DRAFT
8/18/11

KRUCHKO & FRIES
COUNSELORS AT LAW

Suite 400
502 Washington Avenue
Baltimore, Maryland 21204
----
(410) 321-7310

Suite 560
1750 Tysons Boulevard
McLean, Virginia 22102

Telephone: (703) 734-0554
Telecopier: (703) 734-0876
www.KruchkoandFries.com

Suite 900
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
----
(202) 347-6550

JOHN G. KRUCHKO

JKruchko@KruchkoandFries.com

August 22, 2011

VIA ELECTRONIC TRANSMISSION AND FIRST CLASS MAIL

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW.
Washington, DC 20570

RE: **Formal Comment of National Ready Mixed Concrete Association to Proposed Regulation 76 FR 2011-15307 (June 22, 2011)**

Dear Mr. Heltzer:

The National Ready Mixed Concrete Association ("NRMCA"), through its undersigned counsel, submits its formal comment on the above-referenced proposal by the National Labor Relations Board ("NLRB" or the "Board") to "amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer." 76 Fed. Reg. 36812 (June 22, 2011). As explained more fully below, the NRMCA believes that the Board's proposed amendments will effectively deny employees their right to make an informed choice in representation elections and seriously impair the opportunity for employer members of the NRMCA to exercise their Section 8(c) right to participate non-coercively in NLRB representation proceedings. *See* 29 U.S.C. § 158(c).

I. INTEREST OF THE NATIONAL READY MIXED CONCRETE ASSOCIATION

The National Ready Mixed Concrete Association was founded in 1930. NRMCA represents 1300 member companies and their subsidiaries employing more than 125,000 American workers, of which many are unionized. The industry is currently estimated to include more than 65,000 concrete mixer trucks. NRMCA represents a unique industry that utilizes employees located at many dispersed production plants in order to provide a perishable product for just-in-time delivery at all hours of the day.

Currently, the vast majority of the ready mixed concrete industry is made up of small businesses. As with most small businesses, owning and operating a ready mixed concrete company means that the owner is responsible for everything, whether it is ordering inventory, hiring employees, meeting environmental and safety regulations or dealing with an array of government mandates. Due to the unique features of the ready mixed concrete industry with its isolated plant locations, unpredictable delivery requirements, dispersed employees, and unusual business hours, NRMCA and

its members bring a unique perspective on the impact of the Board's proposed amendments to its rules. The NRMCA believes the NLRB's proposed rule will not allow its member companies enough time to accurately and thoroughly assess the process, actions, and legal options associated with representation elections or to educate employees to make an informed decision regarding union membership.

II. INTRODUCTION – THE BOARD'S RATIONALE FOR ITS PROPOSED AMENDMENTS

On June 21, 2011, the National Labor Relations Board, Member Hayes dissenting, proposed reforms of the procedures it follows prior and subsequent to conducting a secret ballot election to determine if employees wish to be represented for purposes of collective bargaining. (*See* "Proposed amendments to NLRB election rules and regulations fact sheet" at http://nlrb.gov/node/525 (hereinafter "Fact Sheet")). As stated by the Board in its Fact Sheet: "The proposed amendments are intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing." In his dissent, Member Hayes described the proposed changes to the Board's rules differently, stating: "[T]he principal purpose for this radical manipulation of our election process is to effectively . . . eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

In its Fact Sheet, the Board identifies at least twelve substantial changes that will be wrought by the proposed amendments to its election rules including (1) mandating that a hearing be scheduled within seven days after the petition is filed, while at the same time deferring litigation of most voter eligibility issues until after the election unless the issue in dispute concerns the eligibility of at least 20 percent of the proposed bargaining unit; (2) requiring each party to file a Statement of Position no later than the date of the hearing that identifies the issues to be resolved at the hearing and describes the supporting evidence to be presented at the hearing; (3) eliminating all post-hearing briefs and requests for review to the Board; and (4) within two days after the Direction of Election, requiring the employer to provide the union with a voter eligibility list that contains the names, addresses, telephone numbers and e-mail addresses of eligible voters.

The net effect of these changes will be to reduce the election cycle from the current 37.5 day median (from representation petition to election vote) to as little as 10-21 days. In addition, there will be no meaningful opportunity to raise pre-election voter eligibility issues that would inform employees as to the scope and composition of the bargaining unit. Instead, post-election litigation could result in a bargaining unit that is significantly different from the proposed unit voted upon by the employees.

III. THE REALITY OF THE BOARD'S PERCEIVED NEED TO ALTER ITS ELECTION RULES

There is no need for sweeping changes to the Board's election procedures. The NLRB currently resolves representation petitions in a very timely manner. During fiscal year 2010, for example, the NLRB received more than 3,000 representation petitions, with the average time from petition review to election being 31 days. Despite the current availability of pre-election litigation procedures that the Board seeks to eliminate with its proposed amendments, over 95 percent of all elections are held within 56 days of the filing of a petition. It thus appears that, in fact, there are no "barriers to the fair and expeditious resolution of questions concerning representation."

During the time between the filing of a petition and the election, there is a significant amount of activity that is supervised and handled by the Board. The employer and union must work out election day procedures; employee information is provided to the union; notices about the election rules and procedures are prepared and posted; voter eligibility is determined, and employee observers for the election are chosen by the union and the employer. Given this level of activity, it would seem that the NLRB should not arbitrarily "streamline" its election process under the guise of fixing flaws that don't appear to exist.

Further, the Board's proposed amendments do not address the role of blocking charges in delaying elections, other than to raise questions about the policy and ask for comments. Blocking charges, usually filed by unions to delay a vote, can prevent employees from exercising their § 7 rights, often without good cause, for an indeterminate period of time. It seems odd that the Board would state as a goal for its proposed rule the need to eliminate "wasteful litigation" during the election process yet fail to address the most egregious waste of time and resources allowed by current NLRB regulations.

The Board's blocking charge policy delays the processing of a representation petition when there is a pending unfair labor practice case. *See, e.g., Bally's Atlantic City*, 338 NLRB 443 (2002). "[T]he blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730. According to the Board, holding a petition in abeyance rather than processing it in the face of unresolved unfair labor practice charges preserves the laboratory conditions required for all elections and allows employees to vote in an atmosphere free of unfair labor practices.

There is no justification, however, for allowing a union to dictate whether a tally of ballots will issue simply by choosing to file an unfair labor practice charge instead of an election objection. To do so permits a party to manipulate and compromise the election process. In order to prevent this result and to promote consistency in the Board's election procedures, the Board's rules should provide that an election be allowed to proceed regardless of whether an unfair labor practice charge has been filed. *See Bally's Atlantic City*, 338 NLRB at 443. (Member Cohen arguing that the Board should reconsider its "blocking charge" policy in circumstances where the unfair labor practice charge alleges conduct that could properly be alleged in a post-election objection).

IV. LEGAL INFIRMITIES OF THE BOARD'S PROPOSED AMENDMENTS

The proposed amendments to the Board's election process would implement substantial changes to representation-case procedures that are inconsistent with the language and purpose of the National Labor Relations Act (the "Act"). Section 6 of the Act (29 U.S.C. § 156) grants the Board rulemaking authority but the Board cannot exercise that authority in an arbitrary or capricious manner or create rules that are inconsistent with express provisions of the Act *See American Hospital Association v. NLRB*, 499 U.S. 606, 609-10, 617-19 (1991).

Although NRMCA believes the proposed amendments are vulnerable in numerous respects to judicial and statutory challenge, the following discussion focuses on three serious legal consequences of the Board's proposed action: (1) the § 8(c) right of employer members of NRMCA to communicate with employees about union representation issues will be impaired by the Board's new "quickie election" rules; (2) the § 7 right of employees to make an informed choice on representation issues will

be eviscerated by the Board's proposal to defer voter eligibility issues until after the election and rush precipitously to a vote; and (3) the privacy of employees will be violated by the Board's proposal to release telephone numbers and e-mail addresses to the petitioning union without the employees' consent.

(1) Impairment of Employers' Section 8(c) Rights

Section 8(c) of the Act protects an employer's right to communicate with employees regarding unions and representation issues. (29 U.S.C. § 158(c)). The Supreme Court has said the enactment of Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 68 (2008) quoting from *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). The Court has expressly recognized the First Amendment right of employers to engage in non-coercive speech about unionization. *See Thomas v. Collins*, 323 U.S. 516, 537-538 (1945). Section 8(c) enforces the free speech rights of employers by denying the Board any authority to regulate non-coercive employer speech. *Chamber of Commerce v. Brown*, 554 U.S. at 74.

In *Chamber of Commerce v. Brown*, the Supreme Court held that the NLRA preempted certain California statutory provisions that prohibited employers that received state funds from using such funds to assist, promote or deter union organizing. 554 U.S. at 69. In so doing, the Court found that the California statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA." *Id*. at 73. Although the principle of federal preemption is not implicated by the Board's proposed amendments, by restricting the exercise of free speech by employers, the Board's proposed action nevertheless presents a clear obstacle to the objective of § 8(c) of the Act; that is, to guarantee free speech to employers.

While the Board majority claims that the proposed rules do not impose limitations on the election-related speech of employers, that argument is disingenuous. The practical effect of the reduction in processing time for representation elections will be to reduce the opportunities for employers to communicate with eligible voters prior to the election. To paraphrase one speaker at the public hearing on this matter, "when there is not enough time to speak, the right of free speech is rendered meaningless." The "quickie election" period envisioned by the Board in proposing these amendments will dramatically diminish the free speech opportunities available to employers.

There can be no doubt as to the motivation of the Board majority in shortening the time period from petition to a vote by employees on representation. The goal is to curtail the free speech rights of employers. In this respect, the proposed amendments are arbitrary and capricious and in direct conflict with Section 8(c). Thus, the Board is clearly acting outside its rulemaking authority.

(2) Impairment of Employee Section 7 Rights

When Congress enacted the Taft-Hartley Act in 1947, it amended Section 7 of the Act to emphasize that employees "have the right to refrain from any and all § 7 activities." *See Chamber of Commerce v. Brown*, 554 U.S.at 67. The Supreme Court has said that the amendment to § 7 with its emphasis on the right to refuse union membership "implies an underlying right to receive information opposing unionization." *Id*. at 68.

The Board's proposal to reduce the time between petition and election will prevent employees from receiving information from their employers regarding the negative aspects of union membership. Their § 7 rights will have been compromised on the altar of unnecessary expediency. The "uninhibited, robust, and wide-open debate in labor disputes" sanctioned by the Supreme Court in *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974) is thwarted by the Board's proposed rule.

Employees will normally receive information from a union concerning representation issues for months prior to any petition being filed. Union leaders do not broadcast the fact that they are trying to organize an employer's workforce. Management is usually unaware of furtive union activity until a demand for recognition is made or a petition is filed. Only then is there is an opportunity for debate regarding the pros and cons of representation by the petitioning union. At the very moment when the employees' § 7 rights can be exercised to their fullest extent, the Board's proposal will curtail debate.

The Board's proposal to defer voter eligibility issues until after the election and rush precipitously to a vote will also injure the § 7 rights of employees. Under the proposed rule, questions of voter eligibility will not have to be resolved prior to the election, unless they affect more than 20 percent of the prospective voters. An election process where the eligibility of up to 20 percent of the individuals who are voting is in question will inevitably compound the uncertainty for employees trying to determine whether to vote for representation. As suggested by Member Hayes in his dissent to the proposed amendments:

> Employees who do belong in the bargaining unit may be so mislead about the unit's scope or character that they cannot make an informed choice, instead basing their vote on perceived common interests or differences with employee groups that ultimately do not belong in the unit.

76 Federal Register 36831, citing *NLRB v. Beverly Health And Rehabilitation Services*, 1997 WL 457524 at *4 (4th Cir. 1997).

In *Hamilton Test Systems, Inc. v. NLRB*, 743 F.2d 136 (2nd Cir. 1984), the court of appeals refused to enforce a bargaining order issued by the NLRB and granted the employer's request for review where the Board had reduced the size of the bargaining unit after the election. The court said: "We will not enforce an order of the Board . . . when the Board has effectively denied employees the right to make an informed choice in a representation election." *Id*. at 142.

Similarly, in *NLRB v. Beverly Health and Rehabilitation Services*, 1997 U.S. App. LEXIS 21257 (4th Cir. 1997), the court of appeals refused to enforce a bargaining order after the Board modified the bargaining unit post-election by excluding all LPNs from the unit. The court concluded the employees' freedom to make an informed choice had been compromised by the subsequent modification of the bargaining unit, saying:

> Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from

> the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election.

Id. at *10.

A fully-informed choice during the election process is the essence of the employees' § 7 right. *See Theil Industries*, 375 N.L.R.B. 1122 (1998). The Board's proposed amendments to its representation procedures, including the deferral of election eligibility issues and reduction in time from petition to election, make it unlikely that employees will be able to make a fully-informed choice. The Board should withdraw its proposed rule because it will impair the § 7 rights of employees.

(3) Violation of Employee Privacy Rights

The proposed amendments would require that both telephone numbers and e-mail addresses be included along with each bargaining unit employee's name and address on the voter eligibility list. Any requirement that employers provide non-work related telephone numbers or personal e-mail accounts of employees raises significant employee privacy concerns. *See Trustees of Columbia University*, 350 N.L.R.B. 574 (2007) (noting potential privacy concerns in requiring employer to provide employee e-mail addresses); *see also JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 911-12 (8th Cir. 2004) (no compelling need for the Union to obtain the strike replacement employees' home addresses and telephone numbers).

In *Trustees of Columbia University*, the Board considered the claim of a union attempting to organize a bargaining unit consisting of employees who were at sea aboard a vessel during the time of the pre-election organizing campaign. The union requested e-mail addresses of the employees and the employer refused to provide them. The union filed an objection to the election, contending that the employer's refusal frustrated the purpose of the Board's requirement in *Excelsior Underwear, Inc*. that the employer provide the union with a list of the names and addresses of eligible voters The Regional Director concluded that, notwithstanding the absence of any Board precedent, the employer should be required to provide the e-mail addresses to the union.

In a two-to-one decision, the Board panel refused to extend the *Excelsior* rule under the facts of the case to require the employer to provide e-mail addresses. The majority raised a number of questions including the potential cost of sending e-mails, the potential impairment of the employer's electronic system by voluminous e-mails, an employer's right not to provide a forum for third-party expression of views on its virtual property and potential invasion of employees' privacy rights. 350 N.L.R.B. at 576.

An absolute rule mandating production of telephone numbers and e-mail addresses is not only unnecessary in this context but an overreach of the Board's authority, especially where employee privacy concerns are implicated. In other contexts, the Board has been admonished by federal courts of appeal against requiring the production of private employee information where the individual's interest in confidentiality outweighs the union's need for such information. *See Chicago Tribune Co. v. NLRB*, 79 F.3d 604, 608 (7th Cir. 1996); *East Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993). In addition, electronic privacy protections can be broader under state constitutions than under the Fourth Amendment. *See, e.g., State v. Reid*, 945 A.2d 26 (N.J. 2008) (The New Jersey Supreme

Court held that, under the New Jersey constitution, an individual has a reasonable expectation of privacy with respect to his or her internet subscriber identity).

The Board goes too far in allowing unions access to employee phone numbers and e-mail addresses without the consent of the employees. This aspect of the proposed rule will not withstand legal challenge on invasion of privacy grounds.

V. PRACTICAL IMPACT ON NRMCA MEMBERS

If finalized, the proposed rule will impact NRMCA's members by (1) dramatically shortening the time between the filing of a representation petition and the election date, and (2) substantially limiting the opportunity for a full evidentiary hearing on voter eligibility issues and/or a review by the full Board These restrictions are especially unfair to small employers in the ready mixed concrete industry, most of which lack the specialized knowledge and legal counsel necessary to respond to a representation petition in the abbreviated time period proposed by the Board.

The proposed rule also would require employers to raise all hearing issues and state its basis for raising them in a maximum of seven days or forfeit all legal right to pursue those issues. Typical small business owners, including many NRMCA members, do not have labor counsel readily available to evaluate an election petition nor do they generally know how or where to obtain such counsel. They cannot be expected to understand and comply with the maze of NLRB procedures in the time period allowed by the new amendments.

Finally, the new rule would restrict the ability of NRMCA members to disseminate information to their employees about union membership in general and the particular union that is seeking to represent them in collective bargaining. A fair election can only be achieved where each party has the opportunity to speak to the voters. An informed electorate is always the best option for assuring that the election result is the one actually intended by the voters.

VI. CONCLUSION

For all the foregoing reasons, the NRMCA respectfully requests the Board to withdraw the proposed regulations and continue to use its existing procedures for representation elections.

Very truly yours,

KRUCHKO & FRIES

By: _____

John G. Kruchko
Counsel for the National Ready Mixed
Concrete Association

JGK:bsp

cc: Robert A. Garbini, P.E., President
Kerri Leininger, Senior Vice President, Government and Political Affairs