THE COALITION FOR A DEMOCRATIC WORKPLACE

COMMENTS ON THE NATIONAL LABOR RELATIONS BOARD'S PROPOSED RULEMAKING, "FAIR CHOICE – EMPLOYEE VOICE" RULE, 87 FR 66890, RIN 3142-AA22 (NOVEMBER 4, 2022)

Via Electronic Submission: www.regulations.gov

The Coalition for a Democratic Workplace ("CDW" or the "Coalition")[1] submits these comments in response to the National Labor Relations Board's ("NLRB" or "Board") proposed rulemaking which it ironically labels, "Fair Choice – Employee Voice." (hereinafter, "Proposed Rules").[2] To the contrary, rather than promote employee free choice in the workplace, the Proposed Rules inexplicably abandon the current regulatory framework that provides greater freedom for employees to choose – or not choose – to be represented by a labor union. The Coalition believes the Proposed Rules will negatively affect the Board's representation case jurisprudence, undermine the Agency's statutory goals and reputation, diminish employee free choice, and upset the balance of countervailing interests. For these reasons, and as explained in more detail in the comments below (which largely reemphasize comments CDW submitted in response to the underlying rulemaking, "Election Protection Rule", 84 FR 39930, RIN 3142-AA16 (August 12, 2019)), the Board should withdraw the Proposed Rules and keep the current regulations in place.

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,

[1] CDW encompasses hundreds of employer associations, individual employers and other organizations that collectively represent millions of businesses of all sizes. They 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.

[2] 87 FR 66890, RIN 3142-AA22 (November 4, 2022).

self-organization, and designation of representatives of their own choosing[.]." 29 U.S.C. § 151. The Board now proposes to rescind three important steps that were taken in furtherance of those congressionally mandated goal through the adoption of certain amendments to its rules and regulations that the Board made in April 2020 (the "2020 Rule"), by the NLRB's "Proposed Rules." The Board should decline to adopt the three new rules outlined in its Notice of Proposed Rulemaking ("NPRM"). *Id*.

All three Proposed Rules would undo important improvements and clarifications to the Board's representation case practices and procedures, imperil employees' right of free choice in representational matters, and disrupt the Board's current representation processes. First, the Proposed Rules would reinstate the unconscionable delays in processing employees' representational desires that unquestionably resulted from the Board's misbegotten "blocking charge" policy. Under current policy, the Board's procedure correctly allows employees to express their preferences soon after the filing of a petition, but preserves the integrity of the electoral process by delaying the vote *count* and certification 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 as expressed through a speedy election. In sharp contrast, the Proposed Rules would presume *unproven* allegations of unfair labor practices have the *potential* to affect employee sentiment; and, on this basis, would preclude employees from expressing their representational choices *at all*, for unlimited months or even years. Simply put, the Proposed Rules would allow entrenched unions to frustrate and deny the will of employees to choose or not choose representation in the workplace.

Second, the Board improperly proposes to strip away critical safeguards that were re-instituted by the 2020 Rule to address the employee free choice implications of voluntary

recognition. While retaining the "voluntary recognition bar" doctrine, the 2020 Rule created an opportunity for employees to voice their preferences through the preferred process of Board-conducted elections. Specifically, the Board's current rule provides for 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 current rule unquestionably serves to safeguard employee free choice while in no way materially impeding the process of lawful voluntary recognition. Yet the Proposed Rules would strip employees of the ability to challenge their employer's decision to voluntarily recognize a union, and deny them their right to participate in an NLRB-supervised, secret ballot election.

Third, the Board proposes to rescind the current rule pursuant to which 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 would allow a construction union to attain Section 9(a) status by virtue of contract language alone, notwithstanding the lack of actual evidence of majority support. It would also prohibit any challenge to a construction union's claimed "contractual language"-based majority status after an initial six-month period. Thus, these proposed changes would facilitate 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. The Proposed Rules ignore the fact that if an 8(f) union that claims 9(a) status truly enjoys majority support, then the current 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 will needlessly undo existing protections that support and preserve the central role of employee free choice in the selection of bargaining representatives. The exercise of employee free choice lies at the core of the Act, yet each of the Proposed Rules ignores this principle in favor of affording unions greater ease in accomplishing their organizational goals, while infringing upon the paramount right of employees to determine whether or not they wish to be organized in the first instance. Because the Proposed Rules would interfere with employee free choice in representational matters, CDW strenuously objects to the proposals and encourages the Board to reject all three Proposed Rules.

Morevover, the current NPRM represents an arbitrary and capricious exercise of the NLRB's rulemaking authority by a new Board majority, in an unjustified attempt to subvert the important policy goals that were thoughtfully and thoroughly addressed in the 2020 Rule. As aptly noted by dissenting Members Kaplan and Ring, the majority proposes to rescind the subject rules "not because they must, but because they can." 87 FR at 66915. The Board should responsibly exercise its right to engage in rulemaking and refrain from engaging in such "needless policy oscillation that tends to upset the settled expectations of the Agency's stakeholders" and "would undermine the very policy of employee free choice on which the 2020 Rule is predicated." *Ibid.*

This NPRM is, unfortunately, yet another manifestation of an extremely disturbing trend in Agency activity. It now appears that with each change in the political persuasion of the Board's majority its members believe it not only essential, but somehow incumbent upon them to engage in the serial reversal of any actions by their political predecessors. The behavior has become utterly predictable, and its consequences equally predictable and decidedly problematic. Indeed, the Board's administration of the Act has become like New England weather – if you do not like it today, just wait a minute. While such unpredictability may add to New England's charm, it is

poisonous to the Board's statutory mission. The periodic and wholesale change of Board precedent, practice and procedure that is fast becoming the Agency's stock in trade is incredibly de-stabilizing for its stakeholders. When rules and principles are in constant flux stakeholders are not merely frustrated, they are almost constantly at sea as to how to conform their actions and behavior to what may be yet another change in the Administration of the Act. It is axiomatic that clarity and consistency foster compliance, whereas serial change yields the opposite result.

By far, however, the most destructive effects of this "reversal mentality" are on the Agency itself. As the Board's actions become more partisan in nature its credibility with stakeholders suffers enormously. For an agency that relies, in large measure, on voluntary compliance and negotiated resolutions such distrust is not merely unfortunate, it is potentially fatal. When stakeholders believe that the Board's electoral processes are designed more to produce a particular result than to ensure that employees have the unfettered right to accept *or reject* union representation; or, when they believe the outcome of Board litigation is pre-ordained, its ability to fulfil its congressionally mandated role is in serious peril.

These considerations arise at a decidedly unpropitious time for most government institutions including the Board. Not only are reviewing federal courts increasingly skeptical of both the power and propriety of agency decision and rule-making, but public trust in the institutions of government appear, by all indications, to be at historically low levels.

This is not all a matter of stakeholder perception. It is a matter of appellate viability as well. In the instance of rule-making in particular, while reviewing courts concede the right of an agency to "change its mind" and jettison a prior rule, that right is not unfettered. In considering the propriety of the current NPRM, CDW respectfully submits that there are a number of factors the Board should keep in mind.

First, rule-making, by its very nature is intended to foster stability and predictability. Rules are intended to last, and not be subject to facile change. The current Board would do well to take note of one of the Agency's earlier forays into rule-making as instructive of its effective use. Following the 1974 Health Care Amendments to the Act, the question of what constituted appropriate bargaining units in the acute care setting spawned considerable confusion as well as varying and often inconsistent results both from the Board and reviewing federal courts. It was a genuine controversy which the Board resolved through a conscientious and thorough use of its rule-making authority. The product of the effort were the unit rules promulgated in 1991. No doubt there were stakeholders that were disaffected by the rules, and no doubt, subsequent Board members that felt the same. Yet, the benefits of stability and predictability, to say nothing of respect for the rule-making process, preponderated over any temptation to substantially alter those rules which have remained essentially unchanged for more than thirty years. The current NPRM which seeks to completely overturn a three-year old rule stands in stark contrast. Moreover, the Healthcare Unit Rules were borne out repeated criticism of the Board's unit determinations by a number of circuit courts. There is no such criticism or controversy with respect to the 2020 Rule. Despite any persuasive empirical evidence of any negative impact, it seems destined for reversal simply because organized labor does not like it.

Second, the utter lack of rationale articulated by the majority in its effort to vitiate the 2020 Rule is matched only by its haste to do so. Thus, as more fully explicated below the NPRM fails to cite any compelling reasons or circumstances that have arisen in the short three years of the current rule's existence to warrant its wholesale reversal. This goes well beyond fueling the perception of partisanship. It is potentially problematic from a purely legal perspective. Thus, although, as already noted, reviewing courts will approve the reversal of a prior rule, doing so must

be accompanied by some persuasive or empirical rationale or else it will be deemed "arbitrary and capricious." The present NPRM is woefully lacking in this regard. What exactly has happened in the short life of the 2020 rule that would cause the Board to expend its limited resources in overturning it?

Third, changes to an extant rule are generally singular undertakings by regulatory agencies. By contrast, the present NPRM is merely one additional drop in a deluge of change fashioned by the new majority. Indeed, its publication preceded by mere weeks the issuance of not one, but four precedent-reversing decisions by the newly constituted Board majority. It is but the beginning of the wholesale rejection of extant case law that every practitioner and stakeholder now expects. While on its own, the multitude of other changes by the current Board may not render the instant NPRM a dead letter, it certainly, at best, does great harm to the Agency's credibility, and, at worse, gives credence to the claim of arbitrary and partisan behavior.

II. THE CURRENT RULE EFFECTIVELY BALANCES EMPLOYEE FREE CHOICE WITH THE POTENTIAL FOR UNFAIR LABOR PRACTICES TO AFFECT VOTER SENTIMENT.

The NPRM includes a proposal to restore the Board's blocking charge policy and rescind the critical amendments to this policy that were implemented pursuant to the 2020 Rule.

§ 103.20 of the Board's Rules currently requires that ballots be impounded for up to sixty (60) days following an election where pending charges allege (1) 8(a)(1) and (2) violations or 8(b)(1)(A) violations, which challenge the circumstances surrounding the petition or the showing of interest; and/or (2) unlawful employer domination of a union, where the employer allegedly seeks to "disestablish a bargaining relationship." Where such allegations are present, if a complaint issues before expiration of the 60-day period, ballots will remain impounded until a final determination issues. If no complaint issues within the 60-day period, the ballots will be promptly opened and counted. The filing of serial charges will not extend the 60-day period.

For all other charges, the current rule requires that ballots be promptly opened and counted. However, a certification of the election results will not issue "until there is a final disposition of the charge and a determination of its effect, if any, on the election petition." Thus, the current rule protects the right of employees to timely participate in an NLRB-supervised election, while preventing the certification of election results that are the result of unlawful interference with employees' exercise of that right.

The NPRM proposes rescinding the current rule and returning to the Board's blocking charge policy, pursuant to which unions would once again have the power to interfere with employees' exercise of their rights by indefinitely forestalling an election through the filing of meritless blocking charges. The Board majority's purported reasoning – *i.e.*, that employees should not be permitted to vote *at all* where there is a possibility that the election could potentially occur in a "coercive atmosphere" – is unfounded and illogical. Clearly, elections can be (and are) conducted in a potentially coercive atmosphere, as evidenced by the fact that parties routinely file election objections on that basis. Indisputably, many election objections involve alleged conduct that would also comprise unfair labor practices. The Board's processes for handling meritorious election objections – including by the conduct of rerun elections – establish that there is no justification for the Board majority's proposal to effectively reinstate a golden "power of veto" that has historically allowed one party (typically an incumbent union) to indefinitely block employee access to the ballot box in the first instance (typically in cases where employees are seeking to exercise their protected right to remove said incumbent union).

The infirmities in the proposed blocking process, the common-sense nature of the current rule, and its consistency with the overall policies of the Act all support rejection of the NPRM's proposed return to the blocking charge policy. The Proposed Rule would improperly deny

employees their Section 7 "right to choose" based on nothing more than unproven allegations, while once again affording unions the disproportionate power to "game" the NLRB's representational processes without consequence – an approach that dissenting Members Ring and Kaplan correctly observe "does make it easier for incumbent unions bent on self-preservation to frustrate the will of the majority." 87 FR at 66919.

A. The Proposed Blocking Charge Policy Will Result 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 could remain blocked indefinitely, with no opportunity for employees to vote, even if the Charging Party provided 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). 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. In the 2020 Rule, the Board properly remedied that failure. The current rule brings Board policy with regard to the relationship between unfair labor practice charges and elections into harmony with the rules' overall emphasis on expediency.

In contrast, reinstitution of the blocking charge policy would likewise reinstitute an anomalous phenomenon described by one scholar as "the long tail" of delay in representation cases. 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, up to and including delays of as many as 1,705 days between filing and election. *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 protecting 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 subsequently made clear that Board policies and Rules did not treat the two circumstances equally, and that the blocking charge policy required modification.

For example, 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 the more serious pending unfair labor practice allegations, including those that alleged surface bargaining. The ALJ 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 failed to comport with the animating principles espoused by the Board in furtherance of the 2015 Rule changes.

Statistics made the case for blocking charge reform even clearer. For example, in a study of fiscal year 2008 cases conducted by scholar Samuel Estreicher, he found a median time from petition to election of 139 days for blocked petitions, compared to a median of only 38 days for unblocked cases. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. Rev. 361, 369-70 (2010). Statistics for fiscal years 2016-2018 reflected an even wider disparity, with a median time from petition to election ranging from 122 to 145 days in blocked cases, and only 23 days in unblocked cases. *See* 84 FR 39930, RIN 3142-AA16 (Aug. 12, 2019) at 39933 fn. 14. Worse, as of December 31, 2018, "there were 118 blocked petitions pending; those cases had been pending for an average of 893 days; and the oldest case had been pending for 4,491 days, *i.e.*, more than 12 years." 84 FR at 39933.

The cases adversely affected by the blocking charge policy were overwhelming RD cases. Thus, in the absence of policy reform, it appears that under the Board's blocking charge policy, speed and free choice somehow mattered only when representation was being sought, not when employees sought to end it. Such a double standard does not square with the free choice principles that form the basis of Section 7.

The Board's current rule directly and effectively addresses the "long tail" problem with the Board's blocking charge policy. This rule thus significantly advances employee free choice, and should remain in effect.

B. The Delays and Gamesmanship Created by the Proposed Blocking Charge Policy Would 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[.]" 87 FR at 66916. 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 not 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 the NLRB's tolerance of such gamesmanship. For example, in a 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 prior version of § 103.20 of the rules invested significant case-handling discretion at the Regional Director level. Yet, Regional Directors received little guidance on blocking decisions beyond broadly-defined categories of "Type I," "Type II," and other categories affecting the petition's validity. This ill-defined degree of discretion 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 blocking charge policy that the NPRM improperly seeks to reinstate resulted in both inconsistency and gamesmanship with respect to representational processes, all to the detriment of employee choice. The current rule eliminates these significant problems without otherwise adversely affecting the Board's administration of the Act.

C. The Current Rule Properly Enhances Employee Free Choice While Ensuring the Integrity of the Electoral Process.

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 resolving a question concerning representation, 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 blocking charge policy was born 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 proposal to reinstate the 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 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, reinstatement of the

blocking charge policy would needlessly denigrate this principle by denying employees the right to vote for months or even years after a petition is filed. In stark contrast, the current rule 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 the pool of eventual voters is confined to those employed at the time 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 historically delayed a vote for months, or even years from the time a petition was filed, it effectively turned this principle on its head. Thus, under the blocking charge policy the voter pool in an eventually "unblocked" election would 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, the **annual turnover rate** among private sector employees in 2021 stood at **52.4%**.[3] 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. Meanwhile, the current procedures protect the goal of electoral integrity without doing harm to electoral integrity.

[3] Department of Labor, "Table 16. Annual total separations rates by industry and region, not seasonally adjusted," last modified March 10, 2022, available at https://www.bls.gov/news.release/jolts.t16.htm.

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 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 that preceded the 2020 Rule concisely summarized 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.

84 FR at 39937. This is the very antithesis of due process. Under the blocking charge policy, petitioning employees would be denied the right to a timely vote based on untested allegations. The current rule preserves electoral integrity without depriving employees of the right to timely vote in the absence of adequate process.

D. <u>The Current Rule Supports the Act's Overall Policy Objectives.</u>

1. *The Current Rule 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. The approach under the current Rules 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.

In contravention of Section 8(a)(2)'s prohibition on recognition and bargaining with a minority union, the 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 blocking charge policy that the NPRM would impose *prevents* employees from even *expressing* in a Board election whether they support the union. Instead, the proposed blocking charge policy would suspend 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 allowed unions to undermine the entire legal mechanism through indefinite delay.

The current process addresses this deficiency. While blocking charges forced employees to wait months or years to vote, assuming they remain employees and get to vote at all, the current process ensures that the same employees who created the evidence of loss of majority support can exercise their right to vote promptly. From the employer's perspective, the reinstitution of the blocking charge policy will encourage employers to forego the "safe harbor" of an RM petition and sail instead into the murkier legal waters of a withdrawal of recognition. Under the current rule, however, the "safe harbor" more closely lives up to its name. The current rule thus advances the preference for Board-conducted elections expressed by the *Levitz* Board, while the blocking charge policy would only undermine the supposed "safe harbor" of such elections.

E. <u>All of the Relevant Factors Support Maintenance of the Current Rule.</u>

As demonstrated above, the Board's proposed 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 current 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 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.

The current procedure permits outcomes in which the balance between electoral integrity and employee free choice can "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 decline to adopt the proposed revision to § 103.20 of the Board's Rules as proposed in the NPRM.

III. THE CURRENT VOLUNTARY RECOGNITION BAR STANDARD PROVIDES EMPLOYEES WITH A VOICE WHEN SUBSTANTIAL CHANGES OCCUR AT THEIR WORKPLACES.

The NPRM also calls for rescission 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). After a Board majority jettisoned this procedure in 2011 in *Lamons Gasket*, 357 NLRB 739 (2011), it was rightfully restored in the 2020 Rule. Maintaining 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 – including but not limited to the increasing use of "electronic authorization cards" by unions in support of claims of majority status.

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 as much as *four years* following recognition. From a balancing perspective, the sheer amount of time involved establishes 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 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. As noted earlier, this nearly complete absence of any empirical justification for proposing to rescind the current rule invites the conclusion that the Board's action is plainly arbitrary and capricious.

A. The Current Rule Safeguards Employee Choice When Employers and Unions Enter Into Voluntary Recognition Agreements.

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 2020 Rule altered that fact or precedent in any way. Any claim to the contrary is merely a deceptive straw man. All the current rule has done 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* invoke 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.") 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 is, 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.[4] The Board's current rule represents a sound *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 Rules, the Board should take into account the reality that incidences of "voluntary" recognition resulting from card check and neutrality agreements have 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 due to the terms of neutrality agreements. *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).

[4] 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.

B. The Proposed Rule Is Unjustified and Ignores Evidence That the Current Rule Has Successfully Operated to Protect Employee Choice.

Notably, in support of its currently-proposed rescission of the *Dana* procedures, the NPRM cites NLRB data showing that, of a total of 260 requests for voluntary recognition notices filed following implementation of the 2020 Rule, only one election petition was subsequently filed. Specifically, one *decertification* petition was filed – "after which the union disclaimed interest." 87 FR at 66898. Clearly, the data therefore shows that the availability of *Dana* procedures under the current Rule (1) does not interfere with the vast majority of voluntary-recognition arrangements; and (2) provided a necessary means for employees in at least one case to effectively challenge a union's claim to be their majority representative. Bizarrely, the NPRM utterly fails to attach any significance to the fact that the union in that case responded to employees' invocation of the *Dana* procedures by *disclaiming interest* – a clear indication that the union *lacked* majority support, notwithstanding the employer's agreement to voluntarily recognize it. Instead, the NPRM fixates on the fact that the decertification petition in that case did not result in an election. In other words, the only "reason" the NPRM articulates for a proposed rescission of the *Dana* procedures is effectively the same as that advanced by the *Lamons* majority – *i.e.*, a claim that "nobody really uses them." This remains an illogical and unjust basis for denying employees an opportunity to challenge an employer's agreement to voluntarily recognize a union that claims to have majority support among them. Presumably, the NLRB would cite any data it had to suggest that maintaining the *Dana* procedures would in any way infringe upon employee rights. The glaring fact that no such data is referenced – along with the fact that the *Dana* procedures admittedly *have* been utilized at least once since they were reinstituted under the 2020 Rule – establishes there is no basis whatsoever for the NLRB to rescind the current rule.

The current rule safeguards the right of employees to at least have access to the *Dana* procedures when a voluntary recognition agreement may not reflect the actual wishes of the employees in the claimed bargaining unit, as indisputably evidenced by the fact that in at least one recent case, employees successfully ousted a non-majority union after exercising their right to file a decertification petition under the current rule. It is deeply troubling that the Board majority would discount this critical evidence that the current rule is in fact operating to ensure that employee choice is protected – and effected. As dissenting Members Kaplan and Ring astutely observed, "The majority's position begs the question of how many employees must be effectively disenfranchised and saddled with a bargaining representative lacking majority support before they will leave the current framework alone." 87 FR at 66923.

Equally disturbing is the fact that in the complete absence of any evidence that the current rule in any way "burdens collective bargaining," the NPRM cites a purely hypothetical "concern" regarding this equally hypothetical "burden" as the basis for a conclusion that maintenance of the *Dana* procedures "cannot be justified by reference to Federal labor policy, which favors voluntary recognition." 87 FR at 66909. The majority fails to recognize that "Federal labor policy" should "favor" the right of employees to choose whether or not to be represented, over the "right" of employers and unions to enter into voluntary recognition agreements that may not reflect the actual desires of a majority of the employees involved. Instead, the majority relies on the same conjecture employed by the *Lamons* majority – *i.e.*, that the *Dana* procedures might cast needless doubt on a union's majority status and interfere with its ability to engage in effective collective bargaining – while willfully ignoring the abject lack of any evidence adduced since the implementation of the 2020 Rule to show that such hypothetical adverse effects have ever materialized.

In sharp contrast, the majority's statement that there is "no reason to doubt that voluntarily recognized unions actually enjoy majority support" (87 FR at 66911) is *patently false*. There is indeed "reason to doubt," based on the very case cited in the NPRM, in which a union chose to disclaim interest after employees who were subjected to a "voluntary recognition" exercised their right to file a decertification petition under the current rule. The NPRM improperly concludes, however, that the desire of those employees to not be represented should have been ignored in favor of upholding a union's right to enjoy an extension of voluntary recognition from an employer, notwithstanding whether such a recognition agreement accurately reflects "employee choice."

Nor is there any basis for the Board majority's claims that the current *Dana* procedures are an unjustified "waste of party and Board resources." 87 FR at 66909. The procedures require nothing more than the filing of a form with the NLRB and the dissemination of notices to employees. An election is only required if employees determine there is a need to file a petition challenging their employer's voluntary acceptance of a union's claim to represent them. As the Board majority necessarily recognizes, that has only happened once since the implementation of the 2020 Rule – and the NLRB did not even need to expend any resources to conduct an election, because the union responded to the decertification petition by effectively acknowledging its lack of majority support through a prompt disclaimer of interest. Even if the NLRB had conducted an election, these facts establish it would hardly have been a "waste" of Board resources to do so. To the contrary, Board resources would have served the paramount purposes of the Act, by ensuring that employee choice was upheld and the employer in question did not unlawfully recognize and deal with a minority union.

The claim of "wasting" Board resources is truly tone deaf. It is not a waste of the Board's resources to ensure employee free choice. It's the Board's job to do so. Moreover, the current effort to overturn an extant rule and re-instate the anti-democratic *Lamons* rubric is going to waste far more agency resources than processing a small number of *Dana* petitions.

Without evidence that the current *Dana* procedures unduly interfere with collective bargaining, "waste" party or Board resources, or in any way contravene the purposes of the Act, there is no basis for the majority's proposal to rescind the current rule based solely on unsubstantiated concerns that have never materialized – and in the face of admitted evidence that the current Rule has *in fact* successfully safeguarded employees from the imposition of a minority union. As a result, the Board should maintain the current rule and uphold the current *Dana* procedures, and the Board should decline to rescind this critical rule as proposed in the NPRM.

IV. THE CURRENT CONSTRUCTION INDUSTRY SECTION 9(A) EVIDENTIARY STANDARD FURTHERS 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 union members or at least favorably disposed toward the union who facilitated the work). *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 completely different from 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 that 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 of 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 born 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. Frequently, 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.

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 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 and facilitates the imposition of a minority union as a 9(a) representative, 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.

The Board's 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 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) (Emphasis in original.).

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 maintain the current rule, and decline to adopt the new Proposed Rules. 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, the 2020 Rule properly rejected *Staunton Fuels'* untenable theory, and overruled *Casale Industries*, 311 NLRB 951 (1993), to the extent *Casale* imposed Section 10(b)'s six-month statute of limitations applicable to alleged unfair labor practices on challenges to a union's claim of 9(a) status pursuant to language in an 8(f) agreement with a construction employer.

The Board majority's proposal to rescind the 2020 Rule and return to the standards established in *Staunton* and *Casale* is unwarranted and undercuts the right of construction industry employees to determine whether or not a union will be accorded representational status under Section 9(a). The majority's chief complaint is nothing more than that the current Rule requires construction employers and unions to maintain records to support a claim of 9(a) status. However, the majority's claimed desire to ease the recordkeeping burdens of employers and unions cannot trump the Section 7 rights of employees. The Board should reject the Proposed Rules.

V. CONCLUSION

For the foregoing reasons, the Coalition for a Democratic Workplace respectfully urges the Board to reject its proposed, so-called "Fair Choice – Employee Voice" Rule, as set forth in 87 FR 66890, November 4, 2022.

Respectfully submitted,

THE COALITION FOR A DEMOCRATIC WORKPLACE

The following CDW member organizations join in the filing of these comments.

American Bakers Association
American Hotel & Lodging Association
American Pipeline Contractors Association
Associated Builders and Contractors
Associated General Contractors of America
Independent Electrical Contractors
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Grocers Association

National Ready Mixed Concrete Association
National Retail Federation
Power and Communication Contractors Association
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