NLRB FACT SHEET

Proposed Rule to Protect Employee Free Choice

The National Labor Relations Board published a Notice of Proposed Rulemaking (NPRM) proposing three amendments to the representation election regulations located at 29 CFR part 103 to better protect employees' statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret-ballot election under the National Labor Relations Act. Specifically, the NPRM proposes revisions to three of the Board's current discretionary bars to the timely processing of a validly supported election petition: the current blocking charge policy, the immediate imposition of a voluntary recognition bar, and the contract bar created by the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language.

NPRM OVERVIEW

As detailed in the Notice of Proposed Rulemaking (NPRM), the Board is proposing three amendments:

- **Blocking Charge Policy:** This proposed amendment would establish a vote-and-impound procedure for processing representation petitions when a party has requested blocking the election based on a pending unfair labor practice charge.

  Why is it needed? The current blocking charge policy permits a party – almost invariably a union and most often in response to an RD petition – to block an election indefinitely by filing unfair labor practice charges that allegedly create doubt as to the validity of the election petition or as to the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. This policy can preclude holding the petitioned-for election for months, or even years, if at all. Therefore, in order to prevent this delay in the holding of a Board-conducted secret-ballot election, the amendment proposes that the Board adopt a vote-and-impound procedure whereby an election would be held regardless of whether a blocking charge and blocking request are pending and the ballots would be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition or fairness of the election.

- **Voluntary Recognition Bar:** This proposed amendment would modify the current recognition bar policy by reestablishing a notice requirement and 45-day open period for filing an election petition following an employer's voluntary recognition of a labor organization as employees' majority-supported exclusive collective-bargaining representative under Section 9(a).

  Why is it needed? Currently, an employer's voluntary recognition of a union immediately bars the filing of an election petition for no less than six months after the date of the parties' first bargaining session and no more than one year after that date. The imposition of an immediate recognition bar, followed by the execution of a collective-bargaining agreement, can preclude a Board-conducted secret-ballot election contesting the initial non-electoral recognition of a union as the majority-supported exclusive bargaining representative for as many as four years. This is despite the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board-conducted secret-ballot election. Therefore, the amendment proposes requiring the employer to post a notice to employees that it has voluntarily recognized a union and providing the employees a 45-day open period to petition for a Board-conducted secret-ballot election.

- **Section 9(a) Recognition in the Construction Industry:** This proposed amendment would state that in order to prove the establishment of a Section 9(a) relationship in the construction industry and the existence of a contract bar to an election, extrinsic evidence is required to demonstrate that recognition was based on a contemporaneous showing of majority employee support.

  Why is it needed? Section 8(f) of the Act addresses the unique characteristics of employment and bargaining practices in the construction industry and permits an employer and labor organization in the construction industry to establish a collective-bargaining relationship in the absence of majority support, an exception to the majority-based requirements for establishing a collective-bargaining relationship under Section 9(a). Yet, current Board law also permits an employer and labor organization representing employees engaged in the construction industry to prove Section 9(a) recognition based on contract language alone without any other evidence of a contemporaneous showing of majority support and, thus, triggering the three-year contract bar against the processing of election petitions filed by employees and other parties. Therefore, in order to restore the protections of employee free choice to those employees engaged in the construction industry, the amendment proposes that an employer and labor organization representing employees engaged in the construction industry can only establish a Section 9(a) bargaining relationship based on positive evidence, apart from contract language, of the labor organization's majority support.

DISSENTING VIEW

Board Member Lauren McFerran dissented from the proposed rulemaking. In her opinion, the majority's proposals in no way serve the goal of protecting employee free choice – Indeed, if implemented, they would undermine the stated goals of the Act to "encourag[e] the practice and procedure of collective bargaining" and to "protect[ ] the exercise by workers of…designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."

In addition, Member McFerran believes that the majority's proposal, at least at this stage of the proceedings, fails to meet even minimal standards of reasoned decision making. The proposal relies on faulty premises, fails to ask critical questions, and fails to analyze the relevant data and agency experience. In her view:

- The majority's proposal to replace the current blocking charge policy with a vote-and-impound procedure inevitably will undermine employee rights and the policies of the Act, while imposing unnecessary costs on the parties and the Board, by requiring regional directors to run, and employees, unions, and employers to participate in, elections conducted under coercive conditions that interfere with the ability of employees to freely cast their ballots for or against representation.

- The proposed modification of the current voluntary recognition bar is contrary to the policies of the Act and will discourage the establishment of stable collective bargaining relationships by creating unnecessary procedural hurdles undermining a union that has already lawfully secured recognition.

- The majority's proposal to modify requirements for proof of Section 9(a) relationships will disrupt the balance between protecting employee free choice and accommodating the needs of the construction industry by unjustifiably treating construction unions less favorably than unions in other industries.

ADDITIONAL INFORMATION

The Board seeks public comment on all aspects of its proposed amendments. As specified in the Notice of Proposed Rulemaking, published in the Federal Register, public comments may be submitted electronically or in hard copy.

The Board will review the public comments and work to promulgate a final rule that will better protect employees' statutory right of free choice on questions concerning representation.