



Comments To The National Labor Relations Board On Behalf Of The Massachusetts Nurses Association Over the Board’s Proposed Rule Entitled “Joint Petitions for Certification Consenting to an Election.”

The Massachusetts Nurses Association (MNA) is currently the certified bargaining agent for over twenty thousand registered nurses under the National Labor Relations Act, as amended. It is easily the largest labor organization representing registered nurses within Massachusetts, and is currently engaged in multiple organizational drives in Massachusetts and other New England states. For the following reasons, MNA opposes the Board’s proposed rule (the Proposed Rule) entitled “Joint Petitions for Certification to an Election” as written. MNA also proposes below several amendments that, if adopted, would render the Proposed Rule acceptable to it.

1. The Proposed Rule is antithetical to the rights of employees protected under Section 7 of the Act to designate “representatives of their own choosing,” and would therefore be in excess of the Board’s authority under the Act. That is so because the Proposed Rule does not require that an employer and union filing jointly for an election provide the Board with evidence that a question concerning representation exists, and because the election resulting from a jointly filed petition impairs free choice. Indeed, an employer and union could obtain representation rights for the union without evidence that a single

employee, to say anything about a substantial number of employees as required by Section 9 of the Act, wished to be so represented. That defect cannot be resolved through the subsequent conduct of a representational election by the Board for three reasons. First, allowing an employer and a union to jointly sponsor a petition for an election invariably informs employees that the jointly petitioning union has the imprimatur of the employer and necessarily encourages employees to vote for that union for fear of retaliation if the union is not selected. Second, the speed with which a joint petition is to be processed by the Board - from date of filing - to date of approval - to date of election - does not allow for timely intervention by another interested labor union. This incredibly truncated processing of a joint petition in a very real way deprives employees of the possibility of placing another labor organization on the ballot, deprives employees of the benefits of an informative debate between the jointly petitioning union and an intervener over which is the best option for the employees covered by the petition, and denies employees the advocacy of another labor union, uncompromised by any explicit or implicit agreement between the joint petitioners, in determining important issues within the administrative process such as the scope of the bargaining unit, the composition of the bargaining unit, and terms of the election. Third, the hospitality displayed by the Board to the joint petitioners under the Proposed Rule through the alacrity with which it proposes to process the joint petition, and the practical, but imposing, limits placed on any putative intervener strongly suggest that the Board also favors representation by the jointly

petitioning union. The imprimatur of the employer on the jointly petitioning union, the lack of any real opportunity for intervention, and the palpable impression that the Board also favors representation by the jointly petitioning union, singularly or in combination, would severely restrict employee free choice in any representation election.

2. The Proposed Rule is antithetical to the unfair labor practice provisions of the Act at Sections 8(a)(2) and 8(b)(1)(A), and therefore in excess of the authority granted the Board under the Act. Under Section 8(a)(2) of the Act, the Board has long protected employees from unions that cannot fairly represent their interests because such unions are unduly controlled, influenced, or supported by their own employer. Implicit in the Proposed Rule is an invitation to an employer and a union to negotiate a partnership under which the union will enjoy the fruits of representation with the employer's blessing. In such a partnership it is likely that the consideration flowing to the employer would meaningfully, and disadvantageously, impact the terms and conditions of employment of its employees at a time when the union's majority status has not yet been established or even marginally tested. The Board has long prosecuted this sort of unlawful early dealing, yet under the Proposed Rule the Board would serve as the facilitator of the very conduct it has historically prosecuted.

The Board need not speculate, however, about the extent to which the Proposed Rule would encourage unlawful negotiations between an employer

and a union to determine that the Proposed Rule is contrary to the Act. That is so because an employer's support of the jointly petitioning union under the Proposed Rule is express; the employer and the union present themselves as partners in the election process. If the employer sponsorship of a labor union as its own partner as contemplated under the Proposed Rule is anything, it is support of a labor union contrary to the requirements of 8(a)(2).

3. The Proposed Rule is also in excess of the Board's powers because it denies due process within the meaning of the Fifth Amendment to the United States Constitution to the employees subject to the joint petition. Although the Act is expressly designed to protect the employees in the exercise of all rights protected by the Act, including, but not limited to, the right to freely select a bargaining representative of their own choosing, the Proposed Rule largely subordinates the interests of the employees to the interests of the joint petitioners. In this regard, the Proposed Rule (a) eliminates the requirement that the Board determine that a question concerning representation exists prior to processing a joint petition; (b) truncates the timeline for processing of the petition to a time frame that effectively denies employees the opportunity to seek an alternate labor union to represent their interests in the determination of election related issues and to appear as another option on the ballot; and (c) forces the employees into an election in which the only choice is a labor union handpicked by their own employer to represent their often adverse interests. In effect, the Proposed Rule eliminates *all process* contemplated by the Act to

protect its fundamental purposes. This constitutional infirmity is not saved by the notion that the employees can themselves avoid being forced into a union of which they disapprove by expressing that opinion at a Board conducted election. As explained above, the pressures on them from their own employer and by the Board itself to vote for the jointly petitioning union significantly impinge on their free choice. Moreover, even if they vote against representation by the jointly petitioning union, they will be foreclosed by the Board's certification bar rule from seeking to be represented by another labor union for at least a year from the election conducted under the joint petition. That delay in the delivery of rights will not be necessary if the Board follows its normal process for representation elections rather proceeding under the Proposed Rule.

4. The Proposed Rule is also in excess of the Board's powers because it denies equal protection within the meaning of the Fifth Amendment to the United States Constitution to all other unions interested in competing for the right to represent the employees subject to the joint petition. In this regard, the authority provided under the Proposed Rule for the Board to approve a joint petition within three (3) days of its filing, without any notice to the covered employees or to probable interested parties, effectively precludes meaningful intervention in the pre-election and election process. This uneven treatment of rival labor unions, none of whom have yet demonstrated any substantial support within the proposed bargaining unit, to the advantage of one and the

disadvantage of the others, based solely upon employer preference for its joint petitioner as the bargaining agent of its employees, is constitutionally impermissible.

5. For the Proposed Rule to survive statutory and/or constitutional scrutiny, the following amendments would be required.

(a) The Regional Director in the Region where a joint petition has been filed shall require that a showing of interest for the petitioning union from at least thirty percent (30%) of the employees in the unit covered by the joint petition as a condition precedent to its processing.

(b) Upon determining that a sufficient showing of interest exists to present a question concerning representation, the Regional Director shall docket the joint petition and within three (3) days thereafter forward to the employer for posting, in the same numbers and locations that a notice of election would be required to be posted, notice that the Regional Office is entertaining a joint petition and that it plans to approve an election within twenty-one (21) days of such posting absent the need for a hearing or for other cause. The Regional Director shall at the same time mail the same notice to any other labor organization that has in writing notified the Regional Director, within a one (1) calendar year period immediately prior to the filing of the joint petition, that it has an interest in representing employees within the jurisdiction of the

Regional Office who are employed in the same or similar job classifications covered by the joint petition.

(c)(1) The Regional Director shall permit full intervention in the proceeding covered by the joint petition upon a showing of interest by any other labor organization, received no later than the twenty first (21st) day after the mailing of the notices referred to section (b) above, from at least ten percent (10%) of the employees in the unit covered by the joint petition, or from at least ten percent (10%) of the employees covered by the joint petition who are employed in job classifications for which a smaller unit containing them is also appropriate under Board unit determination standards. Upon the approval by the Regional Director of intervention under this section, further processing of the petition shall be handled under the Board's Rules and Regulations for RC petitions.

(c)(2) The Regional Director shall permit intervention in the proceeding covered by the joint petition for the limited purpose of appearing on the ballot if it has received a showing of interest by any other labor organization, no later than the twenty first (21st) day after the mailing of the notices referred to section (b) above, from at least one (1) employee within the unit covered by the joint petition. The terms and conditions of such intervention shall be otherwise controlled by prevailing Board practice.

(d) In the absence of intervention under section (c)(1) above, the Regional Director may, after the expiration of the twenty-one (21) day period referred to

in section (c) above, approve a joint petition hereunder for further processing as provided under this rule.

The MNA believes the Proposed Rule exceeds the power of the Board rule making authority. The MNA firmly believes that the Proposed Rule is a perilous path in which the NLRB encourages organizing employers as a first priority rather than encouraging employees to assert their right to organize under the Act. The Proposed Rule would reverse the role of the Act from one providing the right of employees to organize with a representative of their choice, to instead one providing employers the right to lawfully participate in the selection of a union for its employees. The MNA urges the withdrawal of the Proposed Rule.