NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142–AA16

Representation—Case Procedures:

[3] Other discretionary election bar policies established through adjudication, all of which preclude electoral challenges to an incumbent union bargaining representative for some period of time, include the contract bar, [illegible], 139 NLRB 1123, 1125 (1962) (precluding election for up to first 3 years of contract term); the affirmative remedial bargaining order bar,

[1] NLRB Casehandling Manual (Part Two) Representation Proceedings.

[2] In Board terminology, representation election petitions filed by labor organizations are classified as RC petitions and those filed by employers are RM petitions; decertification petitions filed by an individual employee are classified as RD petitions.

283 F.2d 705, 710 (5th Cir. 1960) (''Nor is the Board relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.''); v. ., 425 F.2d 665, 672 (2d Cir. 1970) (''[If] the charges were filed by the union, adherence to the [blocking charge] policy in the present case would permit the union, as the beneficiary of the [e]mployer's misconduct, merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power. If, on the other hand, the charges were filed by others claiming improper conduct on the part of the [e]mployer, we believe that the risk of another election (which might be required if the union prevailed but the charges against the Employer were later upheld) is preferable to a three-year delay.''); v. ., 444 F.2d 1064, 1069 (5th Cir. 1971) (''The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative 'of their own choosing' to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced.''); v. ., 445 F.2d 415, 420 (8th Cir. 1971) (''[I]t appears clearly inferable to us that one of the purposes of the [u]nion in filing the unfair practices charge was to abort [r]espondent's petition for an election, if indeed, that was not its only purpose.'').

The potential for delay is the same when employees, instead of filing an RD petition, have expressed to their employer a desire to decertify an incumbent union representative. In that circumstance, the blocking charge policy can prevent the employer from being able to seek a timely Board-conducted election to resolve the question concerning representation raised by evidence of good-faith uncertainty as to the union's continuing majority support. Thus, the supposed ''safe harbor'' of filing an RM election petition that the Board majority referenced in . , , 333 NLRB 717, 726 (2001), as an alternative to the option of withdrawing recognition (which the employer selects at its peril) is often illusory. As Judge Henderson stated in her concurring opinion in , v. , it is no ''cure-all'' for an employer with a good-faith doubt about a union's majority status to simply seek an election because ''[a] union can and often does file a ULP charge—a 'blocking charge'—'to forestall or delay the election.' '' 849 F.3d 1147, 1159 (D.C. Cir. 2017) (quoting from Member Hurtgen's concurring opinion in , 333 NLRB at 732).

Concerns have also been raised about the Agency's regional directors not applying the blocking charge policy consistently, thereby creating uncertainty and confusion about when, if ever, parties can expect an election to occur. See Zev J. Eigen & Sandro Garofalo, , 98 Minn. L. Rev. 1879, 1896–1897 (2014) (''Regional directors have wide discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive unmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.'').

In 2014, the Board engaged in a broad notice-and-comment rulemaking review of the then-current rules governing the representation election process. In the Notice of Proposed Rulemaking (NPRM) issued on February 6, 2014, a Board majority proposed numerous specific changes to that process. 79 FR 7318. The overarching purpose of these proposed changes was ''to better insure 'that employees' votes may be recorded accurately, efficiently and speedily' and to further 'the Act's policy of expeditiously resolving questions concerning representation.' '' [7] Many, if not most, of the proposed changes focused on shortening the time between the filing of a union's RC petition for initial certification as an exclusive bargaining representative and the date of an election. With relatively few variations, the final Election Rule published on December 15, 2014, adopted 25 changes proposed in the NPRM. 79 FR 74308 (2014). The final Election Rule went into effect on April 14, 2015.

The 2014 NPRM included a ''Request for Comment Regarding Blocking Charges'' that did not propose a change in the current blocking charge policy but invited public comment on whether any of nine possible changes should be made as part of a final rule or through means other than amendment of the Board's rules.[8] Extensive commentary was received both in favor of retaining the existing policy and of revising or abandoning the policy. The final Election Rule, however, made only minimal revisions in this respect. The majority incorporated, in new Section 103.20, provisions requiring that a party requesting the blocking of an election based on an unfair labor practice charge make a simultaneous offer of proof, provide a witness list, and promptly make those witnesses available. These revisions were viewed as facilitating the General CoufacilitSA(adoptvailable. urtgen changes

[7] 79 FR 7323, quoting from v. ., 329 U.S. at 331, and , 261 NLRB 1001, 1002 (1982).

[8] 79 FR 7334–7335.

[9] 79 FR at 74418–74420, 74428–74429.

[10] 79 FR 74429.

[11] See discussion at 79 FR 74455–74456. The dissenters advocated ''a 3-year trial period in which petitions will be routinely processed and elections conducted in Type I blocking charge cases, with the votes thereafter impounded, even in cases where a regional director finds that there is probable cause to believe an unfair labor practice was committed that would require the processing of the petition to be held in abeyance under current policy.'' 79 FR 74456.

A 2015 review of the Election Rule by Professor Jeffrey M. Hirsch excepted the majority's treatment of the blocking charge policy from a generally favorable analysis of the rule revisions. Noting the persistent problems with delay and abuse, Professor Hirsch observed that ''[t]he Board's new rules indirectly affected the blocking charge policy by requiring parties to file an offer of proof to support a request for a stay, but that requirement is unlikely to change much, if anything. Instead, the Board should have explored new rules such as lowering the presumption that favors staying elections in most circumstances or setting a cap on the length of stays, either of which might have satisfied the blocking charge policy's main purpose while reducing abuse.'' [12]

Statistics provided by the General Counsel for years postdating the 2015 implementation of the Final Rule confirm Professor Hirsch's observation that the rule did not change much.[13] Those statistics do indicate a drop in the number of blocked cases that have been processed to an election for Fiscal Years (FY) 2016, 2017, and 2018, possibly indicating that the new evidentiary requirements have facilitated quick elimination of obviously baseless blocking charges. On the other hand, the statistics indicate the same or greater disparity between blocked and unblocked cases in petition-to-election processing time, when compared to the 2008 statistics analyzed in the Estreicher study.[14] Even more concerning is the information that on December 31, 2018, there were 118 blocked petitions pending; those cases had been pending for an average part 9 124.T* (dispar)Tj;ccases th 9 (De59 349oa8 not changer stud)Tj 0 -(anoli.0028 Tw 7cdther of w (D

[12] Jeffrey M. Hirsch, *:* *9*, 64 Emory L.J. 1647, 1664 (2015).

[13] See Majority Appendix B, available at *://* . . .

[14] See Majority Appendix A, available at *://* . . . The median number of days from petition to election from 2016 through 2018 was 23 days in unblocked cases. The median number of days from petition to election in the same period for blocked cases ranged from 122 to 145 days.

[15] We note that our dissenting colleague takes a different view of the breadth of the current blocking charge policy's impact, based on her preliminary review of statistics provided to us and her by the General Counsel. However, she acknowledges that in FY 2016 and FY 2017, about 20 percent of decertification petitions filed were blocked. She views this number as either inconsequentially slight or justifiable on policy grounds. That is her opinion. We welcome the opinions of others, including their statistical analyses, in comments responsive to the NPRM.

[16] The 2007 decision followed a decision granting review, consolidating two cases, and inviting briefing by the parties and amici on the voluntary recognition bar issue. *.*, 341 NLRB 1283 (2004). In response, the Board received 24 amicus briefs, including one from the Board's General Counsel, in addition to briefs on review and reply briefs from the parties. *.*, 351 NLRB at 434 fn. 2.

[17] 351 NLRB at 441. The recognition bar modifications did not affect the obligation of an employer to bargain with the recognized union during the post-recognition open period, even if a decertification or rival petition was filed. Id. at 442.

[18] v. *G P* ., 395 U.S. at 603.

[19] ., 351 NLRB at 438.

[20] Id. at 439.

[21] Id.

[22] Id.

[23] Id., citing McCulloch, , Proceedings of ABA Section of Labor Relations Law 14, 17 (1962).

[24] Id.

[25] Similar to the

should reinstate the notice and open period requirements.

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In 1959, Congress enacted Section 8(f) of the Act to address unique characteristics of employment and bargaining practices in the construction industry. Section 8(f) permits an employer and labor organization in the construction industry to establish a collective-bargaining relationship in the absence of majority support, an exception to the majority-based requirements for establishing a collective-bargaining relationship under Section 9(a). While the impetus for this exception to majoritarian principles stemmed primarily from the fact that construction industry employers often executed pre-hire agreements with a labor organization in order to assure a reliable, cost-certain source of labor referred from a union hiring hall for a specific job, the exception applies as well to voluntary recognition and collective-bargaining agreements executed by a construction industry employer that has employees. However, the second proviso to Section 8(f) states that any agreement that is lawful only because of that s T* (t3sg)Tj kr5[mjob, the excsly beean0 T ctiteds w3s4ion

[30] , 307 NLRB 1494, 1495 (1992) (citing , & , supra). In an Advice Memorandum issued after , & , the General Counsel noted record evidence that the employer in that case ''clearly knew that a majority of his employees belonged to the union, since he had previously been an employee and a member of the union. However, the Board found that in the absence of positive evidence indicating that the union sought, and the employer thereafter granted, recognition as the 9(a) representative, the employer's knowledge of the union's majority status was insufficient to take the relationship out of Section 8(f).'' . , ., Case 9–CA–25539, 1989 WL 241614.

presented, the Board will be better able to make an informed judgment as to the impact the current bar policies have had on employee free choice.

Second, rulemaking does not depend on the participation and argument by parties in a specific case, and it cannot be mooted by developments in a pending case. For example, in , , Case 05–CA–158650, the Board recently sought public input on the issue of what proof should be required to establish a majority-supported Section 9(a) bargaining relationship in the construction industry by issuing a notice and invitation to file briefs. 2018 WL 4357198 (September 11, 2018). The Charging Party Union in that case thereafter filed a request to withdraw its charge. The Board granted the request by unpublished order issued on December 14, 2018, 2018 WL 6616458, thus precluding the possibility of addressing the issue presented through adjudication until such unforeseen time as it might be raised in a new case.

Third, by establishing the new election bar standards in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively)

[illegible]

[39] v. ., 329 U.S. at 331.

[40] v. , 22 F.3d 1114, 1122 (1994).

[41] Even that remedial presumption of taint is not without its critics. See & . v. , 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case.").

[42] 79 FR 74456, citing . ., 134 NLRB 1275 (1961) (to be found objectionable, alleged conduct must occur during critical period between petition and election dates).

[43] v. ., 329 U.S. at 331. As indicated in fn. 4 above, the Board disagrees with observations by both the majority and dissent in their respective discussions of the 2014 Election Rule that the blocking charge policy was incorporated into or embedded in that rule. Sec. 103.20 incorporates only certain evidentiary procedures to be applied to blocking charges. Although the majority clearly endorsed the current blocking charge policy, determination of whether and when a blocking charge policy should apply is not addressed in the 2014 Election Rule. It remains a product of adjudication outside the Board's Rules, details of which are summarized in the General Counsel's nonbinding Casehandling Manual.

the parties' respective arguments are fresh in the mind of unit employees. Balloting would occur with the understanding that allegations have been proffered, regardless of whether probable cause has been found; thus, neither the charging party nor the charged party would be in control of the narrative underlying the election campaign. Should the director find that the ULP charge is without merit, the count and resulting tally of ballots could occur immediately, rather than after a further delay while the petition is unblocked, an election is either negotiated or directed, the mechanics of the pre-election period dispensed with, and balloting take place. Moreover, any burden in conducting elections created where the ballots may never be counted is more than offset by the benefit of preserving employees' free choice. Indeed, the preservation of employee free choice through a vote and impound procedure far outweighs any other concerns.'' [44]

The Board believes, subject to comment, that the proposed vote-and-impound rule best satisfies the goal of protecting employee free choice in cases where, under existing policy, the election would be blocked by assuring that petitions will be processed to an election in the same timely manner as in unblocked petition cases. The concern for protection of that choice from coercion by unfair labor practices will still be met by holding the counting of ballots and certification of results until a final determination has been made as to the merits of the unfair labor practice allegations and the effects on the election of any violations found to have been committed.

V

The Board proposes, subject to comments, to overrule , to reinstate the notice and open period procedures following voluntary recognition under Section 9(a), and to incorporate those procedures in the Rules as a new Section 103.21(a). This modification to the current immediate voluntary recognition bar is not intended to and should not have the effect of discouraging parties from entering into collective-bargaining relationships and agreements through the undisputedly valid procedure of voluntary recognition based on a contemporaneous showing of majority support. However, the Board believes, subject to comments, that the justifications expressed in the Board majority and dissenting opinions for the limited post-recognition notice and open period requirements are more persuasive than those expressed by the Board majority in support of an immediate voluntary recognition bar.

It is undisputed that ''secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.'' v. *P* ., 395 U.S. at 602. Although voluntary recognition is a valid method of obtaining recognition, authorization cards used in a card-check recognition process are ''admittedly inferior to the election process.'' Id. at 603. The Board believes that the majority failed to accept this distinction or the several reasons, summarized above, articulated by the majority supporting it. Further, the Board believes that the majority failed to address at all the cumulative effect of an immediate recognition bar and a subsequent contract bar that would apply if parties execute a collective-bargaining agreement during the six-month to one-year reasonable bargaining period following the first bargaining session following voluntary recognition. In this circumstance, employees denied an initial opportunity to vote in a secret-ballot Board election on the question of representation could be denied that opportunity for as many as four years.[45]

[44] General Counsel's April 18, 2018 response to the Board's Request for Information regarding the 2014 Election Rule, p. 2, available for viewing on the Board's public website at ://

[45] Indeed, because the reasonable period for bargaining runs from the date of the first bargaining session following voluntary recognition, and because parties often need time following voluntary recognition to formulate their positions before they meet and bargain, the combination of immediate voluntary recognition bar followed by contract bar could deny employees a vote on the question of representation for more than four years.

[46] , 357 NLRB at 751.

[56] The Board has also directed an immediate election, despite pending charges, in order to hold the election within 12 months of the beginning of an economic strike so as not to disenfranchise economic strikers, *P* ., 139 NLRB 601, 604–605 (1962), or in order to prevent harm caused to the economy by a strike resulting from an unresolved question of representation, , 107 NLRB 364, 375–376 (1953). The Casehandling Manual sets forth other circumstances when regional directors may decline to block petitions. Casehandling Manual Section 11731.

[57] For either Type I or II charges, parties have the right to request Board review of regional director determinations to hold petitions in abeyance or to dismiss the petitions altogether. See 29 CFR 102.71(b); Casehandling Manual Sections 11730.7, 11733.2(b).

[58] Accord v. , 641 F.Supp. 415, 417–418, 419 (D.D.C. 1986) (rejecting claim that Section 9 imposes on the Board a mandatory duty to proceed to an election whenever a petition is filed notwithstanding the pendency of unfair labor

and impound the ballots pending Board resolution of the charges.[59]

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[59] The majority's proposal is thus is even more radical than the position unsuccessfully advocated in 2014 by dissenting Members Miscimarra and Johnson, who proposed a vote-and-impound procedure merely for cases involving Type I blocking charges. 79 FR 74308, 74456 (Dec. 15, 2014). The majority never explains whether it considered this alternative, and, if so, why it was rejected.

[60] See April 13, 2018 Regional Director Committee's Response and Comments to the Board's Request for Information on the Representation-Case Procedures p.1 (reporting that directors ''do not see a need to change'' blocking charge Section 103.20).

[61] Nor does the majority explain why it is proposing to jettison the blocking charge policy in the context of initial organizing campaigns to select union representation (involving ''RC'' petitions), based merely on alleged abuse in the context of decertification campaigns to remove incumbent unions (involving ''RD'' petitions).

[62] Compared to the countless examples of cases where employers engage in coercive behavior—such as instigating decertification petitions, committing unfair labor practices that inevitably cause disaffection from incumbent unions, and engaging in unfair labor practices after a decertification petition is filed—in an effort to oust incumbent unions, or engage in coercive behavior to sway employee votes in the context of initial organizing campaigns, [illegible] Board Volumes 1–368, the majority cites only a few isolated cases arising during the 80-plus year history of the blocking charge policy to support its claim that unions abuse the policy. And the cited cases hardly constitute persuasive authority for jettisoning the blocking charge policy. Two of the cited cases— [illegible] v. [illegible] *P* [illegible]., [illegible]., 444 F.2d 1064 (5th Cir. 1971) and [illegible] v. [illegible]., 283 F.2d 705 (5th Cir. 1960)—arose in the Fifth Circuit, which in fact has subsequently and repeatedly [illegible] the blocking charge policy, recognizing that that the policy has been ''legitimized by experience.'' See [illegible] v. [illegible], 502 F.2d at 1028–1029 (and cases cited therein); [illegible], [illegible]. v. [illegible], 826 F.3d 215, 228 fn. 9 (5th Cir. 2016). ''[T]ime and again'' the Fifth Circuit has taken pains to note that cases such as [illegible] do not constitute a broad indictment of the blocking charge policy, but merely reflect the ''most unusual'' circumstances presented there. See [illegible] v. [illegible], 502 F.2d at 1030–1031.

Similarly, in [illegible] v. [illegible]., [illegible]., the court wholeheartedly endorsed the notion that the Act requires the Board ''to insure . . . employees a free and unfettered choice of bargaining representatives.'' 425 F.2d 665, 672 (2d Cir. 1970). While the court criticized the Board for declining to conduct a rerun election before the employer's unfair labor practices were remedied, that was only because of the highly unusual circumstances presented there, where the employer's unlawful acts were actually designed to support the incumbent union against the decertification petition. See id. at 667, 669, 672 (''If ever there were special circumstances warranting the holding of [a rerun] election, they existed here'' because the union was the ''[illegible] of the Employer's misconduct,'' and thus the union was using the charges to achieve an indefinite stalemate ''designed to perpetuate [itself] in power.''). Although the Court also opined, ibid, that a rerun election should not have been blocked even if the charges had been filed by the decertification petitioner, the blocking charge policy as it exists today would not have blocked the election in such circumstances, because, as shown, a petition is not blocked unless, among other things, the charging party requests that its charge block the petition.

Meanwhile, the Seventh Circuit's conclusion that the union abused the blocking charge policy in *P* [illegible]. v. [illegible], is mystifying. 260 F.2d 880, 882 (7th Cir 1958). The court appeared to blame the union first of all for seeking an adjournment of the representation case hearing so that it could file an amended unfair labor practice charge. But the facts as found by the court bely any such conclusion; the discharge that was a subject of the amended unfair labor practice charge in question occurred after the adjournment, not before. Thus, the union could not have filed that amended charge before the hearing. 260 F.2d at 882. Moreover, the court ultimately agreed with the Board that the union's amended charge—alleging that the employer had discharged a union supporter—had merit. Id. at 882–883. The court also appeared to blame the union for seeking to delay the representation proceeding by filing a [illegible]-petition amended unfair labor practice charge, because the union had chosen to file a petition despite its other [illegible]-petition unfair labor practice charges. But such criticism was also unwarranted. Thus, the court ignored that, as the employer itself argued to the administrative law judge, while the union would not waive the amended unfair labor practice charge, the union was requesting a delay based on the post-petition amended unfair labor practice allegations. See *P* [illegible]., 120 NLRB 987, 995 (1958). In any event, by filing a petition despite [illegible]-petition misconduct, a union certainly cannot be deemed to have waived its right to request that the petition be held in abeyance if the employer commits additional unfair labor practices [illegible]-petition that would interfere with employee free choice.

And [illegible] v. [illegible]., was not even a blocking charge case, but instead arose at a time in the distant past when an employer had no right to decline a union's demand for recognition (and no right to demand that the union seeking 9(a) status win an election), unless the employer had a good faith doubt of the union's majority status. 445 F.2d 415, 417–418 (8th Cir. 1971). It was in that context that the union business agent made the statement that the court relied on in concluding that the union was not even interested in obtaining a free and fair election, and therefore had filed the charges to abort the employer's petitioned-for election and obtain a bargaining order. See id. at 417, 420.

[63] See Dissent Appendix, available at [illegible]:// [illegible]. (The Dissent Appendix includes my attempt to assemble and analyze a reliable list of the FY 2016- and FY 2017-filed RD, RC, and employer-filed RM petitions that were blocked pursuant to the blocking charge policy, independent of the data relied upon by my colleagues or provided to the public in the past. It also includes charts from the agency's website

Continued

showing the numbers of petitions filed during those two fiscal years.).

[64] In determining whether a petition was blocked by a meritorious charge, I applied the Office of the General Counsel's long-standing merit definition contained in OM 02–102 available at ://. . / - / - . Accordingly, a petition was deemed blocked by a meritorious charge if the petition was blocked by a charge that resulted in a complaint, a pre-complaint Board settlement, a pre-complaint adjusted withdrawal, or a pre-complaint adjusted dismissal. Id. at p.4. I note in this regard that the new Chairman and new General Counsel used the same merit definition in their Strategic Plan for FY 2019–FY 2022. See, ., .,

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[70] The majority also mistakenly argues that neither party will be able to control the preelection narrative under its proposed vote-and-impound procedure, whereas the blocking charge policy enables the party filing the unfair labor practice charge to control the narrative that the Board has blocked the petition because it has found ''probable cause'' that a party has committed unfair labor practices. The majority is wrong on both counts. Thus, under the blocking charge policy, neither the Board nor the regional director notifies unit employees that the petition is being held in abeyance because there is ''probable cause'' to believe that a party has committed unfair labor practices.

The Board, of course, has no contact at all with the unit employees. And when before an election is scheduled, a regional director decides to hold a case in abeyance because of blocking charges, the regional director communicates his or her decision only to the parties and does not even request that the employer post the abeyance letter for unit employees to read. In any event, the regional director's letter typically makes no reference to the sufficiency of the evidence in support of the charge. See, *e.g.*, October 27, 2016 abeyance letter in [illegible], Case 18–RD–186636 (''This is to notify you that the petition in the above-captioned case will be held in abeyance pending the investigation of the unfair labor practice charges in Case 18–CA–186811.'') Even when a regional director issues an order postponing or cancelling a scheduled election because of a blocking charge, and requests that the employer post the order so that employees will know that the election will not be held as scheduled, the regional director's order often merely states that the election is being postponed or cancelled because of a pending unfair labor practice charge, with no reference to the merits of the charge. See, *e.g.*, February 10, 2017 order postponing election in *X [illegible] P & [illegible]*, Case 08–RD–191774 (''This is to advise that the election scheduled for Friday, February 17, 2017 is indefinitely postponed pending the investigation of the unfair labor practice charge in Case No. 08–CA–192771, filed by United Food and Commercial Workers Union Local 880. Further processing of the petition is hereby blocked. The Employer should immediately remove all election notices and post a copy of this letter so that employees are advised that no election will be held.'')F , thatUniehe election [illegible] right

time is due to the time it takes to resolve the unfair labor practice issues, which, as shown, will still have to be resolved before the ballots can be counted and the results certified under the majority's vote-and-impound procedure.[72]

b.

Just as the majority fails to engage in a reasoned analysis of the supposed benefits of its proposed vote-and-impound procedure, so too does the majority fail to engage in a reasoned analysis of the costs of its proposed vote-and-impound procedure. As a result, it has failed to justify its current conclusion that the cost of conducting coercive elections in which the impounded ballots will never be counted is more than offset by the benefit of letting employees vote sooner in those cases where the blocking charges are subsequently determined to lack merit.

The majority's first mistake here is that it fails to ask a critical question—namely, what percentage of blocked petitions are blocked by meritorious charges. After all, if every blocked petition were blocked by a meritorious charge, my colleagues would have to concede that there would be no reason to change the policy. There would no point in holding elections and impounding ballots if the Board knew in advance that those ballots would never be opened because parties had committed unfair labor practices interfering with employee free choice or that were inherently inconsistent with the petition itself. To be sure, there is no way to be certain whether a particular charge is meritorious when it is filed, though, as the majority implicitly concedes, the Board's simultaneous offer-of-proof requirement does provide a tool for regional directors to weed out plainly nonmeritorious blocking charges. But it would be reasonable to expect that before proposing to jettison the blocking charge policy in favor of a vote-and-impound procedure, rational Board Members would analyze the relevant data to determine the percentage of petitions that are blocked by meritorious charges. Yet, the majority inexplicably fails to analyze the data.

If the majority wanted to proceed in a rational manner, it could have determined the percentage of petitions blocked by meritorious charges. The data necessary to reach that determination is available using the Agency's electronic case tracking system 05inexplicably fic case trrd's sim_kxGeoss been unable to pee choice or

proposed vote-and-impound procedure been in effect during the last 12 years, the ballots in those cases would have never been counted.

[72] It is notable that the majority has seemingly failed to consider other actions outside the context of this rulemaking that might address unnecessary delays in the processing of blocking charges. For example, the current General Counsel has terminated the practice of requiring regional directors to adhere to the Impact Analysis system for prioritizing the processing of unfair labor practice charges (See GC Memorandum 19–02 p. 3), which had placed blocking charges in Category III, the category of charges to be afforded highest priority, because those charges involve allegations ''most central to achievement of the Agency's mission.'' See Casehandling Manual Sections 11740, 11740.1. If anything, I would think that in its role of supervising delegated authority under Section 3(b), the Board Majority would want to look into this change and take steps to ensure that blocking charges are afforded the highest priority in terms of case processing.

The majority's failure to consider such an obvious alternative to address delay evidences the arbitrary nature of the Majority's approach. The majority also should have analyzed the impact the mandatory-offer-of-proof and prompt-furnishing-of-witness requirements have had on the time it takes for regional directors to determine that a blocking charge lacks merit and the impact those requirements have had on the merit rates of blocking charges. See , . v. , 826 F.3d 215, 228 (5th Cir. 2016) (citing amended Section 103.20's offer of proof requirement, and concluding that the Board ''considered the delays caused by blocking charges, and modified current policy in accordance with those considerations.''). Yet it appears that the majority has short circuited the process by prematurely deciding that more robust measures are necessary to deal with the problem of delay caused by nonmeritorious blocking charges.

[73] A petition may be deemed blocked in NxGen for a variety of reasons having nothing to do with the blocking charge policy.

[74] Ironically, the limited data relied upon by the majority simultaneously overcounts by some two dozen the number of petitions in FYs 2016 and 2017 allegedly blocked by the blocking charge policy. For example, the majority incorrectly counts petitions for which there were no associated charges. See, ., the nine separate petitions associated with , 1–RC–183014 et al. The majority also mistakenly counts petitions that were held up because of internal union constitutional provisions governing raiding situations. See, ., , 29–RC–196404; , 18–RC–196593. See also NLRB Casehandling Manual Sections 11017, 11018.1, 11019 (noting that Board procedures accommodate established programs for handling representational disputes (raiding) between and among affiliates of the AFL–CIO). In other instances, the majority errs by counting certain petitions as being blocked by the blocking charge policy when the petitioner affirmatively indicated that it wished to proceed to the election (see, ., V , 06–RC–198567) or where the regional director rejected a request to delay the election and the charging party then withdrew its request to block (see, ., , 32–RC–179906). Further, the majority's faulty tally of allegedly blocked petitions incorrectly includes petitions that proceeded to an immediate election but later became the subject of overlapping objections/determinative challenges and unfair labor practice charges, and for which the charging party did not make a request to block the petition. See, ., , , 27–RC–195781; , 29–RC–175858. See 29 C.F.R § 103.20; GC Memorandum 15–06 p.35 (''[U]nder the final rule, the regional office will no longer block a representation case unless the party filing the unfair labor practice charge requests that the petition be blocked. . . .''). Indeed, it makes no sense to fault the blocking charge policy for the delay in resolving such post-election matters given that regional directors would also have been unable to immediately certify those election results until the objections or determinative challenges were resolved even if the Board had never adopted the blocking charge policy 80 years ago. (While similar flaws are likely present in the majority's FY 2018 cases as well, I did not have sufficient time prior to the publication of this NPRM to review the relevant data for FY 2018.)

meritorious Type II blocking charges or because the petitioner decides to withdraw the petition after the unfair labor practice conduct has been remedied—that strikes me as a statutory success, not a failure. After all, the Board should not conduct elections if the employer unlawfully instigated the petition or if the petitioner has a change of heart after the unfair labor practice conduct has been remedied and no longer wishes to proceed to an election.[75] By failing to ask critical questions and to analyze the relevant data, the Majority has acted arbitrarily and capriciously. See *V* . v. ., 463 U.S. 29, 43 (1983) (agency acts arbitrarily if it fails to examine the relevant data or failed to consider an important aspect of the problem).

The majority's failure to consider the relevant data leads it to underestimate the unnecessary financial costs its proposal will impose on the parties and the Board. Assuming that the number of representation cases resulting in ballot impoundment under the proposed vote-and-impound procedure is comparable to the number of representation cases that were blocked during FY 2016 and FY 2017, and assuming that the merit factor for the concurrent unfair labor practice charges filed under the Majority's vote-and-impound procedure remains comparable to the merit factor for blocking charges filed in FY 2016

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[75] And, as shown, there also is no need to conduct a decertification election if the incumbent union disclaims interest in representing the unit.

[76] Thus, my analysis indicates that out of the 217 RC, RD, and RM petitions that were blocked in Fiscal Years 2016 and 2017, 146 (or 2 out of every 3) of them, were blocked by meritorious charges. See Dissent Appendix, Sec. 1.

[77] Indeed, it seems impossible to square the majority's proposal—of requiring elections in all cases no matter the severity of the employer's unfair labor practices—with the Supreme Court's approval in of the Board's practice of an election and issuing a bargaining order when the employer has committed serious unfair labor practice conduct disruptive of the election machinery and where the Board concludes that ''the possibility of erasing the effects of [the employer's] past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order . . . .'' , 395 U.S. at 591–592, 610–611, 614.

vote-and-impound procedure further impairs employee free choice and contravenes the Board's responsibility to conduct free and fair elections. Thus, the majority's proposed regulatory text set forth in the final sentence of proposed section 103.20 indicates both that an election will be conducted and that the ballots will be impounded if a case settles prior to the conclusion of the election. Incredibly, this means that an election will be held and the ballots will be counted the parties sign a settlement agreement before the conclusion of the election, even if the employer has not fully remedied the unfair labor practice conduct as provided for in the agreement. Previously, the Board—including members of today's majority—would not have considered the ballots cast in such an election to reflect employees' unimpeded desires, given that ballots were cast before the alleged unfair labor conduct was fully remedied. See ., 367 NLRB No. 59, slip op. at 1, 3 (2018) (citing with approval ., 349 NLRB 227, 227 (2007) (''we hold that . . . the decertification petition can be processed and an election can be held associated with the settlement of the unfair labor practice charge.'')) (emphasis added).[78]

At the same time, the majority's proposed vote-and-impound procedure likewise will dramatically increase the number of employers who face uncertainty about whether they may unilaterally change their employees' working conditions. Under , an employer acts at its peril in making changes in terms and conditions of employment during the period between an election and the certification of the results. 209 NLRB 701, 703 (1974), enf. denied on other grounds, 512 F.2d 684 (8th Cir. 1975). Thus, if the union is ultimately certified as the employees' representative following the election, the employer will have to rescind any unilateral changes it made during that period and make employees whole for losses resulting from any such changes.

By definition, the majority's proposed vote-and-impound procedure will increase the number of cases where employers face that uncertainty. Under the majority's proposal, if the regional director or the Board ultimately determines in a given case that the impounded ballots should be opened and counted—because the unfair labor practice charge was ultimately determined to be lacking in merit—and the union turns out to win the election, then the employer will need to rescind, and make employees whole for any losses resulting from, any unilateral changes it made between the date of the election and the certification. A T* son turns ou/ke ef the a5 * ulti date of (and a. * ((emph the 656air l4. /T1_2 1 Tf 0 Twty"uldned Two yea whago,cereou its pe a iires, givenexistet 1ruso T* (fontunctice.022 sbetween th248 -cy dicis makhe equy may *dolij Tmployees' r(citach,cer mamat ty* TFnagencyj T* (on.ed the baexs itencFnadtimestTjio

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[78] For all these reasons, the majority's contention—that its proposed vote-and-impound procedure meets ''[t]he concern for protection of [employee free] choice from coercion by unfair labor practices''—is simply untenable.

[79] See , 368 NLRB No. 20 (2019) (Member McFerran, dissenting); , 368 NLRB No. 2, slip op. at 15 & fn. 56 (2019) (Member McFerran, dissenting); , 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); , 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); , 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); ., 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); , 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); , ., supra, slip op. at 14, 16 (Members Pearce and McFerran, dissenting); ., 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); ., 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting); , 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

[80] See ., 351 NLRB 434, 441 (2007).

[81] Id.

[98] See *& P & .*, ., 2014 WL 4302554 (Aug. 29, 2014); , . *1996 (V . .),*

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[106] The proposed rule does not permit a construction-industry employer to withdraw recognition where [illegible] would prohibit it. Nor does it provide that a construction-industry employer violates Section 8(a)(2) when it recognizes a union as the majority representative (as reflected in the collective-bargaining agreement), but cannot prove by ''positive evidence'' that the union had majority support. Presumably, the majority's failure to address unfair labor practice issues is related to its decision to combine rulemaking on the [illegible] issue with two other rulemakings, neither of which directly involves unfair labor practice issues.

[115] Moreover, contrary to the Majority's claim, was not the first time the Board found a Sec. 9(a) relationship based solely on contract language. See, ., , 315 NLRB 188, 189 (1994); P P , 318 NLRB 840, (1995), enfd. 101 F.3d 1341 (10th Cir. 1996).

[116] , supra, 325 NLRB at 719–720. In & , 291 NLRB 1034 (1988), cited by the majority and which preceded , the Board found the parties' relationship to be governed by Sec. 8(f) because the collective-bargaining agreement merely required unit employees to be members of the union—which was consistent with either a Sec. 8(f) or a Sec. 9(a) relationship—and there was no indication in the contract or in any other form that the union had sought and been granted Sec. 9(a) recognition. The relationship in & , in short, would have been found Sec. 8(f) under .

[117] See , supra at 720. n.15 (Board would continue to consider extrinsic evidence of the parties' intent where the contract's language is not independently dispositive). See also . , 356 NLRB 822, 824–825 (2011).

[118]

describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS).

[128] Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. v. , 306 U.S. 601, 606–07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of $500,000 or more. ., 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of $100,000 per year. ., 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least $50,000. , 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

—Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).

—employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery. 29 U.S.C. 153(3).

—employers subject to the Railway Labor Act, such as interstate rj Trchasel1ose engaged in factivity in interu

[126] U.S. Department of Commerce, Bureau of Census, 2016 Statistics of U.S. Businesses (''SUSB'') Annual Data Tables by Establishment Industry, *://* */* */* */2016/* */* */2016-* - . (from downloaded Excel Table titled ''U.S., 6-digit NAICS'').

[127] . The Census Bureau does not specifically define ''small business'' but does break down its data into firms with fewer than 500 employees and those with 500 or more employees. Consequently, the 500-employee threshold is commonly used to

[134] These NAICS construction-industry classifications include the following codes: 236115: New Single-Family Housing Construction; 236116: New Multifamily Housing Construction; 236117: New Housing For-Sale Builders; 236118: Residential Remodelers; 236210: Industrial Building Construction; 236220: Commercial and Institutional Building Construction; 237110: Water and Sewer Line and Related Structures Construction; 237120: Oil and Gas Pipeline and Related Structures Construction; 237130: Power and Communication Line and Related Structures Construction; 237210: Land Subdivision; 237310: Highway, Street, and Bridge Construction; 237990: Other Heavy and Civil Engineering Construction; 238110: Poured Concrete Foundation and Structure Contractors; 238120: Structural Steel and Precast Concrete Contractors; 238130: Framing Contractors; 238140: Masonry Contractors; 238150: Glass and Glazing Contractors; 238160: Roofing Contractors; 238170: Siding Contractors; 238190: Other Foundation, Structure, and Building Exterior Contractors; 238210: Electrical Contractors and Other Wiring Installation Contractors; 238220: Plumbing, Heating, and Air-Conditioning Contractors; 238290: Other Building Equipment Contractors; 238310: Drywall and Insulation Contractors; 238320: Painting and Wall Covering Contractors; 238330: Flooring Contractors; 238340: Tile and Terrazzo Contractors; 238350: Finish Carpentry Contractors; 238390: Other Building Finishing Contractors; 238910: Site Preparation Contractors; 238990: All Other Specialty Trade Contractors. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, *:// 2. . / - / / /2012/ _6 _ _ 2012. .*

[135] NAICS codes 236115–237130 and 237310–237990 have a small business threshold of $36.5 million in annual receipts; NAICS code 237210 has a threshold of $27.5 million in annual receipts; and NAICS codes 238110–238990 have a threshold of $15 million in annual receipts. See 13 CFR 121.201.

proposed rule on small entities.'' Specifically, agencies must consider establishing different compliance or reporting requirements or timetables for small entities, simplifying compliance and reporting for small entities, using performance rather than design standards, and exempting small entities from any part of the rule.[150]

First, the Board considered taking no action. Inaction would leave in place the current blocking charge policy and immediate voluntary recognition bar and allow for continued establishment of Section 9(a) bargaining relationships in the construction industry based on contract language alone. However, for the reasons stated in Sections I through III above, the Board finds it desirable to revisit these policies and to do so through the rulemaking process. Consequently, the Board rejects maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that exemptions for small entities would substantially undermine the purposes of the proposed rule because such a large percentage of employers and unions would be exempt under the SBA definitions. Specifically, to exempt small entities from the decision to eliminate the blocking charge policy would leave most small entities without the benefits of the superior vote-and-impound procedure. To exempt small entities from the modified voluntary recognition bar or to alter the notice posting timelines would be contrary to the purpose of the rule: Providing employees prompt notice of the employer's voluntary recognition of a union and of employees' right to petition to decertify that union or to support a different union. Similarly, to exempt small construction-industry entities from the elimination of the contract-language basis for establishing a Section 9(a) relationship would not serve the purpose of that change because the vast majority of employers in the construction industry are considered to be ''small employers.'' Further, it seems unlikely that drawing this distinction would be a permissible interpretation of the relevant statutory provisions. Also, if a large construction-industry employer entered into a bargaining relationship with a small labor union, both entities would be exempted, further undermining the policy behind this provision.

Moreover, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers. As the Supreme Court has noted, ''[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.'' [151] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

Because no alternatives considered will accomplish the objectives of this proposed rule while minimizing costs on small businesses, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including alternatives that it has failed to consider.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (''PRA''). 44 U.S.C. 3502(1) and (5). The PRA creates rules for agencies for the ''collection of information,'' 44 U.S.C. 3507, which is defined as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format,'' 44 U.S.C. 3502(3)(A). Collections of information that occur ''during the conduct of an administrative action or investigation involving an agency against specific individuals or entities'' are exempt from the PRA. 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4(a)(2).

As a preliminary matter, the new vote and impound procedure does not require any collection of information, so the PRA does not apply.

The two remaining changes contained in this proposed rule are exempt from the PRA because any potential collection of information would take place in the context of a representation or unfair labor practice proceeding, both of which are administrative actions within the meaning of the PRA. As the Board noted in its 2014 rulemaking, the Senate Report on the PRA makes it clear that the exemption in ''Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.'' Representation-Case Procedures, 79 FR 74306, 74468 (Dec. 15, 2014) (quoting S. Rep. No. 96–930, at 56 (1980)). 5 CFR 1320.4(c) (OMB regulation interpreting the PRA, providing that exemption applies ''after a case file or equivalent is opened with respect to a particular party.''). Every representation and unfair labor practice proceeding involves specific adversary parties, and the outcome is binding on and thereby alters the legal rights of those parties. See 79 FR 74469.

Specifically, the proposed modified voluntary recognition bar change triggers a three-step proceeding specific to an employer and union: (1) An employer or a union gives the Board notice of a voluntary recognition of a union, (2) the Board provides the employer with an individualized notice to be posted for a 45-day period, and (3) the employer certifies to the Board that the notice posting occurred. The proceeding closes once the Board receives the completed certification form. Because this proceeding is an administrative action involving specific adversary parties, it falls within the PRA exemption.

The voluntary recognition will only bar a decertification petition if the employer opts to post the notice and no decertification petition is filed within the 45-day period described above. If either of those conditions is not met, a decertification petition filed by an employee or a representation petition filed by a rival labor organization could potentially trigger an election proceeding that would also fall within the PRA exemption.

The proposed elimination of establishing a Section 9(a) relationship in the construction industry based solely on contract language will require unions that wish to achieve Section 9(a) status to collect and retain proof of majority support, to the extent that the union's majority status may be challenged in a potential unfair labor practice or representation proceeding. Both kinds of proceedings fall within the PRA exemption described above.[152]

Accordingly, the proposed rules do not contain information collection requirements that require approval of the Office of Management and Budget under the PRA.

[150] 5 U.S.C. 603(c).

[151] v. . . . , 402 U.S. 600, 603–04 (1971) (quotation omitted).

[152] As acknowledged in the Initial Regulatory Flexibility Analysis above, all three of the proposed changes may lead to elections that would not have been held under the prior policies. Nonetheless, particular collections of information required during the course of an election proceeding are not attributable to the instant proposed rule; instead, such requirements flow from prior rules, including the 2014 election rule. And in any event, even if such collections of information were attributable to this proposed rule, an election is a representation proceeding and therefore exempt from the PRA.

Text of the Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

2. Revise § 103.20 to read as follows: