



April 17, 2018

Ms. Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: **RIN 3142-AA12**
Representation-Case Procedures, Request for Information

On behalf of the National Ready Mixed Concrete Association (NRMCA), I am writing to submit comments regarding the December 14, 2017 National Labor Relations Board (NLRB) request for information (RFI) titled, "Representation-Case Procedures". *See* 82 Fed. Reg. 58783.

NRMCA was founded on December 26, 1930, and today represents an industry with more than 2,250 companies and subsidiaries that employ more than 135,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry includes more than 70,000 ready mixed concrete trucks and 6,000 ready mixed concrete plants. NRMCA represents a unique industry that utilizes employees located at many dispersed production plants in order to provide a perishable product for just-in-time delivery at all hours of the day.

Roughly 85% of all U.S. ready mixed concrete companies are small businesses. As with most small businesses, owning and operating a ready mixed concrete company means that the owner is responsible for everything, whether it is ordering inventory, hiring employees, meeting environmental and safety regulations or dealing with an array of government mandates. Due to the unique features of the ready mixed concrete industry with its isolated plant locations, unpredictable delivery requirements, dispersed employees, and unusual business hours, NRMCA and its members bring a unique perspective on the impact of the NLRB's December 15, 2014 final rule on representation-case procedures.

NATIONAL READY MIXED CONCRETE ASSOCIATION

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The ready mixed concrete industry manufactures a construction material vital for constructing our built environment. From roads and bridges, to homes and high-rises, our built environment could not be realized without the use of ready mixed concrete. This important building material is created by combining fine and coarse aggregates, cement and water. In 2017 alone, the industry is estimated to have produced more than 350 million cubic yards of ready mixed concrete, representing a value in excess of \$35 billion. Virtually every construction project in America uses at least some ready mixed concrete.

NRMCA submits its formal comment on the above-referenced RFI by the NLRB or the “Board”. NRMCA believes the NLRB’s final rule does not allow its member companies enough time to accurately and thoroughly assess the process, actions, and legal options associated with representation elections or to educate employees to make an informed decision regarding union membership. As explained more fully below, NRMCA believes that the Board’s December 15, 2014 rule effectively denies employees their right to make an informed choice in representation elections and seriously impairs the members of NRMCA to exercise their Section 8(c) right to participate non-coercively in NLRB representation proceedings. *See* 29 U.S.C. § 158(c).

I. THE REALITY OF THE BOARD’S ALTERRED ELECTION RULES

There was never a need for sweeping changes to the Board’s election procedures. The NLRB previously resolved representation petitions in a very timely manner. During fiscal year 2014, for example, the median time from petition review to election was merely 38 days. Despite the availability of pre-election litigation procedures that the Board eliminated with its final rule, roughly 93 percent of all elections were held within 56 days of the filing of a petition. Thus, in fact, there were no “barriers to the fair and expeditious resolution of questions concerning representation” as the NLRB suggested prior to



the rule's finalization.

During the time between the filing of a petition and the election, there is a significant amount of activity that is supervised and handled by the Board. The employer and union must work out election day procedures; employee information is provided to the union; notices about the election rules and procedures are prepared and posted; voter eligibility is determined, and employee observers for the election are chosen by the union and the employer. Given this level of activity, it would seem that the NLRB should not have arbitrarily "streamlined" its election process under the guise of fixing flaws that didn't appear to exist.

Further, the Board's rule did not address the role of blocking charges in delaying elections, other than to raise questions about the policy and ask for comments during the proposal stage. Blocking charges, usually filed by unions to delay a vote, can prevent employees from exercising their § 7 rights, often without good cause, for an indeterminate period of time. It seems odd that the Board would state as a goal in its proposed rule the need to eliminate "wasteful litigation" during the election process yet fail to address the most egregious waste of time and resources allowed by NLRB regulations in its final rule.

The Board's blocking charge policy delays the processing of a representation petition when there is a pending unfair labor practice case. *See, e.g., Bally's Atlantic City*, 338 NLRB 443 (2002). "[T]he blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730. According to the Board, holding a petition in abeyance rather than processing it in the face of unresolved unfair labor practice charges preserves the laboratory conditions required for all elections and allows employees to vote in an atmosphere free of unfair labor practices.



There is no justification, however, for allowing a union to dictate whether a tally of ballots will issue simply by choosing to file an unfair labor practice charge instead of an election objection. To do so permits a party to manipulate and compromise the election process. In order to prevent this result and to promote consistency in the Board’s election procedures, the Board’s rules should’ve provided that an election be allowed to proceed regardless of whether an unfair labor practice charge has been filed. *See Bally’s Atlantic City*, 338 NLRB at 443. (Member Cohen arguing that the Board should reconsider its “blocking charge” policy in circumstances where the unfair labor practice charge alleges conduct that could properly be alleged in a post-election objection).

II. LEGAL INFIRMITIES OF THE BOARD’S FINAL RULE

The Board’s election process final rule implemented substantial changes to representation-case procedures that are inconsistent with the language and purpose of the National Labor Relations Act (the “Act”). Section 6 of the Act (29 U.S.C. § 156) grants the Board rulemaking authority but the Board cannot exercise that authority in an arbitrary or capricious manner or create rules that are inconsistent with express provisions of the Act. *See American Hospital Association v. NLRB*, 499 U.S. 606, 609-10, 617-19 (1991).

Although NRMCA believes the final rule is vulnerable in numerous respects to judicial and statutory challenge, the following focuses on three serious legal consequences of the Board’s action: (1) the § 8(c) right of employer members of NRMCA to communicate with employees about union representation issues are impaired by the Board’s “quickie election” rules; (2) the § 7 right of employees to make an informed choice on representation issues is eviscerated by the Board’s rule to defer voter eligibility issues until after the election and rush precipitously to a vote; and (3) the privacy of



employees are violated by the Board's rule to release telephone numbers and e-mail addresses to the petitioning union without the employees' consent.

(1) Impairment of Employers' Section 8(c) Rights

Section 8(c) of the Act protects an employer's right to communicate with employees regarding unions and representation issues. (29 U.S.C. § 158(c)). The Supreme Court has said the enactment of Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 68 (2008) quoting from *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). The Court has expressly recognized the First Amendment right of employers to engage in non-coercive speech about unionization. *See Thomas v. Collins*, 323 U.S. 516, 537-538 (1945). Section 8(c) enforces the free speech rights of employers by denying the Board any authority to regulate non-coercive employer speech. *Chamber of Commerce v. Brown*, 554 U.S. at 74.

In *Chamber of Commerce v. Brown*, the Supreme Court held that the NLRA preempted certain California statutory provisions that prohibited employers that received state funds from using such funds to assist, promote or deter union organizing. 554 U.S. at 69. In so doing, the Court found that the California statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA." *Id.* at 73. Although the principle of federal preemption is not implicated by the Board's rule, by restricting the exercise of free speech by employers, the Board's action nevertheless presents a clear obstacle to the objective of § 8(c) of the Act; that is, to guarantee free speech to employers.

While the previous Board majority claimed that the final rule did not impose limitations on the



election-related speech of employers, that argument is disingenuous. The practical effect of the reduction in processing time for representation elections reduces the opportunities for employers to communicate with eligible voters prior to the election. To paraphrase one speaker at the public hearing on this matter, “when there is not enough time to speak, the right of free speech is rendered meaningless.” The “quickie election” period set by the Board dramatically diminishes the free speech opportunities available to employers.

There can be no doubt as to the motivation of the previous Board majority in shortening the time period from petition to a vote by employees on representation. The goal is to curtail the free speech rights of employers. In this respect, the final rule is arbitrary and capricious and in direct conflict with Section 8(c). Thus, the Board was clearly acting outside its rulemaking authority.

(2) Impairment of Employee Section 7 Rights

When Congress enacted the Taft-Hartley Act in 1947, it amended Section 7 of the Act to emphasize that employees “have the right to refrain from any and all § 7 activities.” *See Chamber of Commerce v. Brown*, 554 U.S. at 67. The Supreme Court has said that the amendment to § 7 with its emphasis on the right to refuse union membership “implies an underlying right to receive information opposing unionization.” *Id.* at 68.

The Board’s rule to reduce the time between petition and election prevents employees from receiving information from their employers regarding the negative aspects of union membership. Their § 7 rights have been compromised on the altar of unnecessary expediency. The “uninhibited, robust, and wide-open debate in labor disputes” sanctioned by the Supreme Court in *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974) is thwarted by the Board’s rule.



Employees normally receive information from a union concerning representation issues for months prior to any petition being filed. Union leaders do not broadcast the fact that they are trying to organize an employer's workforce. Management is usually unaware of furtive union activity until a demand for recognition is made or a petition is filed. Only then is there is an opportunity for debate regarding the pros and cons of representation by the petitioning union. At the very moment when the employees' § 7 rights can be exercised to their fullest extent; the Board's rule curtails debate.

The Board's rule defers voter eligibility issues until after the election and rushes precipitously to a vote that also injures the § 7 rights of employees. Under the final rule, questions of voter eligibility do not have to be resolved prior to the election. An election process where the eligibility of employees who are voting is in question compounds the uncertainty for employees trying to determine whether to vote for representation. As suggested by Member Hayes in his dissent to the then proposed amendments:

Employees who do belong in the bargaining unit may be so misled about the unit's scope or character that they cannot make an informed choice, instead basing their vote on perceived common interests or differences with employee groups that ultimately do not belong in the unit.

76 Federal Register 36831, citing *NLRB v. Beverly Health And Rehabilitation Services*, 1997 WL 457524 at *4 (4th Cir. 1997).

In *Hamilton Test Systems, Inc. v. NLRB*, 743 F.2d 136 (2nd Cir. 1984), the court of appeals refused to enforce a bargaining order issued by the NLRB and granted the employer's request for review where the Board had reduced the size of the bargaining unit after the election. The court said: "We will not enforce an order of the Board . . . when the Board has effectively denied employees the right to make an informed choice in a representation election." *Id.* at 142.

Similarly, in *NLRB v. Beverly Health and Rehabilitation Services*, 1997 U.S. App. LEXIS 21257 (4th Cir. 1997), the court of appeals refused to enforce a bargaining order after the Board modified the



bargaining unit post-election by excluding all LPNs from the unit. The court concluded the employees' freedom to make an informed choice had been compromised by the subsequent modification of the bargaining unit, saying:

Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election.

Id. at *10.

A fully-informed choice during the election process is the essence of the employees' § 7 right. *See Theil Industries*, 375 N.L.R.B. 1122 (1998). The Board's final rule, including the deferral of election eligibility issues and reduction in time from petition to election, mean employees are not making a fully-informed choice. The Board should withdraw its rule because it impairs the § 7 rights of employees.

(3) Violation of Employee Privacy Rights

The final rule requires that both telephone numbers and e-mail addresses be included along with each bargaining unit employee's name and address on the voter eligibility list. Any requirement that employers provide non-work related telephone numbers or personal e-mail accounts of employees raises significant employee privacy concerns. *See Trustees of Columbia University*, 350 N.L.R.B. 574 (2007) (noting potential privacy concerns in requiring employer to provide employee e-mail addresses); *see also JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 911-12 (8th Cir. 2004) (no compelling need for the Union to obtain the strike replacement employees' home addresses and telephone numbers).

In *Trustees of Columbia University*, the Board considered the claim of a union attempting to organize a bargaining unit consisting of employees who were at sea aboard a vessel during the time of the



pre-election organizing campaign. The union requested e-mail addresses of the employees and the employer refused to provide them. The union filed an objection to the election, contending that the employer's refusal frustrated the purpose of the Board's requirement in *Excelsior Underwear, Inc.* that the employer provide the union with a list of the names and addresses of eligible voters. The Regional Director concluded that, notwithstanding the absence of any Board precedent, the employer should be required to provide the e-mail addresses to the union.

In a two-to-one decision, the Board panel refused to extend the *Excelsior* rule under the facts of the case to require the employer to provide e-mail addresses. The majority raised a number of questions including the potential cost of sending e-mails, the potential impairment of the employer's electronic system by voluminous e-mails, an employer's right not to provide a forum for third-party expression of views on its virtual property and potential invasion of employees' privacy rights. 350 N.L.R.B. at 576.

Mandating production of telephone numbers and e-mail addresses is not only unnecessary in this context but an overreach of the Board's authority, especially where employee privacy concerns are implicated. In other contexts, the Board has been admonished by federal courts of appeal against requiring the production of private employee information where the individual's interest in confidentiality outweighs the union's need for such information. See *Chicago Tribune Co. v. NLRB*, 79 F.3d 604, 608 (7th Cir. 1996); *East Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993). In addition, electronic privacy protections can be broader under state constitutions than under the Fourth Amendment. See, e.g., *State v. Reid*, 945 A.2d 26 (N.J. 2008) (The New Jersey Supreme Court held that, under the New Jersey constitution, an individual has a reasonable expectation of privacy with respect to his or her internet subscriber identity).



The Board goes too far in allowing unions access to employee phone numbers and e-mail addresses without the consent of the employees. This aspect of the rule should not withstand a legal challenge on invasion of privacy grounds.

III. PRACTICAL IMPACT ON NRMCA MEMBERS

The finalized rule impacts NRMCA's members by (1) dramatically shortening the time between the filing of a representation petition and the election date, and (2) substantially limiting the opportunity for a full evidentiary hearing on voter eligibility issues and/or a review by the full Board. These restrictions are especially unfair to small employers in the ready mixed concrete industry, most of which lack the specialized knowledge and legal counsel necessary to respond to a representation petition in the abbreviated time period finalized by the Board.

The rule also requires employers to raise all hearing issues and state its basis for raising them in a maximum of seven days or forfeit all legal right to pursue those issues. Typical small business owners, including many NRMCA members, do not have labor counsel readily available to evaluate an election petition nor do they generally know how or where to obtain such counsel. They cannot continue to be expected to understand and comply with the maze of NLRB procedures in the time period framed by the final rule.

Finally, the final rule restricts the ability of NRMCA members to disseminate information to their employees about union membership in general and the particular union that is seeking to represent them in collective bargaining. A fair election can only be achieved where each party has the opportunity to speak to the voters. An informed electorate is always the best option for assuring that the election result is the one actually intended by the voters.



IV. CONCLUSION

For all the foregoing reasons, the NRMCA respectfully requests the Board rescind the final rule and restore the use of the pre-December 15, 2014 procedures for representation elections.

NRMCA appreciates the opportunity to comment on this request. Should you have any questions or need more information please feel free to contact NRMCA's Kevin Walgenbach at (240) 485-1157 or kwalgenbach@nrmca.org.

Sincerely,

A handwritten signature in black ink that reads "Robert A. Garbini".

Robert A. Garbini, P.E.
President
National Ready Mixed Concrete Association