March 26, 2008

Mr. Lester Heltzer, Executive Secretary
National Labor Relations Board
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Washington, D.C. 20570

Comments of Center on National Labor Policy on NLRB's Proposed Rulemaking for "RJ Petitions"

The Center on National Labor Policy, Inc. submits the following comments in response to the National Labor Relations Board ("Board" or "NLRB") Notice of Proposed Rulemaking published in the Federal Register on February 26, 2008 ("Proposal").

The Center on National Labor Policy, Inc. ("Center") is a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act, from defending employees in litigation, upholding employee Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interest. *E.g., Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137 (7th Cir. 2002); *Colorado-Ute Electric Ass'n v. NLRB*, 939 F.2d 1392 (10th Cir. 1991); *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100 (4th Cir. 1985); *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983). The Board has recognized the unique status of the Center in formulating policy under the Act and has always consented to the Center's participation as *amicus curiae* in the public interest in federal cases. *See e.g., Sparkling Springs Water, Inc.*, 13-RC-20559 (Aug. 2, 2001).

I. Summary of Comments

The Proposal amends the NLRB's Rules and Regulations to permit joint representation petitions ("RJ Petitions"). The Proposal states that "[t]he public is nevertheless encouraged to suggest alternatives." The Center urges an alternative to the RJ Petition: amend the NLRB's Rules and Regulations to make clear that employers can file RM Petitions upon a union demand for a recognition agreement (hereinafter "RM Petition Alternative").

The election procedures established in § 9(c) of the Act, 29 U.S.C. § 159(c), are being circumvented by prolific union use of private "recognition agreements" to organize employees outside of the Board's processes.[1] The Board is rapidly becoming less and less relevant with respect to how employees choose or reject union representation.

The RJ Petition will do little to stop the Board's slide into irrelevancy because the NLRA's election machinery is not falling into disuse because it is deficient or cumbersome. It is because unions (unsurprisingly) find it much easier to unionize employees under recognition agreements that do not provide the safeguards to employee free choice that are present in Board elections.

The RM Petition Alternative will restore the Board's rightful purview over questions concerning representation by preventing the ongoing vitiation of the NLRA's representational processes by recognition agreements. It will also go far in ensuring that employees can choose or reject unionization in the laboratory conditions of a Board conducted secret-ballot election. As such, the RM Petition Alternative should be adopted in lieu of the proposed RJ Petition.

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[1] The phrase "recognition agreement" shall be used to refer to employer-union agreements that provide for voluntary recognition of the union. The agreements sometime also called or "neutrality agreements" or "organizing agreements."

II. The Board is Becoming Less Relevant in Representational Matters Because Unions Are Circumventing the Electoral Procedures of § 9 of the Act with Recognition Agreements

Section 9(c) of the Act establishes procedures in which questions concerning representation are resolved in Board conducted secret-ballot elections. It has long recognized that "secret elections are generally the most satisfactory—indeed the preferred —method of ascertaining whether a union has majority support." *Dana Corp.*, 351 NLRB No. 28, * 5 (2007) (*quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969)).[2]

"Congress has entrusted the Board with . . . establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 328 (1944).

> 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).

However, use of the Board's election procedures has been in a steady of state of decline. The NLRA's election procedures are being circumvented, and hence vitiated, by prolific union use of private recognition agreements to resolve questions concerning union representation.[3]

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[2] *See also Linden Lumber v. NLRB,* 419 U.S. 301, 304, 307 (1974) *Brooks v. NLRB*, 348 U.S. 96, 100 (1954); *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 723 (2001); *Underground Service Alert of Southern California*, 315 N.L.R.B. 958, 960-61 (1994).

[3] *See e.g.*, Daily Labor Report, C-1 (4 December 2006) (fewer representation elections being conducted); Jonathan P. Hiatt, *Union Survival Strategies for the Twenty-First Century*, Lab. L. J., Summer/Fall 1996, at 176 (AFL-CIO General Counsel urging that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes")

Unions are using private recognition agreements for a simple reason: it is far easier to unionize employees pursuant to a "card check" not subject to the safeguards to employee free choice found in a Board conducted secret-ballot. *See, e.g., Dana Corp.*, 351 N.L.R.B. No. 28, ** 5-7 (2007). Under a recognition agreement, union organizers can pressure employees one at time to "vote" for a union by signing a union card. By contrast, in a secret ballot election, employees are free to vote their conscience in the privacy of voting booth. Under most recognition agreements, employers are gagged from speaking about unionization and forced to assist the union's organizing campaign against their employees. By contrast, Board procedures favor a robust debate in which employees hear both the pros and cons of unionization.[4]

This circumvention of the NLRA's election procedures in favor of private recognition agreements should be deeply troubling for the Board because it places employee rights in the self-interested hands of employers and unions. The Supreme Court has recognized 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 (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961).

It is imperative that the Board reestablish the relevancy of the NLRA's representational procedures and restore the Board's rightful purview over questions concerning representation. To accomplish this objective, the Board must take action to stop the circumvention of its election procedures with private recognition agreements.

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[4] *See Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir.1971); *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986); *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966).

III. The RJ Petition Will Not Address the Declining Relevance of the Board's Representational Procedures

The apparent rationale for the proposed RJ Petition is that the Board's election procedures will be used more frequently if only it were easier for unions and employers to petition for an election and have it expeditiously conducted. The RJ Petition thereby eliminates the requirement for an employee showing of interest and expedites the election process.

These actions will not re-establish the Board's rightful purview over representational issues. The Board's election procedures are not falling into disuse because they are too hard to use or somehow deficient.

Elimination of the employee showing of interest requirement in an RJ Petition will not lead to more elections. It is already easy for unions to petition for an election. Unions can unilaterally request an election with a showing of interest signed by only of 30% employees. The vast majority of employers would welcome such a petition and the opportunity to quickly resolve the question of union representation in an up or down vote. The employee showing of interest requirement is not a reason for the disuse of the Board's elections procedures.

Expediting the election process in an RJ Petition will not result in greater use of the Board's election machinery. Board elections are already expeditious. For example, during fiscal year 2006, "[i]nitial elections in union representation cases were conducted in a median of 39 days from the filing of the petition, with 94.2% of all elections conducted within 56 days." *Dana Corp.*, 351 N.L.R.B. No. 28, * 6 n.25 (2007) (*quoting* G.C. Memo. GC 07-03, Summary of Operations FY 2006 (January 3, 2007)). "[I]n Fiscal Year 2005, only 5 percent of all

representation elections resulted in the filing of objections." *Id.* at * 6 n.25.[5] The Board is not losing its relevancy in representational matters because its election process is too slow.

Again, the Board's election procedures are not being used because unions are deliberately circumventing the procedures with private recognition agreements that practically guarantee union success. The proposed RJ Petition will do little or nothing to address this problem.

IV. Permitting Employers to File RM Petitions Upon a Union Demand for An Organizing Agreement Will Re-Establish The Board's Purview Over Questions Concerning Union Representation

A. The way for the Board to avoid being cut out of the representational process by private recognition agreements is to permit employers to file RM Petition upon a union demand for a recognition agreement. This simple and much needed policy will re-establish the Board as a primary arbiter of employee representational preference because it will prevent circumvention of the NLRA's representational procedures by private recognition agreements.

The Center suggests that the NLRB's Rules & Regulations be amended to include a definition of "claim to be recognized" in § 9(c)(1)(A)(ii) of the Act. The rule would state:

> A union demand or picketing for an agreement that regards or relates to (i) employer recognition of the union as its employees' representative at any time in the future, or (ii) employees' terms and conditions of employment, is a "claim to be recognized" within the meaning of § 9(c)(1)(A)(ii) of the Act, 29 U.S.C. § 159(c)(1)(A)(ii).

Of course, this not is a new idea, but is an issue that has been debated by the Board. *See Hartford Marriot*, 347 NLRB No. 87 (2006); *Brylane L.P.*, 338 NLRB 538 (2002); *Rapera Inc.*, 333 NLRB 1287 (2001); *New Otani Hotel & Garden*, 331 NLRB 1078 (2000). A full Board majority has not definitively ruled on the issue.

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[5] Similarly, in fiscal year 2006, objections filed in only 5.8% of all representation elections (108 of 1881). 2006 Annual Report of the National Labor Relations Board, Table 11B.

The legal foundation for the RM Petition Alternative is established in *New Otani*, 331 NLRB at 1082-83 (2000) (Member Hurgten, dissenting); *Rapera*, 333 NLRB 1287 (2001) (opinion of Members Hurtgen and Truesdale), and *Brylane*, 338 NLRB at 539-540 (2002) (Member Cowen, dissenting). As established in these opinions, a union demand for a recognition agreement is a future demand for "recognition" within the meaning of § 9(c)(1)(B) that requires that the RM Petition be processed. The RM Petition Alternative is fully consistent with the Act and well within the statutory authority of the Board.

This is also consistent with the treatment of a pre-hire agreements without evidence of employee support being the basis for RM Petitions under *John Deklewa & Sons*, 282 NLRB 1375, n. 42 (1987). In that situation, the agreement itself demonstrates the union's future interest in being a representative and supports an RM Petition. The same is true here.

Adoption of the RM Petition Alternative is necessary for the Board to protect its rightful purview over how employees choose or reject union representation from the increasing use of recognition agreements. "Congress has entrusted the Board with . . . establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower*, 329 U.S. at 328; see also *General Shoe Corp.*, 77 NLRB 124, 127 (1948). The Board would be derelict in its duties under the NLRA if it allowed itself to be cut out of the representational process by private recognition agreements. Accordingly, the Board should adopt the RM Petition Alternative to stop the ongoing vitiation of the representational procedures established in the NLRA.

B. In addition to the RM Petition Alternative, the Center urges that the Board amend its rules to make employees "parties" to representation elections for the purpose of filing objections. Current Board rules permit only employers and unions to file objections in representation elections. This leaves employees' rights completely unprotected if the employer supports the union. For example, who will object if an employer unlawfully assists a union with winning a representation election? The employer and union certainly will not, as they are perpetrator and beneficiary of the wrongful. Only employees have an interest to objecting to collusive wrongful conduct by employers and unions As such, employees must be given standing to object to elections to protect the integrity of the Board's election process.

V. The RM Petition Alternative Will Protect Employee Free Choice

The NLRA exists to protect employee free choice to choose or reject union representation. *See* 29 U.S.C. § 157.[6] The RM Petition Alternative will go far to protect employee free choice because "both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check." *Dana Corp.*, 351 NLRB No. 28 at * 5 (citing several cases). This is because: (1) "unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice," *id.* at *5; (2) "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options," *id.* *6 ; (3) "a Board election presents a clear picture of employee voter preference at a

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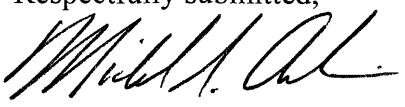
[6] *See Ladies' Garment Workders,* 366 U.S. at 731 (the "Act guarantees employees freedom of choice and majority rule"); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (1983) ("[F]reedom of choice and majority rule in employee selection of representatives" are indeed "[t]he Act's twin pillars").

single moment," *id.*, and; (4) "the Board will invalidate elections affected by improper electioneering tactics, and an employee's expression of choice is exercised by casting a ballot in private . . . [t]here are no guarantees of comparable safeguards in the voluntary recognition process." *Id.*. Each of these reasons strongly favor adoption of the RM Petition Alternative.

V. Conclusion

For these reasons, the Center urges that RM Petition Alternative be adopted.

Respectfully submitted,



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