

Before the Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
United States House of Representatives

H.J. Res. 29, Providing for congressional disapproval under chapter 8 of title 5,
United States Code, of the rule submitted by the National Labor Relations Board
relating to representation case procedures

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March 4, 2015

I. The Ambush Election Rule

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee:

Thank you for your invitation to participate in this hearing. I am honored to appear before you today.¹

By way of introduction, I am a member in the law firm of Glankler Brown, PLLC, in Memphis, Tennessee, where I represent employers in various industries under the National Labor Relations Act (NLRA). I have spent some 50 years working on matters involving the NLRA. The first four years were spent working for the National Labor Relations Board, initially in an NLRB regional office where I conducted elections, held pre-election hearings, and served as counsel for the general counsel in unfair labor practice hearings. Subsequently, in Washington,

¹ This testimony reflects my own personal views; however, I wish to thank Meghan K. McMahon for her efforts in helping me prepare this testimony.

D.C., I served in the NLRB Division of Advice and in the Division of Enforcement.

In private practice, I have represented employers for approximately 46 years. During this time, I have continued my close involvement with the NLRB and workplace issues. During the Clinton administration, I was appointed by Chairman William Gould, IV to serve on the NLRB Advisory Panel and made a presentation during this period to The Dunlop Commission on the Future of Worker - Management Relations. I also served for many years on the ABA's Practice and Procedure Committee under the NLRA. Most recently, I appeared as the lead-off speaker on July 18, 2011, at the NLRB's Public Meeting on its proposed new election rule. I appeared on behalf of the Tennessee Chamber of Commerce & Industry both then and on February 20, 2014, when the Board conducted round two of its rulemaking procedure.

The Board's Final Rule ("Ambush Election Rule," "Final Rule," or the "Rule")² – which was issued on December 15, 2014, and is scheduled to be implemented on April 14, 2015 – is nearly identical to what the Board originally proposed in 2011. As stated by dissenting Board Members Miscimarra and Johnson, the Rule's primary purpose and effect remain the same: to enable initial

² 79 Fed. Reg. 74,308-74,490 (Dec. 15, 2014).

union representation elections to occur as soon as possible.³ The divided Board's issuance of a Final Rule makes sweeping and ill-advised changes to the NLRB's longstanding union representation election procedures and disregards the overriding goal of American labor law for more than 75 years – resolving representation questions not only quickly, but also fairly and accurately.⁴ Clearly, the Ambush Election Rule does not meet the fundamental fairness test. As the dissenters observed, requiring that elections occur as quickly as possible curtails the right of employers and employees to engage in protected speech and impermissibly infringes upon protected speech.⁵ Even if it were within the Board's authority to enact such a rule, the Rule is ill-advised and poorly serves the Act's purposes and policies.

Here, the Board majority's proposed Ambush Election Rule overhaul dramatically curtails the time allowed between the filing of a union election petition and the actual election. In doing so, it conflicts with the statutory policy in favor of free debate guaranteed under the First Amendment and Section 8(c) of the Act. As the Second Circuit so aptly stated in *Healthcare Association of New York State v. Pataki*,⁶ Section 8(c) not only protects constitutional free speech rights, but

³ 79 Fed. Reg. at 74430 (dissent).

⁴ NLRB, Statement by Chairman Wilma B. Liebman on Representation-Case Procedures Rulemaking, <http://www.nlr.gov/news-outreach/fact-sheets/amendments-nlr-election-rules-and-regulations-fact-sheet/statement> (last visited Feb. 27, 2015).

⁵ 79 Fed. Reg. at 74431 (dissent).

⁶ 471 F.3d 87, 97 (2d Cir. 2006).

also serves a vital function within labor law by allowing employers to present an alternative view and information that a union would not present, thus aiding the workers by allowing them to make informed decisions.

As far back as 1962, in *Sewell Manufacturing Company*,⁷ the Board explained that it seeks to remove all obstacles which prevent or impede reasoned and informed choice by employees. Here the Board does just the opposite. It does not remove obstacles; it imposes them by steamrolling elections in the name of “streamlining” the process.

The period of time between the filing of the petition and the holding of the election is critical. During this period, management has the opportunity to communicate its position on unionization to its employees, many of whom would already have signed the union authorization cards that secured the election. An ambush election can leave an information void, heightening the risk that employees may vote without having the benefit of their employer’s alternative viewpoints.

Moreover, after employees receive information from their employers, they need sufficient time before they are asked to vote to develop understanding, seek answers to any questions they may have, and consider each alternative. The drastic rule changes proposed herein minimize, rather than maximize, the likelihood that

⁷ 138 NLRB 66 (1962).

all voters will be exposed to the arguments against, as well as for, union representation. The Board's reformulation instead reduces the election process, as stated by Members Miscimarra and Johnson to "vote now, understand later."⁸

Although the freedom of agencies to fashion their own procedural rules is a basic tenet of administrative law, the Supreme Court emphasized that "such rules must be consistent with statutory requirements."⁹ As Board Member Hayes stressed in dissenting from the issuance of the proposed amendments in 2011, by shortening the time from petition to election date, the Board "broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947."¹⁰ Indeed, as the Supreme Court recently stated in *Chamber of Commerce v. Brown*, Congress's overarching "policy judgment . . . favor[s] uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken work . . . has been expressly fostered by Congress and approved by the N.L.R.B."¹¹

Any concerns about unreasonable delay in a particular case cannot justify conducting all elections in as short a time as possible. As Board Member Hayes stated in his strongly-worded dissent, "the principal purpose for this radical

⁸ 79 Fed. Reg. at 74430 (dissent).

⁹ *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 543-544 (1978).

¹⁰ 76 Fed. Reg. at 36832 (dissent).

¹¹ 554 U.S. 60, 67-68 (2008).

manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."¹²

Section 8(c) represents a sweeping Congressional affirmation of free speech. Concomitant with the right of free speech is the guarantee to a reasonable opportunity for both sides to convey their views to voters. The employer has a fundamental right to communicate information to its own employees. The Board's commitment to resolving representation fairly trumps any perceived benefit that may arise from resolving elections more speedily.

II. While the Board Purports to Eliminate "Unnecessary Litigation and Delay," It Disregards the Actual Increased Delays the Final Rule Will Cause in Resolving Questions of Representation.

In announcing the issuance of its Final Rule, the Board majority represents that it will, *inter alia*, eliminate unnecessary litigation and delay.¹³ In actuality, however, attorneys and individuals who confront day-to-day real life problems in the field and who regularly practice before the NLRB know that the sweeping overhaul of the Final Rule will potentially lead to a litigation surge. Questions of representation will arise and cause insurmountable delays, and protracted litigation will be necessary to remedy the Final Rule's inherent deficiency.

¹² 76 Fed. Reg. at 36832 (dissent).

¹³ *See, e.g.* 79 Fed. Reg. at 74,386.

Under the Final Rule, parties will be limited in pre-election hearings to litigating only those issues that are necessary to determine whether it is appropriate to conduct an election. Parties would no longer have the right to litigate fundamental election issues like voter eligibility and supervisory status, since the Board majority concluded that they do not have to be resolved to determine whether an election should be held. Therefore, vital issues of supervisory determinations that often have far-reaching consequences will no longer be allowed to be litigated. By failing to resolve such critical issues prior to an election, the Final Rule's implications open the door for months, if not years, of necessary litigation following the election with the attendant delays in resolving important representation questions/issues.

The Board should have learned that protracted litigation results when critical voter eligibility issues are not resolved prior to the election after the results of the *ITT Lighting Fixtures*¹⁴ case (“*ITT*”). In *ITT*, following the filing of a union petition for election, the company sought the exclusion from the bargaining unit of its group leaders at a pre-election hearing on the basis that they were statutory supervisors. Following the hearing, however, the Regional Director for Region 26

¹⁴ *ITT Lighting Fixtures*, 249 N.L.R.B. 441 (1979); 252 N.L.R.B. 328 (1980); 658 F.2d 934 (2d Cir. 1981); 265 N.L.R.B. 1480 (1982); 712 F.2d 40 (2d Cir. 1983); 718 F.2d 201 (2d Cir. 1983); 104 S.Ct. 2361 (1984).

chose not to make a determination on the supervisory status of the company's group leaders, instead ordering group leaders to vote by challenged ballot.

Although the group leaders constituted less than 20% of the bargaining unit, their pro-union activities had the real potential of affecting the votes of rank-and-file employees. The company's hands were tied, however, by the NLRB. If the group leaders had subsequently been determined not to be supervisors, the company would have been precluded from interfering with the group leaders' pro-union activities for fear that such interference would constitute an unfair labor practice.

Following the union's election victory in 1979, there existed some five years of subsequent litigation all the way to the United States Supreme Court. This litigation resulted from the Board's order finding the company guilty of unfair labor practices for its technical refusal to bargain with the union in order to obtain court review. The company defended its actions based on the open and pervasive involvement of the group leaders (supervisors) in activities on behalf of the union. In the end, the Board finally found the group leaders to be supervisors, but by then it was too late. The courts proceeded to vacate the election.

The anatomy of *ITT Lighting Fixtures*, which is outlined in attached Exhibit "A," represents a clear and present danger of what can happen when the Board defers litigation of most voter eligibility issues until after the election. The result in

ITT, where a regional director conducted a pre-election hearing but nevertheless chose to vote group leaders by challenge ballot instead of first determining their supervisory status, now becomes the new normal under the Final Rule where pre-election litigation of voter eligibility is actually foreclosed.

Real world experience teaches that the best practice is to resolve unit issues sooner rather than later. The restrictions of the Final Rule are arbitrary, impractical, and the antithesis to the high standards which the Board has set for itself in the conduct of representation elections. In short, the proposed rule change herein can significantly delay the final resolution of representation questions and truly does not serve the interests of employees, employers, or even labor organizations.

III. Conclusion

The self-professed standard set by Chairman Pearce that the Final Rule “will result in improvements for all parties” . . . and represents “a model of fairness and efficiency for all”¹⁵ ignores the fact that the Ambush Election Rule issued by the Board majority is viewed highly unfavorably by employers. This disconnect is demonstrated by the fact that virtually all employers who submitted testimony in 2011 and in 2014 or testified before the Board in the rulemaking proceedings were highly critical of the Rule’s curtailment of fundamental rights of both employer

¹⁵ NLRB Issues Final Rule to Modernize Representation-Case Procedures, NLRB (Dec. 12, 2014) (emphasis added), <http://www.nlr.gov/news-outreach/news-story/nlr-issues-final-rule-modernize-representation-case-procedures>.

free speech and employee free choice. Even assuming *arguendo* that the Board has the authority to make the dramatic sweeping changes imposed herein, why abandon an election process that has worked fairly for decades? There is no convincing need to speed up the election process, and elevating lighting speed over fairness is fundamentally unacceptable as a matter of public policy. Regrettably, it appears from the Board majority's Ambush Election Rule that employer testimony on the gross deficiencies of the sweeping overhaul of the new Rule has fallen on deaf ears.¹⁶

The Board majority stresses that the Rule enables the Board to more effectively administer the National Labor Relations Act by eliminating unnecessary litigation and delay. Moreover, the majority says that the Board will be better able to fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation. One cannot argue against eliminating unnecessary delay in the abstract, but the devil is in the details. Today, the median time for all elections is 38 days, and more than 94% of all elections occur within 56 days of the petition's filing.¹⁷ These statistics are well within the NLRB's own goals for timely elections. The NLRB's longstanding representation process is working today and unions have seen their win rate increase in recent

¹⁶ As shown in Exhibit "B," the comments and suggestions I made on behalf of the Tennessee Chamber of Commerce & Industry were not adopted.

¹⁷ 79 Fed. Reg. at 74,434 (dissent).

years to where unions won 63% of all NLRB elections in 2014.¹⁸ As stated by the two dissenting Board Members, the new Rule is “a solution in search of a problem.”¹⁹

In a 1959 debate over amendments to the National Labor Relations Act, then-Senator John F. Kennedy warned against rushing employees into an election, saying, “There should be at least a 30-day interval between the request for an election and the holding of an election . . . in which both parties can present their viewpoints.”²⁰ Yet the Board herein takes the exact opposite approach. Under the new Rule, elections could take place in as few as 11 days. As the two dissenting Members of the NLRB put it, employees will be asked to “vote now, understand later.”²¹

The Board’s assertion that the Rule enables the NLRB to fulfill its duty to protect employee rights ignores that employees have a fundamental right to make an informed choice before voting in a Board election that has long-term consequences to affected employees. These rights have been abandoned by the new Rule. As a result of quickie elections, employees may not be able to hear all the facts they need to know about risks of unionization. To the detriment of

¹⁸ NLRB, Election Reports, <http://www.nlr.gov/reports-guidance/reports/election-reports> (last visited Feb. 27, 2015).

¹⁹ 79 Fed. Reg. at 74,449 (dissent).

²⁰ 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy).

²¹ 79 Fed. Reg. at 74430 (dissent).

employees, the new Rule imposes built-in obstacles which prevent or impede reasoned and informed choices by employees.

In addition, the new Rule tramples on employee rights of privacy. Thus, employers are required to turn over employees' personal email addresses, cell phone numbers, shift hours and locations, and job classifications, even if the employee says he or she does not want to be contacted by union organizers. The reality is that, despite the guise of protecting employee rights, the employees, like employers, come up big losers under the new Rule.

In sum, the Ambush Election Rule is manifestly wrong as a matter of law and policy and hopefully will never be implemented on April 14 or on any later date.

Thank you for your invitation to appear before the Subcommittee and your consideration of my comments.

ANATOMY OF ITT LIGHTING FIXTURES

**The Nightmare Scenario of What Can Happen When Unit Issues Are Not Resolved
at a Pre-Election Hearing but Left to the Challenge Process**

A. BEFORE THE BOARD

- 1) Union filed a petition for an election on December 14, 1978.
- 2) A hearing was held on January 3, 1979. The Regional Director issued a Decision and Direction of Election, directing an election in a unit of production and maintenance employees. However, no finding was made on the status of group leaders, who were alleged by the company to be supervisors and by the union to be employees. It was instead ordered that the group leaders should vote subject to challenge.
- 3) The election was held on February 16, 1979, in which 175 votes were cast for the union, and 153 against the union with 34 challenged ballots, including those of the 31 group leaders, a number sufficient to affect the results of the election.
- 4) Subsequent to the election, the company filed timely objections, alleging essentially that the group leaders were supervisors who should not have been allowed to vote by challenged ballot and whose pre-election conduct in support of the union interfered with employees' freedom of choice in the election.

5) On February 28, 1979, the Regional Director for Region 26 issued a Notice of Hearing on the challenged ballots and objections to resolve the issues raised by Respondent's objections and by the challenged ballots.

6) On April 23, 1979, the Hearing Officer issued his Report and Recommendations on Employer's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election and Challenged Ballots in which he recommended *inter alia*, that the challenges to the ballots of the group leaders be sustained, that the company's objections be overruled, and that a certification of representative issue.

7) On July 10, 1979, the Regional Director issued a Supplemental Decision and Certification of Representative, adopting the Hearing Officer's findings that 11 of the group leaders were supervisors but that the company's objections were without merit.

8) On August 6, 1979, the company filed a Request for Review of the Regional Director's Supplemental Decision and Certification of Representative.

9) On October 2, 1979, the General Counsel issued an 8(a)(5) and (1) complaint against the company alleging in substance that on July 10, 1979, the union was duly certified and that commencing on or about August 6, 1979, the company refused to bargain with the Union.

10) On November 21, 1979, the Board granted the company's Request for Review in part, but did not grant review of the Regional Director's Supplemental Decision dismissing the company's objections.

11) On December 3, 1979, counsel for the General Counsel filed a motion with the Board entitled, "Motion to Transfer Case to the Board and for Summary Judgment."

12) On December 18, 1979, the General Counsel moved to withdraw its motion due to the pending review of the decision in Case 26-RC-5908 which was granted immediately.

13) On May 9, 1980, the Board issued its Decision on Review in Case 26-RC-5908, adopting the Regional Director's Certification of Representative issued by the Regional Director.

14) On May 19, 1980, the union renewed its request to bargain.

15) On June 3, 1980, the company stated that it was unwilling to bargain on the grounds that the activities of the group leaders had interfered with the election.

16) On June 23, 1980, the General Counsel filed a motion with the Board for transfer of the unfair labor case to the Board and for summary judgment.

17) On September 16, 1980, the Board granted the General Counsel's motion and found that the company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union.

B. BEFORE THE COURTS (AND BOARD)

18) The company filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit and the Board filed a cross-petition for enforcement.

19) On September 1, 1981, the Second Circuit reversed and remanded the case to the Board for further proceedings and action in light of the content of its opinion. The court concluded that the Board, and its designated finders of fact, had avoided the crucial issue: whether the pro-union statements and activities of many of the company's group leaders impaired the employees' freedom of choice in the election and affected any of the 175 pro-union votes cast.

20) On December 16, 1982, following remand, the Board issued a Supplemental Decision and once again found the employer guilty of unfair labor practices and ordered it to bargain with the union.

21) The company refused to bargain with the union and filed a Petition for Review once again in the United States Court of Appeals for the Second Circuit. The Board filed a cross-petition for enforcement.

22) On July 18, 1983, the Second Circuit vacated the Board's supplemental decision and the election

23) On September 20, 1983, the Second Circuit rejected the Board's Petition for Rehearing.

24) On May 14, 1984, the United States Supreme Court denied the Petition for Writ of Certiorari (Justices White and Brennan dissenting).

EXHIBIT “B”

COMMENTS AND SUGGESTIONS MADE ON BEHALF OF THE TENNESSEE CHAMBER OF COMMERCE & INDUSTRY

- We respectfully submitted that the litmus test for any proposed change to the conduct of representation elections must be whether quickie elections will ensure an informed electorate. It was submitted that the quickie elections do not meet this test and were therefore ill-advised as a matter of policy.
- We respectfully submitted that the proposed election rule should not defer voter eligibility issues until after the election, but that such issues, especially disputed issues involving supervisory status, should be heard and resolved in a pre-election hearing.
- We respectfully submitted that any changes to the conduct of representation elections should focus on areas of causing the greatest delays, not the overall election process. We cited the Board’s blocking charge policy as a policy which has been identified at least since 1994 as a major culprit and urged that it should be totally eliminated as a matter of policy.
- We respectfully submitted that if the Board were to adopt a quickie election model, there should be a corresponding requirement imposed on labor organizations to notify the targeted employer at the outset of an organizing campaign to avoid being ambushed, causing harm to employees and employers.

None of the suggestions we made to the Board were adopted.