



VIA ELECTRONIC SUBMISSION

January 9, 2020

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-AA16

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 Aug. 12, 2019, at 84 Fed. Reg. 39930.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 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 firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which 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 notice of proposed rulemaking. 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 Dec. 15, 2014, the NLRB issued the Representation-Case Procedures final rule (hereafter the "2014 Election Rule"),¹ which drastically changed the process for NLRB conducted elections in

¹ 79 Fed. Reg. 74308.

which employees may vote on whether they want to be represented by a union. During the rulemaking process, ABC voiced its strong opposition to the proposed rule² during oral testimony before the NLRB³ and filed written comments, requesting that the proposed amendments be withdrawn in their entirety for significant further study.⁴ ABC affiliates in Texas subsequently sued for declaratory and injunctive relief against the final rule, but that challenge was rejected by the U.S. Court of Appeals for the Fifth Circuit.⁵

On Dec. 14, 2017, the NLRB published a request for information on Representation-Case Procedures, seeking public comment on whether the 2014 Election Rule should be kept as is, modified or rescinded entirely.⁶ ABC submitted comments, arguing that the NLRB should rescind the rule in whole or in significant part, and return to the election procedures that were in effect and working well prior to the 2014 rule's adoption.⁷

On Aug. 12, 2019, the NLRB issued the above-referenced rulemaking, which proposes three amendments to the representation election regulations. 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 supports the NLRB's proposed changes to the three representation rules in the NPRM. In particular, ABC applauds 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. 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. The NLRB's proposed rule is consistent with this judicial authority and with longstanding principles of majority status under Section 9(a).

ABC also supports the NLRB's proposed change to the blocking charge policies. ABC agrees that the current blocking charge policy impedes, rather than protects, employee free choice. Finally, ABC supports the NLRB's proposed modification to the immediate voluntary recognition bar.

² 79 Fed. Reg. at 74318.

³ See testimony on behalf of ABC at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4233/publicmeeting4-10.pdf>

⁴ See ABC's comments at http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC_NLRB_R-Case%20Procedures_NPRM_040714_FINAL.pdf

⁵ *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. June 10, 2016). The court held that the new rules were permissible, though not required, under a highly deferential standard. The court also confined its legal analysis to what it viewed as a "facial" challenge to the rule, adhering to the very high bar for upholding such pre-enforcement challenges. *Id.* at 220, 226. The court declined to consider how the rule is now being applied in practice. *Id.* Thus, nothing in the court decision precludes the NLRB from returning to the previous election rules or otherwise modifying the 2014 rule.

⁶ 82 Fed. Reg. 58783.

⁷ See ABC's comments at https://www.nlr.gov/sites/default/files/webform/uploads/abc_nlr_r-case_procedures_rfi_12.14.17_final.pdf

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

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

The NLRB's NPRM proposes to overrule *Staunton Fuel*,⁹ 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 National Labor Relations Act¹⁰ into a Section 9(a) relationship.¹¹ 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.

Thus, 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*,¹² 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.¹³ The NLRB also held in *Deklewa* that 8(f) agreements may be repudiated at their expiration, unlike Section 9(a) agreements.¹⁴ 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."¹⁵ 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."¹⁶

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.¹⁷ *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 evidence of such proof.

The D.C. Circuit rightly rejected *Staunton Fuel's* holding in the case of *Nova Plumbing, Inc. v. NLRB*.¹⁸ 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

⁹ 335 NLRB 717 (2001).

¹⁰ 29 U.S.C. § 158(f).

¹¹ 29 U.S.C. § 159(a).

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

¹³ *Id.* at 1382.

¹⁴ *Id.*

¹⁵ *Id.* at 1385, n. 41.

¹⁶ *See, e.g., Brannan Sand & Gravel Co.*, 289 NLRB 977, 979-80 (1988).

¹⁷ 335 NLRB at 717.

¹⁸ 330 F.3d 531 (D.C. Cir. 2003).

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*.¹⁹

Since 2003, the D.C. Circuit has twice more rejected the previous NLRB 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*²⁰ and *Colorado Sprinkler v. NLRB*.²¹). In the latter case, the court expressly rejected the NLRB's reliance on what the court referred to as "truth-challenged form language."²²

In light of the D.C. Circuit's views, and the plain language of the act, the NLRB is entirely correct in proposing to overrule *Staunton Fuel*. Equally appropriate is the NLRB's proposal to promulgate a new rule 103.21(b) which sets forth the proper standard for finding that a Section 9(a) relationship has been established in the construction industry. The NLRB's proposed rule will protect the Section 7 and Section 9 rights of employees by requiring positive evidence that a union has unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer has unequivocally accepted the union as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit.

The dissent to the NPRM offers no principled basis for continuing to defy the D.C. Circuit's holdings rejecting *Staunton Fuel*. The dissent instead incorrectly asserts that the proposed rule "would unjustifiably treat construction unions less favorably than unions in other industries."²³ To the contrary, the NLRB's proposed rule restores construction employees to equal status with other industries in the protection of their Section 7 rights by prohibiting the substitution of formulaic contract language for actual evidence of union majority status.

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

ABC also supports the NPRM's proposal to modify Section 103.20 of the NLRB's rules, so as to allow representation elections to proceed to a vote without delay notwithstanding the filing of unfair labor practice charges potentially affecting the election outcome. The NLRB proposes to impound the ballots pending resolution of the charges. ABC supports a further change to allow the votes to be counted, though the results would not be certified until after the charges are resolved.

Certainly, the current blocking charge policy impedes, rather than protects, employee free choice. The NLRB's recitation of the statistics and examples of extraordinary delay in the electoral

¹⁹ *Id.* at 537.

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

²¹ 891 F.3d 1031 (D.C. Cir. 2018).

²² *Id.* at 1040-41.

²³ 84 Fed. Reg. at 39953.

process, particularly with regard to decertification petitions, cannot be seriously disputed.²⁴ Numerous federal courts, cited in the NPRM, have rightly criticized the NLRB for allowing its blocking charge policy to infringe upon the Section 7 rights of employees.²⁵ The current blocking charge policy perversely punishes the employees who support decertification petitions (primarily), due to conduct for which they are not responsible.

For all of these reasons, ABC strongly agrees with the NLRB majority view, expressed in the NPRM, that the current blocking charge policy should be substantially modified so as to permit elections to proceed without blocking charge delays. The proposed rule to allow the vote to proceed subject to impoundment is a definite improvement over the current policy, though ABC would support removal of the impoundment requirement as well.²⁶ If the NLRB determines to finalize the impoundment requirement, ABC urges adoption of some sort of cap on the length of any blocking charge delay, along with a requirement of expedited processing of the blocking charges themselves.

3. Modification To Current Immediate Voluntary Recognition Bar

The NLRB's NPRM proposes to overrule *Lamons Gasket Company*,²⁷ which itself overruled the NLRB's precedent governing voluntary recognition bars in *Dana Corp.*²⁸ In *Dana*, 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."²⁹

ABC supports the proposed return to the *Dana Corp.* standard for voluntary recognition cases covered by Section 9(a), for the reasons expressed by the NLRB in the NPRM. ABC reads the NLRB's proposed rule 103.21 as distinguishing Section 9(a) recognition from voluntary 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, however, then the affected employees should have an opportunity to file an NLRB election petition within 45 days, as called for under the proposed rule.

²⁴ 84 Fed. Reg. at 39931. See *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018) (four-year delay in decertification election resulting from unmeritorious blocking charge). See also Krupman and Rasin, *Decertification: Removing the Shroud*, 30 Lab. L.J. 231, 231 (1979) (noting that a majority of decertification petitions are not able to proceed to a vote, attributed in part to the delays caused by union blocking charges); Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. Rev. 361, 369-70 (2010)(blocking charges result in more than tripling the length of time needed to conduct elections).

²⁵ 84 Fed. Reg. at 39931.

²⁶ Seeing the outcome of the vote could have a salutary effect on the processing of blocking charges, to the extent that the charge filers perceive they are acting against the wishes expressed by an overwhelming majority of employees.

²⁷ 357 NLRB 739 (2011).

²⁸ 351 NLRB 434 (2007).

²⁹ *Id.* at 437.

Conclusion

As set forth above, ABC supports the NLRB's proposals contained in the NPRM, which are more consistent with the statutory policies of the NLRA than current NLRB rules on these subjects and better protect the Section 7 rights of employees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel:

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