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Comments On Behalf Of The Coalition for a Democratic Workplace To The National Labor Relations Board Proposed Rulemaking, "Election Protection Rule", 84 FR 39930, RIN 3142-AA16 (Aug. 12, 2019)

The following comments are submitted on behalf of the Coalition for a Democratic Workplace ("CDW" or the "Coalition"). The Coalition is an organization composed of hundreds of employer associations, individual employers and other organizations that collectively represent millions of US businesses of all sizes. CDW's members employ tens of millions of individuals working in every industry and every region of the United States. These employers and employees have a profound interest in the Board's Proposed Rules. The Coalition believes the Proposed Rules constitute an important first step in addressing deficiencies in current Board representation case law, which undermines statutory goals, employee free choice, and the balance of countervailing interests.

The following organizations also join in these Comments and urge the Board to adopt the Proposed Rules for the reasons described herein: American Bakers Association; American Foundry Society; American Hotel and Lodging Association; American Pipeline Contractors Association; Associated Builders and Contractors; Global Cold Chain Alliance; Independent Electrical Contractors; International Foodservice Distributors Association; International Warehouse Logistics Association; Littler Workplace Policy Institute; Motor & Equipment Manufacturers Association; National Association of Manufacturers; National Association of

Wholesaler-Distributors; National Ready Mixed Concrete Association; National Retail Federation; National Tooling and Machining Association; North American Die Casting Association; Power and Communication Contractors Association; Precision Machined Parts Association; Precision Metalforming Association; Restaurant Law Center; and Retail Industry Leaders Association.

Beyond the current Proposed Rules, CDW urges the Board to continue pursuing further rulemaking to rescind and revise changes to the Board's Representation Case Rules implemented on April 14, 2015. Representation-Case Procedures 79 FR 74308 (Dec. 15, 2014). Those changes to the Board's Rules created numerous procedural and substantive infirmities, including:

- **Flawed Premises Regarding Shorter Elections.** The policies and purposes of the NLRA were subverted by making the target period for conducting representation elections shorter than 42 days, and the changes rested on a flawed premise about the need to accelerate the election process.

- **Disclosure of Email Addresses and Phone Numbers on Voter Eligibility Lists Should Not be Required**. Required disclosure of business email addresses and phone numbers has caused severe hardship and imposed significant costs on employers, as well as an unprecedented and improper intrusion on employee privacy rights.

- **Post-Hearing Deferral of Unit Issues is Improper.** The changes improperly disregarded the statutory purpose of the pre-election hearing, and undermined the statutory scheme by deferring the resolution of many unit issues until after the election.

- **Board Review of Regional Director Decisions Should Not Be Discretionary.** It constitutes an improper delegation of authority for the Board to exercise only discretionary review of Regional Director decisions, contrary to the Act and the legislative scheme underlying the Act.

- **The "Statement of Position" Requirement is Unfair and Punitive to Employers.** The current requirement of a binding pre-hearing written statement of position constitutes an improper denial of due process, which severely prejudices most employers and inappropriately favors union representation.

For further explanation of the need to rescind and revise these changes to the Board's Rules, please see the Coalition's Comments submitted in opposition to the proposal for those Rule changes, dated August 22, 2011.

Nonetheless, the need for substantial further changes to the Representation Case Rules does not alter the necessity or appropriateness of the currently-proposed measures. The Board should adopt the Rules as proposed, while also moving expeditiously to correct broader problems introduced by the prior changes.

I. Introduction

Since its initial passage in 1935, the National Labor Relations Act has declared "the policy of the United States" to include "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]." 29 U.S.C. § 151. As the agency charged with effectuation of this goal, the National Labor Relations Board ("NLRB") now proposes three important steps in furtherance thereof through its proposed "Election Protection Rule", 84 FR 39930, RIN 3142-AA16 (Aug. 12, 2019) (the "Proposed Rules"). The Board should complete those steps by adopting the Rules as outlined in its Notice of Proposed Rulemaking ("NPRM"). *Id.*

All three proposed Rules would serve to improve and clarify the Board's representation case practices and procedures to better protect employees' right of free choice in representational matters; and, would do so without causing disruption to its current representation processes. First, the proposed Rules address the unconscionable delays in processing employees' representational desires occasioned by the Board's "blocking charge" policy. Under current policy, the Board presumes unproven allegations of unfair labor practices have the *potential* to affect employee sentiment; and, on this basis, precludes employees from expressing their representational choices for months or even years. By contrast, the proposed Rule's "vote and impound" procedure allows employees to express their preferences soon after filing a petition, but preserves the integrity of the electoral process by delaying the vote *count* until it has been determined that the alleged misconduct either did not occur or did not impermissibly interfere

with the election. It safeguards the election process, while significantly advancing the interests of employee free choice.

Second, the Board properly proposes to address the employee free choice implications of voluntary recognition. While retaining the "voluntary recognition bar" doctrine, the Board's proposal would create an opportunity for employees to voice their preferences through the preferred process of Board-conducted elections. Specifically, the proposed Rule re-institutes a notice requirement and 45-day window period to permit the filing of a decertification or rival-union petition following voluntary recognition. With the increasing prevalence of "top down" organizing, and the reality that "voluntary" recognition is often far from voluntary, the proposal serves to safeguard employee free choice while in no way materially impeding the process of lawful voluntary recognition.

Third, the Board proposes to clarify that conversion of a construction industry Section 8(f) relationship to a Section 9(a) relationship, with all the durable benefits and obligations associated with such a change, requires tangible evidence of majority support. The proposal eliminates the potential for a construction union to attain Section 9(a) status by virtue of contract language alone. This change would prevent inappropriate grants of Section 9(a) status to labor organizations that do not, in fact, enjoy majority support, but rather benefit from the good fortune of a pre-existing non-majority Section 8(f) relationship and favorable contract language. If an 8(f) union that claims 9(a) status truly enjoys majority support, then the proposed Rule does nothing to imperil its status. If it does not enjoy such support, then the Board cannot and should not confer Section 9(a) status in any event.

All three Proposed Rules represent sound policy choices designed to protect and preserve the central role of employee free choice in the selection of bargaining representatives. The exercise of free choice lies at the core of the Act, and each of the proposed Rules protects and advances this principle without burdening the right to organize. Because the proposed Rules

further employee free choice in representational matters, CDW fully support the proposals and encourages their formal adoption.

II. Rulemaking is the Appropriate and Necessary Method of Protecting Employee Free Choice.

The Board has engaged in substantive rulemaking only a few times in its history, despite explicit authority to do so under the Act. Section 6 of the Act expressly gives the Board power to engage in substantive rulemaking: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § *156.* See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

The Supreme Court has expressly noted the virtues of the Board's rulemaking power:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard. . . . Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. . . . This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power makes them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule-making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us. . . . Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-79 (1969).

Commentators from all sides agree that the Board should exercise its rulemaking authority more often. See Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory Law Journal 1469-1494 (2015) (citing Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 414 & nn.20-22 (2010) (compiling sources)). The advantages typically cited in favor of rulemaking over adjudication include greater stability, certainty, efficiency, and participation.

Additionally, the Board has received criticism for repeated vacillation between competing viewpoints on major issues. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 717-51 (2006) (describing thirteen areas in which Board standards have been modified at least once as a result of changes in the political composition of the Board). This uncertainty makes it difficult or impossible for businesses, labor organizations, and employees alike to effectively assess the potential risks and benefits of long-term business relationships. Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 171 (1985).

Rulemaking provides clarity of expression on significant Board policy and fosters the legitimacy of its policy through an open deliberative process. See *Id*. at 181. Policy established through rulemaking also provides stability for stakeholders since the policy in question cannot be reversed absent recourse to the same deliberative process. The clarity and stability provided through rulemaking allows employers, unions, and employees to plan and prepare for the future, without concern that the law will suddenly change in the midst of their relationships.

Another benefit of the rulemaking process is efficiency in setting significant Board policy and standards. Board adjudications are necessarily confined to the issues raised by the parties to the case. For example, as referenced at page 39937 of the NPRM, a withdrawal request by the Charging Party in *Loshaw Thermal Technology, LLC*, Case 05-CA-158650 recently prevented the Board from addressing construction industry Section 9(a) status through adjudication. Moreover, Board decisions can be lengthy and complex, and often are limited in their application to the specific facts presented, resulting in incremental policymaking over a long period of time. Rulemaking, however, "allows the Board to decide which issues to tackle, when to tackle them, and how broadly or narrowly to address them." Garden, *supra*, 64 Emory Law Journal at 1475.

Regarding representation issues specifically, the Board utilized the rulemaking process to implement wholesale changes to representation procedures in 2015. 79 Fed. Reg. 74308 (Dec.

15, 2014). The changes proposed here – a vote-and-impound process, adjustments to the voluntary recognition bar doctrine, and clarification of the evidentiary standard in the 8(f)-9(a) conversion process – possess the same broad procedural characteristics as the changes implemented five years ago. If the Board considered rulemaking appropriate then, it should also consider rulemaking appropriate now. Furthermore, because representational standards affect the fundamental issue of whether or not a union represents a group of employees (or whether the nature of that representation falls under Section 8(f) or 9(a)), those standards should depend less on developing adjudicatory decisions, and more on a consistent regulatory foundation.

Finally, the rulemaking process provides the most inclusive and transparent approach to Board policy. Policy formulated through adjudication is based solely upon the arguments and evidence presented by the parties to the proceeding. Rulemaking offers the Board an opportunity for a broader scope of action along with public participation and more meaningful notice to affected parties of potential changes in regulatory standards. As the Supreme Court has emphasized, this consideration respects all stakeholders' constitutional due process rights by providing meaningful notice of change. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255-57 (2012). Broader participation of interested stakeholders also leads to better decision-making by the Board. It allows the Board to receive empirical data that may not have been available in previous adjudications and provides an openness unmatched by traditional Board proceedings. Rulemaking also invites all interested parties to provide their commentary and feedback to the proposed rule; and, allows the Board to respond to submitted comments (both for and against). This transparent deliberation and justification for the rules should serve to increase the level deference accorded to the Board's determinations by reviewing federal courts.

III. The Proposed "Vote and Impound" Rule Effectively Balances Employee Free Choice with the Potential for Unfair Labor Practices to Affect Sentiment.

The NPRM includes a proposal to modify § 103.20 of the Board's Rules to require the conduct of an election, and the impounding of ballots, while a concurrent unfair labor practice charge potentially affecting the election remains pending. Under this proposal, if the Board finds the charge does not justify invalidating the election, then it will count the ballots and proceed accordingly. On the other hand, if the charge demonstrates coercion or petition invalidity, then the Board will not count the ballots. The infirmities in the current blocking process, the common-sense nature of the Board's proposal, and its consistency with the overall policies of the Act all support adoption of the "vote and impound" approach as proposed in the NPRM.[1]

A. The Current Blocking Charge Policy Results in Unacceptable Delays.

In 2014-2015, the Board majority argued strongly for the proposition that widespread rule-based changes expediting representation case procedures would best effectuate the policies and purposes of the Act. *See* Representation-Case Procedures 79 FR 74308, 74316 (Dec. 15, 2014) (stating, "Section 9 is animated by the essential principle that representation cases should be resolved quickly and fairly."). Those widespread changes, however, did not include significant adjustments to the Board's long-troublesome blocking charge policy. Under that Board majority's version of § 103.20 of the Rules, a petition can remain blocked indefinitely, with no opportunity for employees to vote, even if the Charging Party can provide only a perfunctory offer of proof. In its 2015 Rule revision, the Board majority simply continued a policy that had consistently countenanced substantial delay in providing employees the opportunity to voice their representational preferences, while professing that it "[was] sensitive to the allegation that at times, incumbent unions may abuse the [blocking charge] policy by filing meritless charges in order to delay decertification elections." *Id*. at 74419 (Board majority).

[1] Additionally, CDW urges the Board to carefully consider modifying the vote and impound procedure in its entirety, by either eliminating it, and providing for an immediate vote count, or, by capping the amount of time ballots would remain impounded. Such proposals merit serious consideration by the Board as they serve to advance the goal of meaningful employee free choice.

Inasmuch as the blocking charge policy overwhelmingly affects only *decertification petitions*, the failure of the 2015 Board majority to meaningfully address the electoral delay it engenders was, at best, inconsistent; and, at worst, hypocritical. It is well past time for the Board to address that failure.

The NPRM's proposed "vote and impound" procedure would bring Board policy with regard to the relationship between unfair labor practice charges and elections into harmony with the current Rules' overall emphasis on expediency. Currently, however, the blocking charge policy creates an anomalous phenomenon described by one scholar, and quoted in the NPRM, as "the long tail" of delay in representation cases. NPRM at 39931 (quoting John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 1999–2004, 62 Indus. & Lab. Rel. Rev. 3, 10 fn. 9 (Oct. 2008)). Thus, statistical evidence demonstrates that even prior to the 2015 Rule changes, the vast majority of Board *RC elections* were held within 75 days of petition filing. By contrast, elections impacted by the blocking charge policy – overwhelmingly *RD petitions* – experienced significantly longer intervals between filing and election. Indeed, delays of as much as 1,705 days between filing and election have elapsed. *Id*.

In changing the representation case Rules in 2015, the Board emphasized the interval between petition and election as a significant metric in determining the efficacy of the Board's representation processes and the protection of employee free choice. The interval is equally significant to employee choice in *both* the RC context *and* the RD context where the blocking charge policy is disproportionately brought into play. Yet, both statistical and anecdotal evidence make clear that present Board policies and Rules do not treat the two circumstances equally, and that the blocking charge policy requires modification.

Anecdotally, a case just decided within the past year plainly illustrates the need for reform. In *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018), the Petitioner-employee (in the face of unlawful threats by the union to sue those who signed) filed an RD petition on October

16, 2014. At the time of filing, a number of unfair labor practice allegations were pending before three different Administrative Law Judges ("ALJs"). On this basis, the Regional Director, pursuant to the blocking charge policy, dismissed the petition subject to possible future reinstatement.

The ALJs subsequently dismissed all of the more serious pending unfair labor practice allegations, including those that alleged surface bargaining. They did find some violations regarding relatively minor issues such as isolated Section 8(a)(1) statements and technical unilateral changes. The parties then settled those allegations prior to any final action by the Board. Nonetheless, the Regional Director refused to reinstate the petition. Noting that this action created "especially harsh" implications for the decertification petitioner because "her petition would be dismissed based on findings that she will never have any opportunity to challenge in any forum[,]" the Board on December 19, 2018 reinstated the petition. *Id*., slip op. at *4. However, as of that date, over ***four years*** had passed since the filing of the original petition. Such an outcome clearly does not comport with the animating principles espoused by the Board in furtherance of the 2015 Rule changes.

Statistics make the case for blocking charge reform even clearer. For example, the NPRM cites a study of fiscal year 2008 cases conducted by scholar Samuel Estreicher. NPRM at 39931. Estreicher found a median time from petition to election of 139 days, compared to a median of 38 days for unblocked cases (3.66 times longer). *Id*. (citing Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. Rev. 361, 369-70 (2010)).

Furthermore, the statistics for fiscal years 2016, 2017 and 2018 reflect an even wider disparity between the expediency of the current Rules and the "the long tail" created by the blocking charge policy. Appendix B (Tables 1, 2, and 3) of the NPRM reflects a similar blocking charge median for days to an election in fiscal years 2016-2018: 135 days. The median for

unblocked cases, however, now stands at 23 days. As a result, petitions with blocking charges now require **5.87 times longer to reach an election** than unblocked petitions. Worse, in **68** blocking charge cases (44% of all such cases), the Board conducted the election **at least 150 days after the petition was filed.**

Among the currently pending cases listed on Table 4 of Appendix B, the data reflects a median of **273 blocked days** as of December 31, 2018. These pending cases include **38 (27.3% of all pending blocked petitions)** that Regions have blocked for more than **1,000 days**. Some petitions have been blocked since 2005 and 2006. The cases adversely affected by the current blocking charge policy are overwhelming RD cases. Thus, in the absence of policy reform, it appears that speed and free choice somehow matter only when representation is being sought, not when employees seek to end it. Such a double standard does not square with the free choice principles that form the basis of Section 7.

The 2015 Board majority implemented numerous measures to address delays in other aspects of representation case proceedings; but, refused to act meaningfully regarding the source of the most egregious delays. The current Rules slice days off the average time to election for most cases, while allowing months or even years to accumulate in others. Dissenting Members Miscimarra and Johnson aptly analogized the clear flaw in this approach:

> Suppose, for instance, that the U.S. Fish and Wildlife Service had a mandate to stop the poaching of manatees, which reside almost exclusively in Florida. It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most states do not even have bodies of water where manatees live. This is precisely the approach reflected in the Final Rule. It applies almost entirely to elections that do not involve significant delay, while failing to identify and target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

79 FR at 74457 (Dissent of Members Miscimarra and Johnson).

The Board's "vote and impound" proposal, similar to the deployment of anti-poaching rangers to Florida, would directly and effectively address the "long tail" problem with the Board's blocking charge policy. This change thus significantly advances employee free choice.

B. The Delays and Gamesmanship Created by the Current Blocking Charge Policy Undermine the Board's Duty to Protect Employee Free Choice

Both Section 1 and Section 7 of the Act emphasize the right of employees to be represented by a representative "of their own choosing." 29 U.S.C. §§ 151, 157. Just as this terminology implies the right of a majority of employees to obtain representation by a preferred union, it also establishes the right for a majority to choose *no* union or a *different* union if they so desire. As the NPRM notes, blocking charges are filed "almost invariably" by unions, "and most often in response to an RD petition[.]" 84 FR at 39931. In other words, a union requesting that an election be blocked has calculated it will not receive majority support in the event a secret ballot election is held. Under such circumstances, it is hardly surprising that an incumbent union would rather prevent employees from voting for as long as possible in the hope that the passage of time, employee turnover, and other changed circumstances may yield different results.

Despite widespread deference to the Board's management of its own representation case processes, no less than five Courts of Appeals have rightfully criticized its tolerance of such gamesmanship. For example, in a recent concurring opinion criticizing the Board's withdrawal of recognition standard (on grounds since addressed by *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019)), District of Columbia Circuit Judge Henderson explained that an RM petition is "no cure-all" because "[a] union can and often does file a ULP charge – a 'blocking charge' – to forestall or delay the election" and "[t]he process takes months." *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1159 (D.C. Cir. 2017) (quoting from Member Hurtgen's concurrence in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726 (2001)). The Second Circuit has similarly referred to unions filing blocking charges "to achieve an indefinite stalemate designed to perpetuate the union in power[,]" while the Fifth Circuit described the blocking charge policy as outright "arbitrary." *NLRB v. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971). The Seventh and

Eighth Circuits have voiced similarly negative critiques. *Pacemaker Corp v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958) (describing the blocking charge policy as "subject to abuse"); *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (observing that a union's purpose in filing charges was to thwart a petition, "if indeed, that was not its only purpose.").

Additionally, the current version of § 103.20 of the Rules invests significant case-handling discretion at the Regional Director level. See also NLRB Casehandling Manual (Part Two), Representation Cases, Sections 11730-34. Yet, even the Casehandling Manual itself provides Regional Directors with little guidance on blocking decisions beyond broadly-defined categories of "Type I," "Type II," and other categories affecting the petition's validity. *Id*. at 11730.

This ill-defined degree of discretion has inevitably resulted in substantial inconsistency in the application of the blocking charge policy from Region to Region. The opportunity for employees to timely express their representational preferences is central to the Act's core purpose. Such opportunities thus should not depend upon the fortunes of geographic location. The current blocking charge policy results in both inconsistency and gamesmanship with respect to representational processes. "Vote and impound" would eliminate these significant problems without otherwise adversely affecting the Board's administration of the Act.

C. <u>The "Vote and Impound" Solution Properly Enhances Employee Free Choice While Ensuring the Integrity of the Electoral Process.</u>

1. *The Proposed "Vote and Impound" Procedure Balances Electoral Integrity and Employees' Wishes at the Proper Time.*

In its administration of the Act, the Board is often called upon to strike a balance between competing interests and/or policies. See, e.g. *Seton Medical Center*, 317 NLRB 87, 88 (1995) (noting that the Board, in that context, was required to strike a "balance between stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives[.]" *See also Silvan Industries*, 367 NLRB No. 28, slip op. at 3 (2018); *Shaw's*

Supermarkets, 350 NLRB 585, 587 (2007). So too, in the context of the blocking charge policy, the Board must strike a proper balance between the right of employees to timely express their representational wishes and the obligation of the Board to ensure the integrity of its electoral processes. In balancing the two, the Board should be guided by the Supreme Court's admonition in another "balancing" context (organizational rights versus private property rights). *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In balancing two important policies under the Act, the *Babcock* Court admonished the Board that in advancing one such right, the Board must ensure it is "obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 112.

The Board's current blocking charge policy was borne of a desire to protect the integrity of the Board's electoral processes. Thus, the notion that misconduct by a party may so adversely affect the "laboratory conditions" necessary for a fair election as to require invalidating its result is well-settled. So too is the Board's central role in policing those conditions. However, in advancing the goal of preserving electoral integrity, the Board cannot do so at the expense of employees' statutory right to free and meaningful choice. The Board's current blocking charge policy impermissibly infringes on this core Section 7 right in multiple respects.

First, as the 2015 Rule revisions make clear, the ability of employees to cast ballots in temporal proximity to the time a question concerning representation arises is an essential element of employee free choice. In a different context, the Board has recently reaffirmed the importance of employee preferences *at the time* a question concerning representation arises. See, *Johnson Controls*, 368 NLRB No. 20. In the name of preserving electoral integrity, the current blocking charge policy does great violence to this principle by denying employees the right to vote for months or even years after a petition is filed. In stark contrast, the "vote and impound" proposal satisfies these competing policies without one doing damage to the other. Thus, employees are

allowed to cast ballots in temporal proximity to the petition while electoral integrity is preserved by subsequent review of any allegation of material misconduct.

Second, and closely related to the notion of temporal proximity, is the principle that those deciding a question concerning representation should be the employees at the time the question arises. Thus, in all elections the Board maintains well-settled, long-standing rules that cut off employee eligibility and ensure that the pool of eventual voters is confined to those employed at the time that the question concerning representation arises. See, e.g., *Plymouth Towing Co*., 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962). Because the blocking charge policy as currently administered delays the vote for months, or even years from the time the petition is filed, it effectively turns this principle on its head. Thus, the voter pool in an eventually "unblocked" election will likely bear little resemblance to the pool at the time the question concerning representation arose.

The reality is that many employees present at the time of petition filing will have moved on by the time the Board holds an unblocked election. According to data compiled by the Department of Labor for 2018, the **annual turnover rate** among private sector employees stood at **48.9%**. *Department of Labor*, "Job Openings and Labor Turnover Survey News Release," published March 15, 2019, available at https://www.bls.gov/news.release/archives/jolts_03152019.htm, Table 16. Furthermore, the trend suggests high turnover will likely continue as the rate has increased every year since 2014. *Id*.

Postponing the vote by months or years beyond the petition filing violates the principle that those voting should be those employed when the question concerning representation arises. By contrast, the "vote and impound" procedure would allow the subject employees to cast their ballots while simultaneously protecting the goal of electoral integrity.

Third, in its administration of the Act, the Board is both constitutionally and statutorily required to achieve its policy goals with proper regard for the due process rights of the parties.

The blocking charge policy as currently applied transgresses this fundamental principle. Thus, by its very nature, the policy deprives employees of their right to timely exercise their free choice on the basis of *unproven allegations.* The NPRM concisely summarizes the fundamental flaw in the blocking charge policy:

> The blocking charge policy rests on a presumption that an *unlitigated* and *unproven* allegation of any of a broad range of unfair labor practices justifies indefinite delay because of a discretionary administrative determination of the *potential* impact of the *alleged* misconduct on employees' ability to cast a free and uncoerced vote on the question of representation.

This is the very antithesis of due process. Under this approach, the petitioning employees are denied the right to a timely vote based on untested allegations. A "vote and impound" procedure would preserve electoral integrity without depriving employees of the right to timely vote in the absence of adequate process.

D. The Proposed Rule Supports the Act's Overall Policy Objectives.

1. *"Vote and Impound" Better Accords with the Considerations Underlying Section 8(a)(2) than the Blocking Charge Policy.*

The various policies of the Act should function in harmony with one another. A "vote and impound" approach best achieves that goal. For example, the Supreme Court has noted, "[i]n their selection of a bargaining representative, Section 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule." *Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961) (citing *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944)). Thus, "a grant of exclusive recognition to a minority union constitutes unlawful support in violation of [Section 8(a)(2)], because the union so favored is given 'a marked advantage over any other in securing the adherence of employees[.]'" *Id.* at 837 (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)). In other words, Section 8(a)(2) crystallizes the Act's emphasis on exclusivity and majority rule.

Despite Section 8(a)(2)'s prohibition on recognition and bargaining with a minority union, the current blocking charge policy creates scenarios in which a lawfully recognized union

may have long since lost the support of a majority of employees. Most importantly, though, the current policy *prevents* employees from even *expressing* in a Board election whether they support the union. Instead, the Board suspends that right for the duration of its administrative processes. Such a delay in the ascertainment of employee views runs directly counter to the policy considerations underlying Section 8(a)(2)'s prohibition on recognition of minority unions.

2. *The Blocking Charge Policy Creates Rocks in the "Safe Harbor" of RM Petitions under* Levitz.

In addressing the Section 8(a)(2) issues faced by an employer presented with evidence of loss of majority support, the *Levitz* Board suggested such an employer could find "safe harbor" by filing an RM petition. *Levitz*, 333 NLRB at 726. It explained:

> While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM elections. Thus, **we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.**

Id. at 723 (emphasis added).

As noted above, however, District of Columbia Circuit Judge Henderson has correctly described the RM petition process as "no cure-all" due to unions' ability to file blocking charges that delay elections indefinitely. *Scomas of Sausalito v. NLRB*, 849 F.3d at 1159. Consequently, though the *Levitz* Board sought to create a comprehensive and workable system to handle union loss of majority support, the blocking charge policy allows unions to undermine the entire legal mechanism through indefinite delay.

The "vote and impound" process addresses this deficiency. While blocking charges force employees to wait months or years to vote, assuming they remain employees and get to vote at all, the proposed vote and impound process would ensure that the same employees who created the evidence of loss of majority support could vote promptly. From the employer's perspective, the current prospect of blocking charges encourages employers to forego the "safe harbor" of an RM petition and sail instead into the murkier legal waters of a withdrawal of recognition. Under

"vote and impound," however, the "safe harbor" would more closely live up to its name. The proposed Rule thus advances the preference for Board-conducted elections expressed by the *Levitz* Board, while the blocking charge policy undermines the supposed "safe harbor" of such elections.

E. The Dissent to the NPRM Provides No Tangible Downside to the "Vote and Impound" Solution.

Dissenting Member McFerran raised several unavailing objections to the "vote and impound" proposal in the NPRM. NPRM at 39939-49. None of these objections merit alterations to the proposed Rule. Initially, as an overarching issue, the dissent errs because it focuses entirely on scenarios in which the Board conducts an election, impounds the ballots, and then never counts them due to meritorious charges sufficient to set aside any results. The Board should reject this approach because it fails to acknowledge the many cases in which concurrent unfair labor practice charges are found to either lack merit, or not preclude a fair election. In those cases, the "vote and impound" procedure secures important employee rights by ensuring the vote takes place in temporal proximity to the petition.

The dissent further fails to establish any material reason why those cases in which the Board decides *not* to count ballots could justify rejection of the proposed Rule. The dissent's primary point appears to be that such elections impose costs on the agency. The agency's mission of supporting employee free choice, however, more than justifies the minimal costs of Board agent time, potential travel, a cardboard ballot box, pens, and paper ballots. Such minimal costs aimed at securing employees' most fundamental rights under the Act can hardly be characterized as unjustified.

The dissent also briefly advances several unsupported claims regarding "elections conducted under coercive circumstances." For example, the dissent argues such elections send a message to employees that "attempting to exercise their Section 7 rights is futile." *Id.* at 39948.

Such concerns, however, may exist *any time* the Board overturns an election, especially after conducting a count. More importantly, this purported message of futility pales in comparison to the message sent when employees file a petition, only to have the union's blocking charges prevent a vote indefinitely.

Finally, the dissent suggests without explanation that "vote and impound" procedures somehow create "perverse incentives for employers to commit unfair labor practices" and introduce uncertainty into whether employers may implement unilateral changes. *Id*. at 39948-49. To the contrary, "vote and impound" procedures create no new incentives or uncertainty compared to the blocking charge policy. The proposed Rule does not affect the standard for whether or not a fair election can occur, nor does it alter the timeframe in which the results of such an election are announced. Employers who commit unfair labor practices will still see decertification petitions dismissed, and employers will continue to act at their peril when making unilateral changes during the pendency of decertification proceedings.

The dissent struggles to criticize the "vote and impound" proposal because it truly reflects the best of both worlds. On one hand, employees receive the opportunity to voice their preferences within a reasonable amount of time. On the other, the Board will not count the ballots if it determines the election did not occur under fair circumstances. This eminently reasonable approach allows the Board to most effectively carry out its mission, and the dissent has identified no legitimate reasons to proceed in any other fashion.

F. All of the Relevant Factors Support Adoption of the "Vote and Impound" Portion of the Proposed Rule.

As demonstrated above, the Board's current blocking charge policy does not support employee free choice. Instead, it results in unacceptably long delays in employees' opportunities to express their preferences; and, encourages unions to file meritless blocking charges in an exercise of pure gamesmanship. Conversely, the proposed Rule accommodates the legitimate

interests of all parties. The employees in the bargaining unit at the time of the petition's filing can express their preferences without delay. If correct in its allegations, the union claiming serious unfair labor practices will not suffer a loss, nor even a ballot count, as a consequence of that vote. If the union fails to establish allegations affecting the outcome, then the validly voiced preferences of the bargaining unit will prevail.

This "vote and impound" procedure permits outcomes in which the balance between electoral integrity and employee free choice will "be obtained with as little destruction of one as is consistent with the maintenance of the other." *Babcok & Wilcox*, 351 U.S. at 112. The Board should therefore adopt the proposed revision to § 103.20 of the Board's Rules as proposed in the NPRM.

IV. The Proposed Voluntary Recognition Bar Standard Provides Employees with a Voice When Substantial Changes Occur at Their Workplaces.

The NPRM also calls for re-establishment of the notice and 45-day window period in cases of voluntary recognition as articulated by the Board in *Dana Corporation*, 351 NLRB 434 (2007). A Board majority jettisoned this procedure in 2011 in *Lamons Gasket*, 357 NLRB 739 (2011). Re-establishing the *Dana* process and affording employees a narrow opportunity to exercise their most fundamental statutory right unquestionably advances the core purposes of the Act, does not impermissibly burden other sound labor policy, and is more than warranted by emerging organizing practices that do not adequately safeguard employee free choice.

In discarding the *Dana* procedure, the majority in *Lamons* purported to be advancing Board policy that: a.) voluntary recognition is permissible under the Act; and b.) once recognition is in place, the parties should have a reasonable period of time to negotiate an agreement. The *Dana* process, they argued, contravened these goals and thus must be overruled.

There were, however, two fundamental flaws with the majority position in *Lamons*. First, despite having solicited public input, there was absolutely no evidence that during the four years

Dana was in place, it had adversely affected either the practice of voluntary recognition, or the process of collective-bargaining. As the dissent in *Lamons* notes, the public request for evidence to this effect drew a "goose egg." *Id*. at 750 (dissent of Member Hayes). Thus, there was zero evidence, either statistical or anecdotal, that the incidence of voluntary recognition was reduced or impeded in any way in the wake of *Dana*, or that its window period in any way adversely effected the bargaining process. In this latter regard, it bears noting that nothing in *Dana* even suggested that the post-recognition bargaining obligation was suspended during the window period. It was not. Moreover, as the total absence of any evidence to the contrary makes clear, all parties were fully aware of the legal bargaining obligation during the brief *Dana* window period.

The second flaw in *Lamons* was that it created a false choice between the aspirational goal of facilitating collective bargaining and the statutory right of free choice. The *Dana* policy allowed employees a narrow opportunity to voice their free choice through the preferred method of a Board election, but, as noted above, had no discernible adverse impact on either recognition or subsequent bargaining. Moreover, even if it resulted in some impact, in the exercise of its balancing obligation the Board should certainly favor those policy options advancing or protecting the core right of free choice. This is particularly true where, as here, the impact on other policies or principles is either non-existent or demonstrably minor. In this regard, it should be kept in mind that *Dana* merely provided a short, 45-day opportunity within which employees might exercise their representational choice through the preferred method of a Board election.

By contrast, the "recognition bar" revived by *Lamons*, in conjunction with other election bars, would often preclude employees from having any opportunity to access the Board's electoral processes for *four years* following recognition. From a balancing perspective, the sheer amount of time involved more than demonstrates that *Dana*, not *Lamons*, embodies the appropriate policy choice. This is particularly true where neither the Board's solicitation of public input, nor any other empirical evidence, supports the notion that the *Dana* window period

impedes either the practice of voluntary recognition or the practice of post-recognition bargaining.

Ironically, the only evidence cited by the *Lamons* majority was to the effect that *Dana* had only *minimal* overall effect. *Id*. at 742-43. The majority in *Lamons* argued that the effect was, in fact, so small, that it proved that the *Dana* procedure was unwarranted. *Id*. Thus, even *Dana's* opponents concede that even its overall effect was negligible, and that there is no evidence it had the effect of impeding bargaining.

Union recognition, even without the safeguard of an NLRB-supervised secret ballot election, is unquestionably lawful. *See MGM Grant Hotel, Inc.*, 329 NLRB 464, 465-66 (1999). *Casale Industries*, 311 NLRB 951, 951 (1993); *Brown & Connolly, Inc.*, 237 NLRB 271, 276 (1978) enfd. 593 F.2d 1373 (1st Cir. 1979). Nothing in the proposed Rule changes that fact or precedent in any way. Any claim to the contrary is merely a deceptive straw man. All the Rule would do is provide for the *possibility* of a secret ballot election in the wake of voluntary recognition, and only in those cases where the *employees themselves* invoked the Board's electoral machinery.

Despite the legality of voluntary recognition, it is also beyond cavil that it is a less desirable, and a less reliable indication of employee free choice than the results of a Board-supervised secret ballot election. *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973) (observing, "[t]here is no doubt but that an election supervised by the Board which is conducted secretly and presumably after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee, to go along with his fellow workers.") (emphasis added). The reasons for this are manifold since such recognition is typically based on a card check agreement that often also

contains an employer neutrality provision. James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819, 825-26 (2005).

First, card check is a public, not a private process. Thus, employees may be subjected to inordinate peer pressure or even intimidation, both overt and subtle. Second, as noted, card check typically goes hand in hand with either formal or informal employer neutrality. Whatever else may be said regarding employer neutrality, one indisputable aspect is that employees are effectively deprived of exposure to any information or argument that might cause them to exercise their statutory right to decline representation. This is the very antithesis of the "robust debate" that the Supreme Court has noted should attend the representational process. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 275 (1974). Not only are employees deprived of the opportunity to consider countervailing information, they may well receive patent *misinformation* that will never be subject to correction.

Third, the neutrality/card check process is not only a contest without an opponent, it more importantly one without a referee. In the instance of voluntary recognition, the Board typically has little opportunity to police the behavior of the employer and union and to thus ensure the rights of the employees. Consequently, it is no wonder that the Board and federal courts have consistently and repeatedly espoused the view that Board supervised elections are the *preferred* method of determining employees' representational desires. *See e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001). Both the Board and the Congress have acknowledged this patent reality. In the latter case, Congress specifically provided in the statute that a bar would attach in the instance of a Board election. 29 USC § 159(c)(3). However, it provided no statutory bar in the instance of lawful, yet decidedly less preferred methods of recognition.

Finally, card-check recognition is oftentimes based on authorization cards signed over a long period of time, as opposed to the electoral process, where the decision is focused at a

particular moment that is proximate to the question of representation. As the discussion regarding *Johnson Controls*, 368 NLRB No. 20 illustrates, such in-the-moment choice is preferable, and, as a matter of plain common sense a more accurate measure of representational choice.[2] The Board's current proposal to reinstate *Dana* represents a *policy* choice. Under such circumstances, the appropriate question is not, as the *Lamons* majority suggests, whether the practice of recognition without an election is *legal;* the correct question is whether an alternative procedure represents a *better policy.* Since a secret ballot election is demonstrably a more preferable and accurate indication of employee choice than voluntary recognition based on card check or similar means, a policy that does nothing more than preserve the prospect for representational confirmation by secret ballot is clearly superior to one that does not.

Lastly, in considering the proposed Rule, the Board should take into account the reality that incidence of "voluntary" recognition resulting from card check and neutrality agreements has been steadily increasing. While neutrality agreements represented a novel approach as recently as the late 1970s, such devices became nearly commonplace by the late 1990s. Brudney, 90 Iowa L. Rev. at 824-26; Adrienne E. Eaton & Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Indus. & Lab. Rel. Rev. 42, 45 (2001) (examining organizing agreements from 36 unions with 10,000 or more members and finding that 23 of those unions had negotiated neutrality agreements). Furthermore, in most cases, the term "voluntary" recognition is a misnomer. Most card check agreements are the result of coercive pressure applied by a union against a given employer, and most reflect such coercion in their limitation on employer rights *Id*. at 46-50 (describing common limits on employer speech and associated reductions in employee anti-union campaigns, as well as the intensity of such campaigns). While coercive pressure by a union to obtain a card check/neutrality agreement may

[2] For those enamored of determining matters by means other than secret ballot vote at a specified time it bears noting that had polling at various points been accurate our history books would now cover the presidencies of Mitt Romney, John McCain, John Kerry, Al Gore, Michael Dukakis, Hubert Humphrey and Thomas Dewey, while the likes of Barak Obama, John Kennedy and Harry Truman would forever bear the "also-ran" designation.

be lawful, it does not follow that its result is reliable. The genesis of such arrangements lies with the employer and the union, *not the employees.* This is simply not the model that the Act primarily contemplates. While such "top down" organizing may be permissible under the Act, it is not the preferred means for all of the reasons noted above which are exacerbated by virtue of an often coerced "voluntary" agreement. Moreover, the mere fact that card check/neutrality agreements are lawful does not somehow suggest that the Board should totally abdicate its statutory role in policing the representational process. That is particularly true where the Board's "intrusion" is so minor as the provision of a narrow 45-day window; and, where the incidence card check recognition agreements continue to increase to the point where they may outstrip the procedures under Section 9 as the predominant mode of organizing.

V. The Proposed Construction Industry Section 9(a) Evidentiary Standard Supports the Principles of Majority Support Envisioned by Congress in the Act.

A "pre-hire agreement," in which an employer and a union acting as the exclusive representative of employees jointly determine the wages, hours, working conditions and other terms and conditions of employment before the union has attained majority status, is fundamentally at odds with the principles that form the foundation of the NLRA. Thus, the Act makes it generally unlawful for both an employer and a union to recognize and enter into an exclusive bargaining relationship where the union has not demonstrated majority support. *See ILGWU*, 366 US 731; 29 USC §§ 152, 157.

The sole exception to this rule is contained in Section 8(f) of the Act. 29 USC § 158(f). Congress added this exception to the Act's majority requirements in 1959. The exception was designed to address certain unique hiring circumstances in the construction industry. Thus, the 1959 amendment grew out of the need of employers in the construction industry to obtain skilled *temporary* labor while engaged in work at *a particular job site.* S. Rep. No. 1509, 82d Cong., 2d Sess., 3-4 (1952); *See generally*, Richard Murphy, Pre-Hire Agreements and Section 8(f) of the

NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability, Fordham Law Review, Vol. 50, Issue 5, Art. 10 (1982). The common practice was to obtain the necessary labor through local union hiring hall referrals. S. Rep. No. 187, 86 Cong. 1st Sess. 28 (1959). The *temporary,* fluid, and typically short-term employment of such individuals made the lengthier unionization processes under the Act (a petition and subsequent election) impractical and unworkable. See, e.g. *NLRB v. Haberman Constructions Co.,* 618 F.2d 288, 304 (5th Cir 1980), *rev'd on other grounds,* 641 F2d 351 (5th Cir 1981).

Consequently, such employees were effectively denied the prospect of union representation despite having been referred by a union hiring hall; and, thus, were either union members or at least favorably disposed toward the union that facilitated their employment. *See*, S. Rep No. 187, 86th Cong., 1st Sess. 28 (1959); S. Rep. No. 1211, 82d Cong. 2d Sess. (1954). However, these factors provided, at best, mere assumptions about the representational desires of an as-yet-not-hired workforce. Thus, in the absence of Section 8(f), an employer and union would plainly violate the Act by bargaining over and agreeing to contractual employment terms for such individuals before they were even hired.

The practical problem was initially "addressed" by the Board's General Counsel essentially declining to issue complaints in these circumstances, despite the fact that such pre-hire agreements facially violated the language of the pre-1959 Act. See, S. Rep. No. 1509, *supra,* at 5-6; *see also* Senate Subcommittee Hearings on S. 1973, 82 Cong., 1st Sess., 30, 32 (1951). Congress remedied this anomaly in 1959 by amending the Act to include the present-day 8(f) language. What is significant as a matter of both factual context and Congressional intent is that 8(f) was plainly a very narrow exception. Thus, it was confined to a narrow group of employers, and to *temporary* employees on a *specific work site.* See, Murphy, *supra,* and material cited therein.

In considering Section 8(f), Congress was deeply concerned about infringement on the employee free choice principles which lay at the core of the statute. See, Murphy, *supra*, at 1018 and fn 26, summarizing salient portions of the Congressional debate. Congress also made clear that an 8(f) relationship was totally different than a 9(a) relationship because the employees impacted by the amendment did not have the opportunity to meaningfully express their representational desires. Accordingly, Congress added a final proviso to Section 8(f) reflecting Congressional intent that any bargaining relationship established under Section 8(f) was of an entirely different nature. Thus, it specifically provided that a relationship established pursuant to Section 8(f) would not have the "bar" quality which the statute accords a bargaining relationship established under Section 9(a). The express reason for the inclusion of this proviso was the concern of Congress in preserving employee free choice as the cornerstone of its representational scheme. Both before and after the passage of 8(f), a 9(a) relationship could be established either by lawful recognition or Board election. Nothing in the express language 8(f) or its legislative history, however, remotely suggests that it was ever intended to provide a third alternative to establishing a 9(a) relationship.

Since its enactment, 8(f) jurisprudence has followed a curious, and frankly counterintuitive, path. Section 8(f) arrangements are currently entered into under factual scenarios far different than those that prompted its enactment in 1959 and, most importantly, are far less likely to reflect the free choice of employees. As noted, Section 8(f) was originally borne out of the typical practice of construction employers utilizing a union hiring hall to obtain *temporary* employees for a *specific site* during a job of limited duration. However, its utilization has now expanded far beyond this initial factual context. These agreements are often no longer limited to a single job site, but are now broad in geographic scope, indeed sometimes nation-wide in breadth.

Moreover, Section 8(f) agreements are now not only applicable to the short-term labor force of an employer, but instead are frequently applied to an employer's *permanent and stable* workforce. Further still, an employer's entry into an 8(f) agreement is oftentimes not volitional. Rather, it is a requirement imposed by the general contractor or, particularly in the case of public projects, by the entity on behalf of which the construction is being performed. Yet, even as the application of Section 8(f) has strayed from its original factual moorings and rendered such arrangements less likely to reflect employee representational choices, such arrangements have been accorded increasing "stability," and their "conversion" to Section 9(a) status has become improperly facile. This trend has effectively turned the original intent and attendant safeguards of 8(f) on its head.[3]

Congress never intended Section 8(f) as a precursor or an alternative pathway to a Section 9(a) relationship. Immediately after its passage, as before, the only statutory pathways to 9(a) status remained a Board supervised election or lawful voluntary recognition predicated on actual proof of majority status.

In *Staunton Fuels*, 335 NLRB 717 (2001), however, the Board plainly stretched the limited exception of 8(f) beyond its breaking point by holding that contract language, alone, could convert an 8(f) relationship into one formed pursuant to Section 9(a). Thus, in *Staunton*, a Board majority held that it would grant such status as long as *the contract language indicated* "the employer's recognition [of the union's 9(a) status] was based on the union's showing, or offer to show, substantiation of its majority support." *Id*. at 719. It arrived at this conclusion, despite the fact that there was no extrinsic evidence that the union, *in fact*, enjoyed contemporaneous majority support. The Board in *Staunton* thus gave dispositive effect to mere contract verbiage in establishing 9(a) status, in the absence of actual evidence of the same. By

[3] CDW believes that implementation of the Board's current rulemaking proposal should not be delayed by an expansion of its proposed scope. However, CDW would suggest that in subsequent adjudications or rulemaking the Board should consider the following issues with regard to Section 8(f): 1.) Whether 8(f) should be applicable at all in any instance other than that involving short-term employment at a particular jobsite; 2.) Whether 8(f) should apply to any agreement that an employer is required to enter as a condition of obtaining work; an, 3.) Whether the notion of what entities are to be deemed "construction employers" has been adequately defined and/or overly expanded.

doing so, the majority elevated the "intent" of the employer and union to create a 9(a) relationship above the demonstrated representational desires of the employees.

As the Board subsequently noted in *Nova Plumbing,* 336 NLRB 633 (2001), where it relied on *Staunton* to find a 9(a) relationship predicated solely on contract language, such a finding was, in its view, proper because the contract's recognition clause "leaves no reasonable doubt that the parties intended a 9(a) relationship." *Id*. at 634. This repeated notion that the parties' intent, or their contract language alone, could somehow substitute for actual evidence of majority support not only lacks any statutory basis, but runs counter to the Act's most fundamental principles. Because the *Staunton Fuels* rubric improperly denigrates the role of employee free choice in forming a 9(a) relationship, it should come as no surprise that it has been greeted by reviewing courts with unvarnished hostility.

Thus, in *Nova Plumbing v. NLRB,* 330 F.3d 531 (D.C. Cir. 2003), the Court of Appeals for the District of Columbia Circuit flatly rejected the Board's view as expressed in both *Staunton* and *Nova.* The *Nova* Court observed: "The proposition [advanced by the Board] that contract language standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in *Garment Workers* [*ILGWU v. NLRB*, 366 US 731 (1961)] for it fails to account for employee rights under sections 7 and 8(f)." *Id*. at 537-38.

Its decision in *Nova* was certainly not the last one in which the DC Circuit criticized and rejected the Board's view under *Staunton. See e.g., M & M Backhoe Services, Inc. v. NLRB,* 469 F.3d 1047, 1050 (D.C. Cir. 2006) (explaining an 8(f) arrangement can convert to one under Section 9(a) "only by election, or demand and proof."). Despite criticism and rejection by the D.C. Circuit, and despite consistent dissent from within (*see e.g., King's Fire Protection, Inc.,* 362 NLRB 1056, 1058-63 (2015)), a slim Board majority has held fast to the discredited theory of *Staunton.*

In 2016, another narrow Board majority, over yet another dissent and the clearly expressed disapproval of the DC Circuit, nonetheless held that "clear and unequivocal contract language can establish a 9(a) relationship in the construction industry." *Colorado Sprinkler*, 364 NLRB No. 55 (2016). This pronouncement landed with what should have been a well-anticipated thud in the DC Circuit. The Court, finding the Board's holding "arbitrary and capricious[,]" overturned the Board and observed that:

> [T]he Board's reliance in this case on a mere offer of evidence in a form contract . . . would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and the employer. Which is precisely what the law forbids. [W]hile an employer and a union can get together to create a Section 8(f) pre-hire agreement, *only the employees,* through majority choice, can confer Section 9(a) status on a union . . . [T]he Board must identify something more than truth-challenged form language before it can confer exclusive bargaining rights on a union under Section 9(a)."

Colorado Fire Sprinkler v. NLRB, 891 F.3d 1031, 1040-41 (D.C. Cir. 2018).

The consistently expressed view of the DC Circuit is unquestionably correct for all the reasons it advances and for those noted herein. This alone should cause the Board to adopt the Rule as proposed in the NPRM. Additionally, the history of this discredited conversion theory further supports doing so. For nearly two decades, slim Board majorities have quite simply ignored the position of the DC Circuit; yet, made little discernible effort at resolving its differing view. This is not a proper use of the Board's policy of non-acquiescence. See, *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 21-25 (D.C. Cir 2016). Thus, rulemaking will both spell the demise of *Staunton Fuels'* untenable theory; and, discourage future majorities from ignoring the well-supported views of reviewing courts regarding fundamental statutory principles.

VI. Conclusion

For the foregoing reasons, the Coalition for a Democratic Workplace respectfully urges the Board to adopt its proposed Election Protection Rule, as set forth in 84 FR 39930, August 12, 2019.

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