors.

First, § 10(b) explicitly creates a six-month limitations period for the filing of

unfair labor practice charges. In some instances, elections or even certifications can be set aside as a result of these ULP charges. Lunardi-Cent. Dist. Co., 161 NLRB 1443 (1966). However, the proposed rules require that ULP charges related to election conduct be litigated in the expedited post-election objection process. The post-election objection process ends seven (7) days after an election is conducted if no objections are filed by the employer or union. This implies that employees' ULP charges filed more than seven (7) days after an election are untimely, or at least unable to effect the results of the election. This is not only procedurally unfair, but in clear violation of Congress' statutory mandate that ULP charges can be filed for up to six (6) months.

Second, the proposed rules appear to vest the power to decide ULP charges in "final" decisions of Regional Directors, rather than in decisions of Administrative Law Judges, which can be reviewed both by the Board and the federal courts of appeals under 29 U.S.C. § 160(f). This raises a concern that the Act itself is being rewritten by these proposed rules. It also raises a concern that due process rights will be trampled when a Regional Director is granted exclusive and final power to both investigate and adjudicate the issues raised in the ULP charges.

Third, employers and unions should not be allowed to make ULP charges filed against them by *other parties*—such as employees or rival unions—subject to the unreviewable discretion of a Regional Director. It is one thing for an employer or union to waive its own right to appeal a Regional Director's decision to the Board. It is quite

another for self-interested employers and union officials to waive the rights of *other* parties to bring their objections or ULPs to the Board and the federal courts.

IV. General Objections: The overarching problem with the proposed rules is that they give almost complete control over the Board's election processes to employers and union officials that have chosen to collude with one another prior to employees designating the union to be their representative. If adopted, the "RJ Petition" will become nothing more than a way for employers and union officials to put the NLRB's stamp of approval on top-down organizing conducted pursuant to "neutrality" and similar "top-down" agreements.

1. The Proposed Rules Give Self-Interested Employers and Union Officials Excessive Control Over The Board's Election Machinery

The proposed rules give almost complete control over the Board's election processes to employers and union officials. These two parties control when and where an election is conducted and who is eligible to vote. Coercive conduct by the employer and union agents is not grounds for blocking the election, and is extremely unlikely to result in a reversal of the election results because only the employer and union are "parties" that can file objections. Entrusting employee rights to the self-interested desires of employers and union operatives is akin to leaving the foxes to guard the henhouse.

Section 7 of the Act gives rights solely to "employees." 29 U.S.C. § 157; *see* Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA

confers rights only on employees, not on unions or their nonemployee organizers"). Section 8 of the Act exists to protect employee rights *against* misconduct by "employers" and "labor organizations." *See* 29 U.S.C. § 158(a-b). Section 9 of Act gives the Board the responsibility to ensure that elections are fairly conducted and that the results of such elections reflect the free and unfettered choice of employees.

> 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. *It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.*

General Shoe Corp., 77 NLRB 124, 127 (1948) (emphasis added).

Here, the Board abdicates this responsibility. Under the proposed rules, the Board will merely and ministerially count ballots on behalf of the employer and union – not ensure that "laboratory conditions" conducive to employee free choice are respected.

The Supreme Court has warned of the danger of "plac[ing] 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." Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961). Indeed, there exists a long and sordid history of employers and union officials colluding to coerce employees into union representation.[2]

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[2] Duane Reade, Inc., 338 NLRB No. 140 (2003) (employer unlawfully assisted Needletrades union with organizing several of its stores); Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other (continued...)