



VIA ELECTRONIC SUBMISSION

February 2, 2023

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

Re: Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships; RIN 3142-AA22

Dear Ms. Rothschild:

Associated Builders and Contractors hereby submits the following comments to the National Labor Relations Board in response to the above-referenced notice of proposed rulemaking published in the Federal Register on Nov. 4, 2022, at 87 Fed. Reg. 66890.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is

¹ For example, see ABC's 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePrview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴ The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC is a member of the Coalition for a Democratic Workplace, which is filing a more detailed set of comments on the NLRB's proposed rule. ABC supports CDW's comments and hereby incorporates them by reference. The purpose of ABC's comments is to highlight issues of concern to the construction industry.

Background

On Aug. 12, 2019, the NLRB issued a proposed rule to amend election procedure regulations under the National Labor Relations Act,⁵ and ABC submitted comments in support of the rule.⁶ The rule was finalized on April 1, 2020, and took effect July 31, 2020.⁷

ABC strongly supports the current rule. In particular, ABC supports the long overdue overruling of the *Staunton Fuel* decision, which purported to permit contract language alone to create a Section 9(a) bargaining relationship in the construction industry. ABC also agrees with the Board's 2020 change to its blocking charge policies, which protects employee free choice. Finally, ABC supports the NLRB's 2020 modification to the

³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ See 2019 proposed rule: <https://www.federalregister.gov/documents/2019/08/12/2019-17105/representation-case-procedures-election-bars-proof-of-majority-support-in-construction-industry>.

⁶ See ABC comments: <https://www.regulations.gov/comment/NLRB-2019-0001-0120>.

⁷ See 2020 final rule: <https://www.federalregister.gov/documents/2020/04/01/2020-06470/representation-case-procedures-election-bars-proof-of-majority-support-in-construction-industry> and delay of effective date to July 31, 2020: <https://www.federalregister.gov/documents/2020/04/10/2020-07537/representation-case-procedures-election-bars-proof-of-majority-support-in-construction-industry>.

immediate voluntary recognition bar, which allows employees 45 days to contest an employer's recognition of a union by filing an election petition.

On Nov. 4, 2022, the NLRB issued the current rulemaking, which would rescind the ABC-supported 2020 final rule. ABC's below comment gives particular attention to the issues that appear to have the greatest impact on construction industry workplaces. The NLRB has long recognized that construction industry employers are "different" in their labor relations from most other industries.⁸

Summary of ABC's Comments in Response to the NLRB's Proposed Rule

ABC strongly opposes the NLRB's proposed rescission of the three 2020 representation rules in the NPRM. In particular, ABC is concerned that the proposed rule returns to the precedent set by the *Staunton Fuel* decision, which purported to permit contract language alone to create a Section 9(a) bargaining relationship in the construction industry, notwithstanding the plain language of Section 8(f) preventing such agreements from acting as bars to employee election petitions. Courts have repeatedly rejected the NLRB's holding in *Staunton Fuel*, requiring instead that a Section 9(a) relationship can only be established upon a showing of actual evidence of union-majority status contemporaneous with the agreement. The NLRB's proposed rule is inconsistent with this judicial authority and with longstanding principles of majority status under Section 9(a).

ABC also opposes the NLRB's proposed change to the blocking charge policies. ABC believes that the proposed return to the Board's defective blocking charge policies impedes, rather than protects, employee free choice. Finally, ABC opposes the NLRB's proposed modification to the immediate voluntary recognition bar.

1. Proof of Majority-Based Recognition Under Section 9(a) in the Construction Industry

The Board's NPRM proposes to return to previous case-law precedent⁹ including *Staunton Fuel*,¹⁰ in which the NLRB held that bargaining agreement language, in and of itself, could somehow convert a relationship based upon Section 8(f) of the NLRA¹¹ into a Section 9(a) relationship.¹² Section 8(f) of the act permits employers in the construction industry to enter into so-called "pre-hire" agreements with unions without a showing that a majority of employees in an appropriate bargaining unit have designated such unions as their bargaining representative. The plain language of Section 8(f) prohibits a non-majority agreement established under the 8(f) proviso from serving as a contract or voluntary recognition bar to a petition for an NLRB election.

⁸ *Steiny & Co., Inc.*, 308 NLRB 1323, 1326 (1992).

⁹ See preamble: <https://www.federalregister.gov/d/2022-23823/p-281>.

¹⁰ 335 NLRB 717 (2001).

¹¹ 29 U.S.C. § 158(f).

¹² 29 U.S.C. § 159(a).

Congress passed Section 8(f) as a narrow exception from the majority representation requirements of Section 9(a), due to the exigencies of the construction industry. Nowhere did Congress express an intent to allow Section 8(f) agreements to achieve permanently binding Section 9(a) status in the absence of a contemporaneous showing of majority support for a union. Since the 1987 decision in *John Deklewa & Sons*,¹³ the NLRB has held that the former “conversion” doctrine improperly deprived employees of their right to petition for an NLRB election to determine whether a union has majority support.¹⁴ The Board also held in *Deklewa* that 8(f) agreements may be repudiated at their expiration, unlike Section 9(a) agreements.¹⁵ Finally, the NLRB held in *Deklewa* that bargaining agreements in the construction industry are presumed to be 8(f) agreements, meaning that those claiming the existence of a Section 9(a) relationship “bear the burden of proving it.”¹⁶ Typically, such proof takes the form of “positive evidence” that a union seeking voluntary 9(a) recognition has “unequivocally” demanded recognition based upon majority status and has “produced a contemporaneous showing of union support among a majority of employees in an appropriate unit.”¹⁷

In *Staunton Fuel*, the NLRB departed from the settled requirement of contemporaneous proof of union-majority status under Section 9(a), holding for the first time that mere language in a collective bargaining agreement could suffice to establish a 9(a) relationship.¹⁸ *Staunton Fuel's* reasoning was defective from its inception because it permitted contract language describing a fictional proof of majority status to substitute for reality, ignoring the absence of any actual, contemporaneous evidence of such proof.

The D.C. Circuit rightly rejected *Staunton Fuel's* holding in the case of *Nova Plumbing, Inc. v. NLRB*.¹⁹ As the appeals court stated in that case:

The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship ... creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers'* holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.²⁰

¹³ 282 NLRB 1375, 1378 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

¹⁴ *Id.* at 1382.

¹⁵ *Id.*

¹⁶ *Id.* at 1385, n. 41.

¹⁷ See, e.g., *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979-80 (1988).

¹⁸ 335 NLRB at 717.

¹⁹ 330 F.3d 531 (D.C. Cir. 2003).

²⁰ *Id.* at 537.

Since 2003, the D.C. Circuit has twice more rejected the previous Board majority's reasoning and denied enforcement of cases where the NLRB allowed contract language to override the absence of any evidence of union-majority status (See *M&M Backhoe Services, Inc. v. NLRB*²¹ and *Colorado Sprinkler v. NLRB*.)²² In the latter case, the court expressly rejected the NLRB's reliance on what the court referred to as "truth-challenged form language."²³

In light of the D.C. Circuit's views and the plain language of the NLRA, the proposed rescission rule violates the Administrative Procedure Act.²⁴ Under the APA, an agency action reversing a previous policy is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."²⁵ All of these factors apply to the Board's action rescinding the 2020 final rule. It is also well settled that agencies who change their existing policies must "provide a reasoned explanation for the change,"²⁶ yet the Board majority here fails to adequately explain or justify the Board's defiance of the D.C. Circuit's clear holdings. Finally, when an agency rescinds a prior policy "its reasoned analysis must consider the alternatives that are within the ambit of the existing policy."²⁷ The Board's stated reasons for rescinding the 2020 rule provide no justification for such action under the APA.

For all of the foregoing reasons, the NLRB should withdraw its attempt in this proposed rule to reestablish the *Staunton Fuel* standard, as well as the erroneous ruling in *Casale Industries*.²⁸ As pointed out in the dissent to the proposed rule,²⁹ *Casale* improperly imposed a six-month time limit on challenges to the 9(a) status of CBAs in the construction industry, when in reality no unfair labor practice is actually committed unless and until a union attempts improperly to enforce an 8(f) agreement as if it is a 9(a) majority agreement. Finally, to the extent the Board's proposed rule is intended to codify or reaffirm the Board's erroneous ruling in *Enright Seeding, Inc.*,³⁰ this too is an arbitrary departure from judicially approved precedent and violates the plain language of the Act.

The Board's proposed rule fails to protect the Section 7, Section 8 and Section 9 rights of construction industry employers and employees by removing the requirement for

²¹ 469 F.3d 1047, 1050 (D.C. Cir. 2006).

²² 891 F.3d 1031 (D.C. Cir. 2018).

²³ *Id.* at 1040-41.

²⁴ 5 U.S.C. 701-706.

²⁵ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1986); *accord Sierra Club v. U.S. Env. Prot. Agency*, 939 F.3d 649, 663-64 (5th Cir. 2019) (citations omitted).

²⁶ *FCC v. Prometheus Radio Project*, ___ U.S. ___, 141 S. Ct. 1150, 1158 (2021).

²⁷ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1913 (2020) (citing *State Farm*, 463 U.S. at 51).

²⁸ 311 NLRB 951, 953 (1993)

²⁹ 87 FR at 66927-28.

³⁰ 371 NLRB No. 127 (2022).

positive evidence that a union has unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit. Absent proof that the employer has unequivocally accepted the union's majority status, based on a contemporaneous showing of support from a majority of employees in an appropriate unit, a pre-hire agreement covered by Section 8(f) cannot be enforced under the terms of Section 9(a).

2. Substitution of a Vote and Impound Procedure for Current Blocking Charge Policy

ABC also opposes the NPRM's proposal to modify Section 103.20 of the NLRB's rules, preventing representation elections from proceeding to a vote after the filing of unfair labor practice charges potentially affecting the election outcome.

The Board justifies this proposal with the following argument:

By shielding employees from having to vote under coercive conditions, the historical blocking charge policy would seem to be more compatible with the policies of the Act and the Board's responsibility to provide laboratory conditions for ascertaining employee choice during Board-conducted elections. In short, we are inclined to believe, subject to comments, that it is the 80-year-old blocking charge policy, not the April 2020 final rule amendments requiring elections in all cases involving requests to block, that best protects employee free choice in the election process.³¹

The proposed rule would return to a blocking charge policy that impedes, rather than protects, employee free choice. It would allow unions to delay pending elections by simply filing an unfair labor practice charge including allegations of employer coercion that would prevent a free election.³² This effectively allows unions, without substantial evidence of any actual coercion, to postpone elections they expect to lose. This denies employees the right to freely choose not to join a union. Similar tactics would be allowable to delay decertification petitions.

In rescinding the 2020 final rule, the Board asserts that some of the data relied on during the previous rulemaking was contested or inaccurate.³³ But ample uncontested data still demonstrates the previous blocking charge policy disproportionately and unfairly delayed decertification petitions.³⁴ And the Board does not dispute that numerous federal courts, cited in the 2020 rulemaking, have rightly criticized the NLRB for previously allowing the blocking charge policy to infringe upon the Section 7 rights of employees.³⁵ The current proposed rule's return to the previous, defective blocking

³¹ See preamble: <https://www.federalregister.gov/d/2022-23823/p-201>.

³² See rule: <https://www.federalregister.gov/documents/2022/11/04/2022-23823/representation-case-procedures-election-bars-proof-of-majority-support-in-construction-industry#p-201>.

³³ 87 FR at 66903.

³⁴ 87 FR at 66921.

³⁵ 84 FR at 39931.

charge policy perversely punishes the employees who support decertification petitions (primarily), due to conduct for which they are not responsible.

Again, the Board's rescission of the 2020 final rule in the face of uncontested proof of disproportionate delay of decertification petitions under the previous blocking charge policy constitutes a violation of the APA's arbitrary and capricious test, under settled court rulings.³⁶ In rescinding the 2020 final rule, the Board has failed to address the most important aspect of the problem of unjustified delay of decertification petitions and ignores facts that are inconsistent with the rescission rule.

For all of these reasons, ABC strongly disagrees with the NLRB's proposal to return to the blocking charge policy in effect prior to the 2020 final rule.

3. Modification to Current Immediate Voluntary Recognition Bar

The Board's NPRM proposes to repeal § 103.21 and reinstate the findings of *Lamons Gasket Company*,³⁷ which itself overruled the NLRB's precedent governing voluntary recognition bars in *Dana Corp.*³⁸ The Board claims that the current rule places an unnecessary burden on voluntary recognition without significantly aiding in verifying employees have freely chosen their bargaining representatives.³⁹ The proposed rule provides that an employer that voluntarily recognizes a union would be unable to withdraw recognition and workers would be unable to file a decertification petition until at least six months have passed since the first bargaining session took place.

In *Dana Corp.*, the NLRB held that there should be no bar to an election following a grant of voluntary recognition unless: "(a) Affected unit employees receive adequate notice of the recognition and of their opportunity to file an NLRB election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly-supported petition."⁴⁰ Under this standard, enforced by the current rule, employees are better able to freely choose their bargaining representatives as they are allowed 45 days to contest an employer's recognition of a union by filing an election petition.

ABC agrees with the Board's ruling in this case and opposes the proposed rule's overruling of the *Dana Corp.* standard for voluntary recognition cases covered by Section 9(a), for the reasons previously expressed by the Board in the 2020 final rule.⁴¹ ABC interprets the current rule as distinguishing Section 9(a) recognition from voluntary

³⁶ See *FCC v. Fox Television*, 556 U.S. 502, 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."), citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1986). The Board in this case gave lip service to the holding of *State Farm*, but failed to comply with it. 87 Fed. Reg. at 66903, n.100.

³⁷ 357 NLRB 739 (2011).

³⁸ 351 NLRB 434 (2007).

³⁹ See preamble: <https://www.federalregister.gov/d/2022-23823/p-241>.

⁴⁰ *Id.* at 437.

⁴¹ See 2020 final rule: <https://www.federalregister.gov/documents/2020/04/01/2020-06470/representation-case-procedures-election-bars-proof-of-majority-support-in-construction-industry>

recognition agreements in the construction industry arising under the unique provisions of Section 8(f) (discussed above), in which employees remain free to petition for an election at any time. In the relatively less frequent situations where a construction employer extends voluntary 9(a) recognition to a union based upon a proper showing of majority employer support, then ABC supports the affected employees having an opportunity to file an NLRB election petition within 45 days, as enforced under the current rule.

Conclusion

As set forth above, ABC opposes the NLRB's proposals contained in the NPRM, which are inconsistent with the statutory policies of the NLRA and fail to protect the Section 7, Section 8, and Section 9 rights of construction industry employers and employees. ABC urges the Board to instead preserve the current 2020 final rule.

Respectfully submitted,



Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel:

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave. NW
Washington, D.C. 20006