Economic Policy Institute

EPI comments on the NLRB's proposed revisions to union election policies

Public Comments • By Celine McNicholas and Margaret Poydock • January 7, 2020

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

Re: Proposed Rulemaking: Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (RIN 3142-AA16)

Members of the National Labor Relations Board:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI strongly opposes the National Labor Relations Board's (NLRB/Board) proposed rulemaking regarding three long-standing Board policies: the blocking charge doctrine, the voluntary recognition bar doctrine, and the *Staunton Fuel* doctrine. While the policies the Board Majority seeks to amend are unrelated, they would each make it more difficult for workers to gain or keep union representation. This marks the third time in under two years that the Trump Board has undertaken a rulemaking process aimed at this goal. Instead of deciding the cases pending before the agency, the Trump Board continues to engage in regulatory efforts to further rig the process by which workers in this nation join unions and collectively bargain.

As the dissent points out, the Board Majority fails to articulate any justification for the proposed rulemaking.[1] As in the recent joint-employer rulemaking, which resulted from the Board Majority's inability

to deliver the desired decision on the issue due to Board members' recusal obligations, this rulemaking is an exercise to ensure the Trump Board successfully overturns precedent it opposes when the issues are not presented in cases currently considered—or considered in as quick a timeline as the Board Majority desires.[2]

However, the law requires that an agency must provide a "reasoned explanation" for changing policy and "must show that there are good reasons for the new policy."[3] Further, as the dissent states, the agency's explanation for this change in policy must address the agency's reasons for "disregarding facts and circumstances…that underlay…the prior policy."[4] The Board Majority fails to provide any such explanation for the significant changes in long-standing policy it has proposed in this rulemaking. Further, it does not include an analysis of relevant data on the issues. Instead, it advances a proposal that will likely be arbitrarily and legally deficient. Moreover, the Board Majority's proposal goes against the agency's most fundamental statutory obligation to encourage collective bargaining and to protect "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[5]

The blocking charge doctrine

The National Labor Relations Act (NLRA/Act) promises America's workers the right to "form, join, or assist labor organizations" free from employer interference or coercion.[6] The Board's chief responsibility in overseeing the election process is to protect employee free choice.[7] In fact, the Supreme Court has recognized it is the "duty of the Board…to establish 'the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.'"[8]

For more than 80 years, the blocking charge doctrine has served as a critical tool in ensuring that elections are free of employer coercion. The blocking charge policy allows the Board to decline to process election petitions in cases where an unfair labor practice (ULP) charge alleges conduct that would interfere with employee free choice. The Board delays the election until the ULP has been remedied and employees can decide freely and fairly whether they want union representation.

In spite of the long-standing importance of the blocking charge doctrine in protecting the sanctity of the election process, the Board Majority proposes to do away with it. Under this proposal, the Board would no longer block any election petition because of pending ULP charges—no matter how serious. Instead, the blocking charge doctrine would be replaced with a vote-and-impound procedure that effectively ensures that some elections are conducted under coercive conditions that interfere with employee free choice. By requiring regional directors to move forward with elections where serious ULP charges have been filed—and found to have merit by an administrative law judge—the Board Majority advances a rigged election system. The proposal is a betrayal of the Board's statutory responsibility to ensure free and fair elections.

The Board Majority fails to articulate a reason for this significant shift in policy. It simply

insists that the blocking charge doctrine impedes employee free choice. The Majority bases this assertion on the fact that the blocking charge doctrine creates delay in the election process. To the Board Majority, it seems that any delay in the election process—even that instituted in the face of alleged coercive, illegal employer behavior—discourages employee free choice. The hypocrisy of this argument—at the same time the Board Majority has announced it will reconsider the representation-case procedure rule designed to streamline and modernize the election process—is startling.

The Board Majority fails to consider any data on the use of blocking charges in advancing the proposed rule. As Member McFerran points out in her dissent to the proposal, relevant data for fiscal years 2016 and 2017 undercut the Majority's articulated concerns around the abuse of blocking charges in the union decertification process. Further, the Board Majority does not analyze how the proposed vote-and-impound procedure would work. Instead, the Majority repeatedly insists that the blocking charge—long recognized as an integral tool in ensuring that elections reflect employee free choice and not employer coercion—impairs an employee's ability to make a free and fair choice concerning representation by the simple virtue that it delays an election. In the proposed rule, the Board Majority states that the median number of days charges were delayed ranged from 122 to 145 days.[9] However, an investigation by Bloomberg Law finds that the Board Majority overstated the delays in more than one-third of cases in which they say a blocking charge was filed.[10] Finally, the Majority included no analysis of the costs associated with the proposal. Specifically, the policy will impose unnecessary costs on all parties, the Board, and taxpayers as it requires that elections be held even when alleged misconduct, if proven, would require the election petition be set aside. For these reasons, we urge the Board to withdraw this proposed rule on removing the blocking charge doctrine.

The voluntary recognition bar doctrine

Today's workers enjoy the right to join together in union by showing majority support either in the form of a secret board election or through voluntary recognition by their employer. Voluntary recognition has been a long-standing practice that even pre-dates the National Labor Relations Act of 1935.[11] In fact, Section 9(c)(1)(A)(i) of the Act allows employees to file for an election petition if they have majority support and "their employer declines to recognize their representative,"[12] indicating that Congress believed board elections were necessary only if an employer refused to voluntary recognize a union. The proposed rulemaking aims to undermine this long-standing practice by explicitly stating that once 45 days have passed after a union receives voluntary recognition, employees can file a decertification petition upon showing that at least 30% of the bargaining unit supports the request for a decertification vote.

For more than 60 years, the Board barred the filing of election petitions for a reasonable period of time after voluntary recognition to ensure that recognized unions had a fair chance at bargaining their first contract.[13] In 2007, the Board decided in *Dana Corp.,* 351 NLRB 434 (2007), to remove the bar on election petitions and allow individuals to file for a decertification petition 45 days after the union was voluntary recognized. This decision was reversed in 2011 under *Lamon Gasket Company,* 357 NLRB 739 (2011), which

reinstated the immediate bar on election petitions. The *Lamon Gasket* decision also defined the criteria of a "reasonable period of time" to be no less than six months and no more than a year after the parties' first bargaining session, ensuring that meaningful bargaining can ensue.[14] Now the Board Majority proposes to reinstate *Dana* by re-establishing that employees and rival unions may file a decertification petition as early as 45 days after a union receives voluntary recognition. The Board Majority's proposal also instructs employers to post an official Board notice informing employees of their right to seek a decertification petition once the 45 days have passed.[15]

The Board Majority claims the proposed rule is needed to guarantee that "employee free choice has not been impaired by a process that is less reliable than Board elections."[16] Yet the Majority fails to recognize the empirical data in the *Lamon Gasket* decision that voluntary recognition accurately reflects employees' choice to elect union representation. In *Lamon Gasket*, the Board Majority finds that during the first four years of the *Dana* procedures, only 1.2% of voluntarily recognized unions were decertified.[17] In the proposed rule, the Board Majority also implies that secret elections are the preferred and superior method to know if a union has majority support. However, the Board recently attempted to weaken the election process with a request for information[18] to update the "Election Rule,"[19] which streamlined the election process and made it possible for employees seeking to vote on union representation to cast their votes in a timelier manner.[20] In other words, within a two-year span the Board has meddled with the two avenues employees have to join a union.

The proposed rule on the voluntary recognition bar does not safeguard employees' free choice; rather it allows a minority of employees to decertify a union a majority of employees voted for. The Board Majority is adamantly ignoring statistical evidence that shows very few employees have "buyer's remorse" when they vote for representation. The proposed rule is an attempt by the Board to make it more difficult for workers to employ their right to join a union. We urge the Board to withdraw the proposal to remove the voluntary recognition bar doctrine.

Modified requirements for proof of Section 9(a) relationships in the construction industry

In the construction industry, when an employer has agreed to a collective bargaining agreement that, by its terms, demonstrates that the parties' bargaining relationship is governed by Section 9(a) of the NLRA, the employer may not treat the relationship as governed by Section 8(f) of the NLRA; the employer is therefore prohibited from unilaterally withdrawing recognition from the union when the collective bargaining agreement expires.[21] This is known as the *Staunton Fuel* doctrine. The Board Majority proposes overturning precedent on this issue. Member McFerran addresses the flaws of the proposal in detail in her dissent, pointing out that it will enable employers to avoid recognizing and bargaining with unions in the construction industry. Further, the Board Majority's decision to proceed with this matter via rulemaking and not case adjudication is particularly inappropriate given the small number of cases that involve this issue—given that only a small number of cases actually involve this issue (as the Board itself notes in

the proposed rulemaking).[22] Given the resources rulemaking consumes, it should be undertaken only when it involves broadly applicable issues. Therefore, we urge the Board to withdraw its proposed rule on the modified requirements for proof of Section 9(a) relationships in the construction industry.

Conclusion

EPI strongly opposes the NLRB's proposed rulemaking regarding three long-standing Board policies: the blocking charge doctrine, the voluntary recognition bar doctrine, and the *Staunton Fuel* doctrine. The three distinct, deeply flawed proposals would each make it more difficult for workers to gain or keep union representation. This marks the third time in under two years that the Trump Board has undertaken a rulemaking process that would result in workers losing existing rights. We urge the NLRB to abandon this flawed rulemaking and ensure that workers receive the full protections guaranteed them under the nation's fundamental labor law.

Sincerely,

Celine McNicholas
Labor Counsel and Director of Government Affairs
Economic Policy Institute

Margaret Poydock
Policy Associate
Economic Policy Institute

Notes

1. 84 Federal Register at 39939.
2. 84 Federal Register at 39939.
3. *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 514–515 (2009).
4. Dissent at 39940 quoting *Encino Motorcars, LLC v. Navarro,*-U.S.-,136 S. Ct. 2117 at 2126 (2016) quoting *FCC*, 556 U.S. at 515–516.
5. 29 U.S.C. § 151.
6. 29 U.S.C §157, §158.
7. 84 Federal Register at 39940.
8. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973).
9. 84 Federal Register at 39938. See fn. 71.
10. Alex Ebert and Hassan A. Kanu, "Federal Labor Board Used Flawed Data to Back Union Election Rule," *Bloomberg Law*, December 5, 2019.
11. 357 NLRB at 741 fn. 7.

12. 29 U.S.C. §§ 159(c)(1)(A)(i).

13. *Keller Plastics Eastern, Inc*. 157 NLRB 583 (1966).

14. See *Lamon Gasket*, 357 NLRB at 748.

15. It should be noted that in 2014 the U.S. Court of Appeals for the District of Columbia Circuit invalidated a previously proposed rulemaking by the NLRB that would have required private-sector employers to post notice of employee rights in the workplace. See National Labor Relations Board, "The NLRB's Notice Posting Rule" (press release), January 6, 2014.

16. 84 Federal Register at 39938.

17. See *Lamon Gasket*, 357 NLRB at 742.

18. "Representation—Case Procedures" 82 Fed. Reg. 58783 (December 14, 2017).

19. "Representation—Case Procedures" 79 Fed. Reg. 74308–74490 (December 15, 2014).

20. Celine McNicholas and Marni von Wilpert, "EPI Comment on the National Labor Relations Board's Updated Election Rule," comments submitted to National Labor Relations Board Chairman Marvin E. Kaplan, April 16, 2018.

21. *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001).

22. 84 Federal Register at 39952.