



Statement of the U.S. Chamber of Commerce

AMBUSHED: HOW THE NLRB'S NEW ELECTION RULE HARMS EMPLOYERS & EMPLOYEES

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Good morning Chairman Alexander, Ranking Senator Murray and Senators of this Committee. On behalf of the U.S. Chamber of Commerce, thank you, for inviting me to testify on this very important and time-sensitive topic. The Chamber is the world's largest business federation, representing more than three million businesses of all sizes, industry sectors, and geographical regions.

My name is Mark Carter. I am the Labor Practice Group Chair and a partner with the law firm of Dinsmore & Shohl LLP. I have spent most of my career representing employers in labor relations matters. This does not mean I never agree with unions. In fact, during my seven year tenure as a member of the Federal Service Impasses Panel during the administration of President George W. Bush, I frequently voted for unions in matters brought before the Panel. However, because I have represented employers in my private practice of law, I have a better ability to testify regarding their perspective and posture as it relates to the NLRB's "ambush" election regulation.

I have practiced law for nearly 29 years focusing on labor relations law and the NLRB's ambush regulation is, without question, the most dramatic revision to the processes surrounding that law I have ever confronted. Mr. Chairman, I have reviewed the very technical changes that this regulation makes to the union election process and I conclude that the changes wrongly accelerate the election process to the detriment of both employers and employees. But let me cut to the chase here. I have been involved in numerous union election campaigns and this regulation will, quite simply, stack the deck against employers while depriving employees of information they need to make a rational decision. While the purpose is clouded behind numerous technical

adjustments to the current process, that will be the end result. And unfortunately we know that is indeed the very purpose of this regulation.

With your permission, Mr. Chairman, I hope to describe for the Committee some of the challenges which will confront employers in not only complying with the regulation, but more importantly, the insurmountable challenge of exercising their rights as created by Congress in the National Labor Relations Act while complying with the regulation.¹

I. **The NLRB's Ambush Regulation Restricts Employers' Statutory Free Speech Rights**

Before discussing the Board's "ambush" regulation, at the outset I believe it is important to note that although it is not perfect, the current representation system works well. In my experience, I have seen unions win elections and I have seen unions lose elections. I have also seen both employers and unions effectively avail themselves of the Board's processes when they thought their rights were violated during a union organizing drive. Thus, in my opinion, there is simply no need for this regulation; which makes its true purpose – to increase union membership rolls – that much more apparent.

As already noted, the regulation is known in the management community as the "ambush election" regulation. The NLRB has described the regulation as the "final rule governing representation-case procedures." It has been referred to as the "ambush election" regulation because the regulation reduces the timeframe of a representational organizing campaign by a labor union from approximately 40 days to as little as 10 days. The dramatically shorter timeframe is seen by employers as an "ambush" in that the

¹ Of course, the Board's ambush election regulation does not occur in a vacuum. Rather, the final regulation comes at a time when the Board is pushing various policies to dramatically overhaul labor law in favor of their union allies. Chief among these is the *Specialty Healthcare* decision and the potential change in the Board's joint employer standard.

employer is unprepared for and unable to effectively respond to the petition for representation in the very short timeframe mandated by the new regulation.

Though couched in terms of fairness and efficiency, the fundamental principle of the ambush election regulation is that it is far easier to win a campaign when the other candidate is unaware of the election. A companion principle is that if the other candidate is consumed by bureaucratic obligations for the period of the campaign, your chances of winning the election are nearly assured.

The fundamental flaw in these principles for the National Labor Relations Board is that they are in direct contravention to the letter and intent of the statute they are obligated to enforce.

Section 8(c) of the National Labor Relations Act² states that:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this (Act), if such expression contains no threat of reprisal or promise of benefit.

The statute clearly anticipates that employers, unions and employees have a right to communicate regarding the benefits of, or negative impact resulting from, union organizing drives. The United States Supreme Court has recognized that §8(c) of the Act reflects a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust and wide-open debate in labor disputes.” *Chamber of Commerce v. Brown*, 554 US 60, 67-68 (2008). Similarly, our Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575, 617 (1969) recognized that “an employer’s free speech right to communicate his

² 29 USC §158(c)

views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board.”

The pragmatic impact of the ambush election regulation will necessarily infringe upon an employer’s free speech right by virtually eliminating the opportunity of an employer to communicate his or her views regarding unionization with employees. Similarly, the legislative goal of stimulating a full and robust debate amongst employees regarding union representation is stifled, if not eliminated, by engineering a process for a representational election where the employee only hears one side of the debate – and is deprived of engaging in a full discussion with everyone involved in the debate.

At least one situation from my career representing management is illustrative of how vitally important it is that employers are able to tell, and employees are able to hear, a side of the story that is not being told by union organizers. In 2011 I represented an employer that was presented with a representation petition by the NLRB. In the course of the union’s campaign, it had represented to the employees that their dues’ obligations would be significantly less than what the union had reported it charged members on a federally mandated form unions are required to file with the United States Department of Labor. The employer then published the LM-2 form filed by the union with the government which established what the union *actually* charged for dues. Armed with this information and other information that was disseminated by both the union and the employer during the campaign the employees voted not to be represented by the union. I am convinced that the free exchange of information that took place during that campaign helped those employees make this very important decision. When unions and employers are able to join in free and robust debate regarding unionization, the employees are able to learn

more and are better able to determine whom they believe and whom they discredit. This debate will not happen under the ambush election regulation.

Indeed, upon the effective date of the ambush election regulation, labor unions will be highly encouraged to organize by stealth without any bilateral debate. A labor union enjoys a distinct advantage in persuading employees regarding the benefits of union membership without the employer's knowledge of their effort because the employer is then unaware of any reason to communicate its views on the subject and is unable to rebut arguments that it is unaware of. The union is thereby in a posture to campaign toward an election that the employer is unaware of. In this way, the regulation very much mirrors the Employee Free Choice Act, which would have limited employers' abilities to communicate to employees because of its card check provision.

Ultimately, the employer becomes aware that an organizing campaign has been underway by the same mechanism existing under the current regulations: the employer will receive a copy of a petition for a representational election, and the election may occur in as little as 10 days after. The employer and employees are then at a distinct disadvantage. Moreover, as set forth in detail below, the burdens upon the employer from that point will be dramatically more difficult to accomplish at every successive step of the process.

II. The Initial Hearing and Statement of Position Requirements are Unduly Burdensome

By way of illustration, the following scenario will confront employers under the Board's "ambush" election regulation. It is important to recall in reviewing this testimony that the median number of employees in a bargaining unit petitioning for representation

before the NLRB from 2004 through 2013 was 23 to 28.³ Employers who employ this volume of employees, in my experience, do not retain in-house counsel – much less counsel with experience practicing before the NLRB. Indeed, most of the employers whom I have served of this relative size were unfamiliar with any attorneys who focused on, or merely had experience practicing law before, the NLRB. As such, the first task facing an employer who desires to respond appropriately to a representational petition is the task of locating and retaining competent counsel. An ordinary timeframe for that task, in my experience, is approximately 3 business days (if the petition was filed on a Friday and/or holiday weekend that could extend the period to five or six calendar days.)

Under the final rule, the NLRB will schedule a representational hearing within 8 calendar days of the date the petition is filed. The day before the hearing the employer must present a Statement of Position articulating, *inter alia.*, **all** of the possible legal arguments it desires the NLRB to consider regarding the petition.⁴ This Statement of Position is, for all intents and purposes, a legal brief – a combination of factual and legal analysis – which is an outrageous requirement to ask of employers, and particularly those small employers who do not have legal counsel. Worse, if the employer fails to include a particular argument in the Statement of Position, those arguments are **waived, meaning that the employer will not be able to raise them at the hearing.** Clearly, this raises serious due process concerns and is another example of how the rule stacks the deck in favor of labor unions.

³ 79 Fed Reg. at 7377 n. 46

⁴ The scope of issues which a hearing officer would consider at the hearing is not precisely defined, in part, because the necessary form the Respondent – or Employer – would be required to complete identifying the issues has not been published. The regulation anticipates the publication of a “Statement of Position” form. However, to date, one has not been available.

There are 13 types of information and/or positions the employer is required to gather and present in the seven days following a petition. A quick review of these 13 categories demonstrates how incredibly difficult it will be for employers – and particularly small employers – to provide such information to the Board in such a short timeframe.

They are:

1. **Whether the employer agrees that the NLRB has jurisdiction.** This is a legal issue that an employer or lawyer unfamiliar with the Act would need to research.
2. **Whether the employer is in “interstate commerce” as defined by the Act.**
3. **Whether the employer agrees with the proposed bargaining unit.** This answer requires a legal analysis of the description and the propriety of the types of employees [statutory employee or supervisory] who are described.
4. **If not, the basis for the employer’s contention that the unit is not appropriate.** This response requires a blended factual and legal argument focused on the type of work accomplished by the individuals who work within the described unit and a legal basis establishing why certain employees should not be included, certain locations should not be included, or why the unit should be expanded to include other employees.
5. **Description of the most similar unit that the employer concedes is appropriate.** This response would require the employer to describe a unit of its own making that is “most similar” to the unit described by the union and **admit** that the unit is appropriate, again, precluding the employer from challenging the propriety of the forced admission of an “appropriate” unit.
6. **Identify any individuals occupying classifications in the petitioned for unit whose eligibility to vote the employer intends to contest and the basis for each such contention.** To respond to this would be practically impossible in a large unit. Employers can object to the inclusion of workers being included in a unit for a variety of reasons. They may be supervisors, employed by contractors, professionals, or meet other descriptions. Given the cumulative obligations of the final rule, and the absence of a real opportunity to investigate, this burden is unrealistic and not likely to be complied with in any but the most modest of proposed units.

7. **Raise any election bar.** This response will require legal analysis and factual analysis involving previous union representation at the facility or past representational election history.
8. **State the employer's position concerning the type, dates, times and locations of the election and the eligibility period.** This response requires an understanding of what the final unit will be. The unit may involve two or more locations of an employer's business and where that issue is not resolved, an employer will be precluded from making a predictive or useful response.
9. **Describe all other issues the employer intends to raise at the hearing.** This response requires a comprehensive factual and legal identification of any objection or issue the employer **could** articulate and if it fails to do so, the issue is waived. This aspect of the required position is the single most unrealistic and unjust of the requirements of the position statement.
10. **Name, title, address, telephone number, fax number and e-mail address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representational proceeding.** This response will ordinarily require retention of counsel or a representative.
11. **Full names, work locations, shifts and job classification of all individuals in the proposed unit.** Beyond being a laborious task (for example, many non-union represented employees do not have job "classifications") §102.63(b)(iv) will require the employer to disclose the employees' telephone numbers, home addresses and e-mail addresses. This disclosure subjects employees, at a minimum, to the inconvenience of potentially unwanted and uninvited emails, telephone calls and home visits from union organizers. However, given the unsavory history of labor organizing, the risks associated with divulging this personal information are greater.
12. **Full names, work locations, shifts and job classifications of all individuals in the most similar unit the employer concedes is appropriate.** As with number 5 above, this section requires the employer to identify and concede the propriety of the "most similar" unit to the unit identified by the petitioning union. Not only is the concession required, but an identification of the employees, their shifts and classifications is required.
13. **The list of names shall be alphabetized and in an electronic format approved by the Board's Executive Director unless the employer certifies that it does not possess the capacity to produce the list in the required form.**

Cumulatively the obligations recited above are in and of themselves onerous given the allotted time for a response; but two specific factors exacerbate the situation. First, the Statement of Position must be presented at the representational hearing which must occur within eight calendar days. During this time, the employer would have to retain counsel, research and review all of the information mandated, as well as prepare witnesses to testify to support its factual allegations. This scenario is untenable.

The second reason is that during the period it is preparing this information, it is presumed that the employer is, of course, simultaneously: 1) continuing to operate its business; and 2) exercising its rights under §8(c) of the Act to communicate with its employees regarding the petition to further the robust and full debate that is the goal of the statute. Under the ambush election regulation, the reality is that neither is likely to happen. Instead, the employer will be so consumed with populating the Board's file regarding the petition that its ability to operate its business and its right to communicate with its employees will be at best frustrated if not flatly eliminated by the requirements of the regulation.

III. The Voter Eligibility List Raises Concerns for Both Employers and Employees

But the employer's obligations do not end there. Within **two days** of the receipt of a direction of election, which should follow the hearing in rapid fashion, the regulation requires the employer to produce a final voter eligibility list. The list⁵, in many respects, is anticipated by the Statement of Position, but here the regulation is very clear that the list must contain the employees' home address, telephone number, and e-mail address.

⁵ This list of employees is commonly called the "Excelsior" list.

This information currently is not required to be produced under NLRB regulation. This sensitive and personal information must be provided regardless of whether the employee authorizes its production. I have personally been involved in cases in which union officials engaged in violence when they did not get what they wanted, so I understand why divulging this sensitive information raises serious privacy concerns for employees.

For employers, the two day turnaround time will be very difficult to satisfy. Most employers, but especially small employers, do not have large Human Resources department staffs and often rely on one person to perform all HR functions. The task of assembling the voter eligibility list will likely fall on the shoulders of this individual who will also likely be occupied performing their daily activities: administering payroll, interviewing job applicants, processing FMLA requests, meeting with benefit vendors, etc. And what if this individual is out of town or otherwise unavailable during this two day period for illness, vacation, a funeral or training? Then the employer may be out of luck, and submitting an inaccurate or untimely voter eligibility list could be grounds for overturning the election results.

The regulation also eliminates the 25 day limitation on the scheduling of an election. Currently, the NLRB prohibits the scheduling of an election for at least 25 days after the issuance of the Regional Director's Decision and Direction of Election in order to allow time for the Board to review any subsequent appeal. Further, the parties may currently seek review of a Regional Director's order of an election as of right on a variety of legal determinations such as who the eligible voters will be and what the proper bargaining unit voting will be. Under the final rule, there is no pre-election review as of right and the Regional Director is free to order an immediate election within his or her

discretion as the 25 day period has been removed. Theoretically, the Regional Director could direct the election to take place the day after the hearing, or, only 10 days after the petition was filed. The elimination of this 25 day period pragmatically eliminates the possibility of an employer campaign, to the obvious detriment of employers, but also to the detriment of employees, who will only hear one side of the story.

IV. Conclusion

The sum and substance of this regulation is that it:

- 1) Makes it highly unlikely an employer can obtain legal advice to compile and present mandatory positions within the maximum eight days between a representational petition and representational hearing;
- 2) Simultaneously frustrates or prohibits the employer from operating its business while it is gathering and preparing the mandatory statement of position;
- 3) Denies the employer meaningful review of pre-election legal determinations by a Regional Director; and
- 4) Frustrates or prohibits the employer from exercising its §8(c) rights to communicate with its employees prior to the election.

However, as onerous as the regulation is to employers, it is most damaging to employees. Employees, seemingly by design, are likely to receive only the union's perspective in an organizing campaign instead of the full and robust debate of the issues anticipated by Congress in creating the Act. They will be compelled to make this profoundly important decision on the basis of "half" of the facts in direct contravention to the purposes and policies behind the law. Moreover, in the process, their privacy rights will necessarily become diluted and the risks attendant to that status will multiply. The "level playing field" that Congress has sought to preserve in the area of labor relations will be abandoned in a plain effort to provide labor unions with the upper hand, and this

imbalance will be the work product of a regulatory agency without any involvement by Congress itself.

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For the reasons described above, the Chamber opposes the NLRB's ambush election regulation. Mr. Chairman and members of the Committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.