FEBRUARY 17, 2023

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half St. SE
Washington, DC 20570

RE: Notice of Proposed Rulemaking, Notice of Proposed Rulemaking: Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships

Dear Ms. Rothschild:

The HR Policy Association welcomes the opportunity to submit the following reply comments for consideration by the National Labor Relations Board ("NLRB" or "Board") in response to the published Notice of Proposed Rulemaking ("NPRM") and Request for Comments regarding certain representation case procedures.[1] Specifically, the Association submits these comments in response to comments filed by Board General Counsel Jennifer Abruzzo.

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

Executive Summary

The Board's Proposed Rule ostensibly aims to better protect and promote employee choice and collective bargaining. In comments submitted in support of the Proposed Rule, the Board's General Counsel articulates her view that the rule best achieves both of these goals, and proposes further steps the Board should take in furtherance of such goals. Unfortunately, however, the Proposed Rule in practice would actually restrict employee choice in contravention of the text and purposes of the NLRA, and continues a troubling pattern of the current Board and its General Counsel in which union interests are elevated over rights of employees and employers under federal labor law.

[1] Notice of Proposed Rulemaking: Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships 87 Fed. Reg. 66890 (Nov. 2, 2022).

The Proposed Rule would reinstate the blocking charge policy and expand the voluntary recognition bar, both of which function to inhibit employees' rights to choose representation and to exercise such rights through Board-conducted secret ballot elections. The blocking charge policy improperly incentivizes unions to file unfair labor practice charges when they are threatened with decertification and inappropriately imbues Regional Directors with unilateral authority to allow such charges to delay decertification petitions, often to the point where they are rendered moot. Such a policy effectively disenfranchises employees to the benefit of unions alone. The voluntary recognition bar has no statutory basis and similarly restricts an employees' ability to exercise their right to choose representation through secret ballot elections. The Board should abandon its current rulemaking on both issues and retain the April 2020 Election Protection Rule which better furthered employee choice interests.

Finally, the Board should reject arguments put forth by its General Counsel in comments submitted to the Board regarding employer withdrawal of recognition where a loss of majority status is evident. The General Counsel advocates prohibiting withdrawal of recognition on the basis of a showing of a loss of support while simultaneously urging the Board to allow unions to gain recognition through the same means (i.e., card check recognition). Such a contradictory position is not only clearly untenable but highlights the continued and inappropriate prioritization of union interests over employees and employers by the General Counsel. As spelled out in the text of the Act, and numerous Supreme Court decisions, the interests of all stakeholders under the NLRA must be balanced equally when engaging in federal labor policymaking.

- **The Proposed Rule would inhibit employee choice in contravention of the National Labor Relations Act.**

Through the Proposed Rule – and corresponding rescission of the April 2020 Election Protection Rule – the Board purports to "better protect employees' statutory right to freely choose whether to be represented by a labor organization, promote industrial peace, and encourage the practice and procedure of collective bargaining." [2] In comments submitted to the Board, the Board's General Counsel similarly argues that the Proposed Rule "would best protect employee free choice and more efficiently utilize limited Agency resources."[3] These sentiments are echoed throughout other comments filed in support of the Board's Proposed Rule.

In practice, however, and contrary to the arguments put forth by the Office of the General Counsel, the Board's Proposed Rule would in fact inhibit employee choice and restrict workers' rights to choose their own bargaining representatives by reinstating the Board's previous block charge policy.

The Board is legally bound by the text of the NLRA to protect the right of employee free choice:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing...and shall also have the right to refrain from any or all of such activities.[4]

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[2] *Id*. at 66890.
[3] National Labor Relations Board Office of the General Counsel, Comment Letter on Proposed Rulemaking: Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships 87 Fed. Reg. 66890 (Nov. 2, 2022).
[4] 29 U.S.C. § 157.

The rights articulated in the above statutory text can be boiled down to employees' rights to vote for or against union representation, and correspondingly, to vote an incumbent union out as the employees' exclusive representation. Employees are empowered under the NLRA and Board procedure to exercise the latter through decertification petitions. In short, the NLRA requires the Board to empower and safeguard employees' rights to decide on their own representation, which includes voting out an incumbent union should they wish to do so.[5]

- *Reviving the Blocking Charge Policy Disenfranchises Employees*

The blocking charge policy restricts such rights. A majority of employees who wish to vote out an incumbent union can be delayed – and effectively prevented – by that same union simply filing unfair labor practices against the employer, regardless of the merit of such charges.[6] A recent decision issued by the Board is particularly illustrative of this issue: in *Geodis Logistics, LLC*, employees filed decertification petitions in 2018 and 2019, which were then dismissed – two years later – by a Regional Director on the basis of unresolved unfair labor practice charges.[7] Such charges were eventually settled between the employer and the union, but the Regional Director declined to reinstate the decertification petition until it had investigated compliance with the settlement, a process that took more than a year.

Upon completion of the investigation in 2021, the Regional Director once again denied reinstatement of the decertification petition, this time on the basis of new unfair labor practice charges alleging violation of the settlement – notably, the alleged conduct took place well after the employees originally filed for decertification. In 2022, the Board issued a decision in the case holding that only decertification petitioners can request reinstatement, but did nothing to resolve the decertification petition and related charges blocking it, which still remain in the hands of the Regional Director, unresolved. In the meantime, the employee who originally filed the decertification petition is no longer even employed in the bargaining unit.

In short, an employee's decertification petition remains unresolved four years after it was initially filed, solely on the basis of an "unlitigated and unproven allegation of unlawful assistance."[8]

This case illustrates the three major issues underlying the blocking charge policy, together which serve to disenfranchise employees in contravention of the NLRA. First, as demonstrated above, such a policy impedes the speedy resolution of decertification petitions to the point they are no longer relevant. Unfair labor practice charges often take years to resolve, a reality that has only been made worse by the Board's current significant case backlog and staffing issues. By the time

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[5] The previous Board's 2019 election rules appropriately recognized that the Act's provisions regarding representation "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Representation Case Procedures, Final Rule, 84 Fed. Reg. 69, 524, 69,524 (Dec. 18, 2019).

[6] The Association does not imply that all such charges are meritless, merely that such charges do not need to have merit to block a decertification petition. Even following the 2015 amendments to blocking charge rules, such charges in practice do not need to include significant evidence to block such petitions – there is no accompanying due process whatsoever.

[7] *Geodis Logistics, LLC*, 371 NLRB No. 102 (May 24, 2022).

[8] *Id.* at 4 (Member Ring, dissenting).

charges blocking decertification petitions may be resolved, the petition itself may be moot – perhaps an intended effect of a blocking charge policy.[9]

In any case, such circumstances contribute to the second issue underlying such a policy: incentive for unions to file meritless unfair labor practice charges solely to retain their status as exclusive representation. As demonstrated in the above case, it often does not matter whether such allegations are ever even fully litigated let alone proven. The mere presence of allegations can be enough to delay decertification petitions long enough to render them moot or otherwise ineffective.

The third major issue underlying the blocking charge policy is that it places an inappropriate amount of authority in the hands of Regional Directors regarding employee choice. More specifically, and far more troubling, the policy essentially disenfranchises employees and transfers such voting rights into the hands of a single Regional Director. Regional Directors can unilaterally determine whether a full dismissal of a petition is warranted, effectively eliminating or at the very least significantly delaying an employee's ability to exercise their rights to choose their own representation.

- *The Voluntary Recognition Bar Has no Basis in the NLRA and Further Restricts Employee Choice*

Nowhere within the text of the NLRA does the statute provide for the voluntary recognition bar, which would be expanded under the Proposed Rule. Any sort of election bar by definition is a limit on the secret ballot election process and by extension an interference with an employee's rights to choose representation in contravention of the Act. In recognizing the importance of allowing parties adequate time to bargain, Congress did provide for the general election bar in enacting the NLRA. This inclusion adequately balances the rights of employees to choose representation – including to reject such representation with the objective of allowing parties adequate time to negotiate a first contract. Accordingly, Congress clearly contemplated the importance of providing such a balance and clearly intended that the sole election bar included in the Act was sufficient in achieving the same. Simply put, creating and expanding the voluntary recognition bar has no basis in the Act and conflicts with its stated goals.[10]

- *The Board and its General Counsel are Inappropriately Substituting Union Prioritization with Employee Choice*

The Board's Proposed Rule and comments to the same submitted by its General Counsel profess to be arguing in favor of expanded employee choice. In reality, however, such arguments are based on the incorrect premise that employees without a union are inherently prevented from exercising their rights under the NLRA. More specifically, the Proposed Rule and the General Counsel's comments appear to overlook the fact that employee choice under the Act includes the right to seek elections to vote out an incumbent union, or at the very least considers such rights subservient to the rights of an incumbent union. In short, the Proposed Rule and the General

[9] *See* lyrics of Hotel California by the Eagles ("You can check out any time you like, but you can never leave).
[10] Indeed, this is especially true as voluntary recognition agreements may be the product of questionable agreements between employers and unions. In any event, they involve "choice" of representation without the benefit of a Board-conducted secret ballot election.

Counsel's comments elevate the interests of unions – and in particular incumbent unions – over employee rights to free choice under the NLRA.

Nowhere is this flawed prioritization more evident than in the General Counsel's urging of the Board to prohibit employers from withdrawing recognition of a union based on a showing of a loss of majority support, absent consent from the incumbent union or other "unusual circumstances."[11] The General Counsel claims that doing so would "better effectuate the Act's goals of protecting employee choice.." and that "the interests of both employers and employees would be best served by processing this issue [determining the loss of majority support] through representation cases [and therefore by secret ballot election]."[12]

Thus, the General Counsel argues here that employers should not be permitted to withdraw recognition based on a showing of a loss of majority support under virtually any circumstance, no matter how compelling the evidence may be that the incumbent union no longer enjoys majority support of unit employees. And yet the General Counsel is also simultaneously vigorously urging the Board to permit unions to achieve recognition without a Board-conducted secret ballot election.[13] The General Counsel's initiative to revive *Joy Silk Mills, Inc.* and card check recognition is not only legally flawed but also lacks merit on a policy basis. The General Counsel attempts to square this obvious contradiction by claiming that employers that withdraw recognition are not doing so to "vindicate employees' Section 7 rights," while implying that unions seeking recognition necessarily are.[14] Not only does such an argument inappropriately automatically assume nefarious intent on the part of employers in such circumstances, but once again evinces a clear belief that the rights of unions should be prioritized over those of employees and employers under the Act – a belief that directly contradicts the text and purposes of the NLRA.

The Board's blocking charge and voluntary recognition procedures should remain in place.

Sincerely,

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[11] National Labor Relations Board Office of the General Counsel, Comment Letter on Proposed Rulemaking: Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships 87 Fed. Reg. 66890 (Nov. 2, 2022).
[12] *Id*.
[13] *See, e.g.* Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 36-45, *Cemex Construction Materials Pacific, LLC*, Cases 28-CA230115 et al. (filed Apr. 11, 2022) (arguing for overruling of Linden Lumber and reinstatement of Joy Silk).
[14] National Labor Relations Board Office of the General Counsel, Comment Letter on Proposed Rulemaking: Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships 87 Fed. Reg. 66890 (Nov. 2, 2022).

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