UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATION'S AND NORTH AMERICA'S BUILDING TRADES UNIONS' PETITION FOR RULEMAKING

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On April 1, 2020, the National Labor Relations Board adopted a Final Rule that added §§ 103.20 – 103.22 to the Board's Rules and Regulations. "Representation – Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships," RIN 3142-AA16, 85 Fed. Reg. 18366 (April 1, 2020). These rules significantly altered the Board's blocking charge policy, its handling of petitions filed following a voluntary recognition, and its law regarding the establishment of a majority-based bargaining relationship in the construction industry. Petitioners American Federation of Labor – Congress of Industrial Organizations (AFL-CIO) and North America's Building Trades Unions (NABTU) file this Petition for Rulemaking pursuant to § 102.124 of the Rules and Regulations, and respectfully request that the Board repeal these sections of its Rules and Regulations.[1]

The Board combined three disparate and unrelated election issues under the umbrella of the Final Rule. We fully explained in our comments on the Notice of Proposed Rulemaking that preceded adoption of these rules why each of the parts of the proposal was inconsistent with the Act, inconsistent with sound labor relations policy, and not justified by the rationales and data presented in the NPRM. We incorporate those comments by reference here. In addition, as described in detail in this Petition, the Final Rule's adoption of each of the three sections of the Rules and Regulations – § 103.20, § 103.21, and § 103.22 – was independently and separately flawed under the Administrative Procedure Act (APA). Accordingly, each section warrants repeal on its own grounds, with each repeal severable from the others.

[1] Petitioner AFL-CIO, along with the Baltimore-DC Metro Building and Construction Trades Council, challenged the Final Rule's provisions in the District of the District of Columbia on similar grounds to those raised in the instant petition. *See AFL-CIO v. NLRB*, 20-cv-1909. This litigation is currently stayed while the D.C. Circuit resolves a jurisdictional question concerning APA challenges to Board rulemaking.

While we believe, the violations of the APA are clear and will be found by the courts if the ongoing litigation precedes to a conclusion, the Board need not find a violation of the APA in order to conclude that the rules should be withdrawn. The Board need only and should only find that the serious flaws in the prior rulemaking process prevented interested parties from having a fair opportunity to provide input and prevented the Board from fully considering the proposals and prudently deciding whether to adopt final rules.

The Board should further make clear that, by repealing these sections of the Rules and Regulations, the Board's prior applicable law, developed through adjudication, will again be in effect because the prior Board decisions were overturned solely by the rulemaking. The Board may decide in future adjudications or rulemakings whether to revisit any of the three issues addressed by this Final Rule, either to revise the prior applicable law in any way or to codify it via rulemaking. Regardless, the Board should immediately withdraw the existing rules.

I. The Board Should Repeal § 103.20, as the Final Rule was Procedurally Flawed under the APA and Experience Has Borne Out that the Rule was Ill-Conceived

The Final Rule's changes to the Board's blocking charges policy, found in § 103.20 of the Rules and Regulations, are fatally flawed under the APA. The Board justified its blocking charge policy changes by citing grossly erroneous data in its Notice of Proposed Rulemaking (NPRM), which it never corrected before issuing the Final Rule. Further, the Final Rule so departed from the NPRM that it was not a logical outgrowth of the original. For those reasons, the Board should repeal § 103.20. If any doubt remains, experience under § 103.20 confirms the need to repeal the Rule.

A. Gross Errors in Data Presented in the NPRM and the Board's Failure to Correct the Errors Violated the APA

In the NPRM, the Board presented data that falsely and grossly exaggerated the delay caused by blocking charges. The data was false and misleading in three respects. First, it

included cases that did not actually involve blocking charges. Second, it substantially overstated the periods of delay attributable to blocking charges. Third, it lumped together charges filed by an incumbent union representative facing an election seeking to displace that union (the only type of charges the NPRM expressed concern about) and charges filed by a union seeking to become the representative of employees for the first time (which the NPRM expressed no concern about). The latter actually constitute the overwhelming majority of blocking charges and are responsible for a larger share of the delay caused by blocking charges.

The first error in the data presented in the NPRM was that it listed cases as involving blocking charges that did not actually involve blocking charges. Dissenting Member McFerran stated, "My colleagues . . . err by artificially inflating the number of 'blocked petitions pending' by including in their list cases . . . which were [not] blocked due to the blocking charge policy." The dissent cited specific examples of this erroneous data. *See* 84 Fed. Reg. 39947 n.71 (Member McFerran dissenting). The AFL-CIO's comments stated that an examination of the dockets for many of the cases the NPRM identified as involving blocking charges revealed no entry for a related unfair labor practice case (*i.e.*, no evidence that any charge had blocked the election), and also gave specific examples. AFL-CIO Comment at 14, Comment ID NLRB-2019-0001-0138.[2]

The second error in the data was that the NPRM grossly overstated the period of time cases were blocked – in some instances by a multiple of 20 or more. As dissenting Member McFerran pointed out, "My colleagues . . . err by artificially inflating the length of time periods that their cited cases were blocked." 84 Fed. Reg. 39947 n. 71 (Member McFerran dissenting). The appendix to the NPRM in many instances listed a period of time cases were blocked that

[2] Available at https://www.regulations.gov/comment/NLRB-2019-0001-0138.

was impossible on its face because it stated that a petition for an election was blocked for more days than the number of days between the filing of the petition and the conduct of the election. *See, e.g*., NPRM, Majority Appendix B, Table 1, at 1, *Fairmont Holdings* (stating that there were 702 blocked days when there were only 35 days between petition filing and the election being held). According to a count reported in the comments of the United Food and Commercial Workers, AFL-CIO (UFCW), 34% of the cases the NPRM reports as blocked in its Appendix have blocking periods longer than the period between the petition being filed and the election. UFCW Comment at 4, Comment ID NLRB-2019-0001-0105.[3] As the UFCW also noted, the same error likely led to overstatement of the blocked period in many more cases where the error is not apparent on the face of the table in the appendix because, while the Board's error exaggerated the number of days an election was blocked, the number did not exceed the number of days between petition and election and thus was not apparent on the face of the Appendix. *Id*.

Despite the fact that these errors were pointed out in the dissent to the NPRM, the majority chose not to correct or even acknowledge them before issuing the NPRM, even though the majority responded to the dissent in other respects in the NPRM. *See, e.g.,* 84 Fed. Reg. 39939. These errors were also detailed in the press in early December 2019 – almost four full months before publication of the Final Rule. *See* Alex Ebert and Hassan A. Kanu, "Federal Labor Board Used Flawed Data to Back Union Election Rule," *Bloomberg Law* (Dec. 5, 2019), https://news.bloomberglaw.com/daily-labor-report/federal-labor-board-used-flawed-data-to-back-union-election-rule-1. The primary press story stated, "a Bloomberg Law review of data supporting the rulemaking found dozens of cases in which the board overstated the length of delays attributable to blocking charges over the last three years – overshooting the mark in one

[3] Available at https://www.regulations.gov/comment/NLRB-2019-0001-0105.

instance by more than 12 years, and in another by five years." *Id*. "The board's data over-counted delays in more than one-third of cases – 55 in all – in which they said blocking charges were filed." *Id*.[4]

The third error in the Board's presentation of the data in the NPRM was that the NPRM expressly and erroneously stated that blocking charges are "almost invariably [filed by] a union and most often in response to an RD petition" seeking an election to decertify the union. 84 Fed. Reg. 39931.

The central, indeed the only, rationale offered in the NPRM for the proposed rule was that the then current blocking charge policy deprived petitioners, the parties seeking an election, of a prompt election. The NPRM repeatedly referred to the "momentum" that was allegedly sapped by the delay caused by blocking charges. *See, e.g.*, 84 Fed. Reg. at 39937 ("Delay robs the petition effort of momentum."). But, contrary to the express statement in the NPRM quoted above, the overwhelming majority of blocking charges are *filed by petitioners themselves* in RC not RD cases and those petitioners have the right, at any time, to request that the election proceed despite the charge. *See* Casehandling Manual (Part Two) Representation, Section 11731.1(b), NLRB, *An Outline of Law and Procedure in Representation Cases* at 120 (Aug. 2012) ("Such a request . . . will usually be honored.").

The AFL-CIO in its comments analyzed data provided pursuant to a Freedom of Information Act request concerning all cases involving blocking charges since 2012. *See* AFL-CIO Comment at 6. The AFL-CIO's comments explained that 80% of all cases involving

[4] The article also identified cases that were listed more than once in the Board's data. *Id*. It further cited administrative law scholars who suggested that a failure to correct the data could violate the APA. *Id*. (quoting Professor Richard Pierce of George Washington University as saying, "If the[Board] proceed[s] without correcting [the data errors], the resulting action would be hard to defend.").

blocking charges were RC cases. *Id*. Moreover, as the expert retained by the AFL-CIO to analyze the data, McGill University Professor John-Paul Ferguson, found, "Blocking charges in RC cases also result in longer periods during which elections are blocked." AFL-CIO Comment, Appendix 4 (J. Ferguson, *Report: Assessing the Available Data Relevant to NLRM Proposed Rule, RIN 3142-AA16* (Jan. 8, 2020)). Professor Ferguson concluded, "Because 80% of cases involving blocking charges are RC cases and because blocking periods in RC cases are, on average, longer than in RM and RD cases, the overwhelming amount of time representation cases are blocked is in RC cases. *Id*. (Ferguson Report at 2). Thus, the Board statement that that blocking charges are "almost invariably [filed by] a union and most often in response to an RD petition" seeking an election to decertify the union, 84 Fed. Reg. 39931, is not only wrong, it is grossly incorrect as RD cases constitute less than 20% of all cases involving blocking charges.

None of these gross errors were ever corrected despite their being pointed out in the dissent, in the press, and in comments. They were not corrected in the NPRM, and they were not corrected in the preamble to the Final Rule. In other words, the Board deliberately presented erroneous data to the public.

While the Board did acknowledge in the preamble to the Final Rule "claims" that it had made errors, 85 Fed. Reg. 18377, even then, the Board did not actually acknowledge the errors or, most importantly, correct the errors. In the Final Rule, the Board stated only:

> We also acknowledge the claims in the dissent to the NPRM and by some commenters that there were errors in some of the data that the NPRM majority cited to support the proposed rule and that these errors led to exaggeration both of the number of cases delayed and the length of delay involved. Even accepting those claims as accurate, the remaining undisputed statistics substantiate the continuing existence of a systemic delay that supports our policy choice to modify the current blocking-charge procedure that does not, and need not, depend on statistical analysis.

Id. (footnote omitted). But the Board did not present or even describe "the remaining undisputed statistics" in the preamble to the Final Rule or elsewhere.

The Board's failure to correct the data or describe "the remaining undisputed statistics" is critical because only the Board was in a position to do so. Both the dissent and commenters had limited access to the data and thus were unable to describe all the errors in the data presented by the Board in the NPRM. Specifically, Member McFerran, while pointing out *some* of the errors in the data in her dissent, made clear that she could only provide "examples" of the errors, as she "did not have sufficient time prior to the publication of this NPRM to review" all the data needed to identify all errors in the majority's presentation. *Id*. at 39947 n. 74. Therefore, the public did not know at the time it was required to comment (and still does not know) how many elections are blocked by ULP charges, how long those elections were blocked, and in how many of those the petitioner could not simply request to proceed.

1. The Errors Deprived Interested Parties of Proper Notice in Violation of the APA's Notice and Comment Requirement

The gross errors in the data presented in the NPRM deprived interested parties of proper notice as required by the APA. 5 U.S.C. § 553(b). The procedural requirements of the APA are meant to inform affected members of the public not only of what is being proposed but also of the agency's rationale and the data the agency has relied on. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). The notice and comment process requires "an exchange of . . . information . . . between interested parties and the agency." *Id*. at 35. The Board's reliance on grossly inaccurate data and its failure to at any time correct that data, violated the notice requirement in five ways.

First, an agency fails to provide adequate notice when it presents inaccurate data in the NPRM. *Resolute Forest Products, Inc. v. USDA*, 187 F.Supp.3d 100, 123 (D.D.C. 2016)

("'notice' surely requires reasonably accurate (and certainly not blatantly misleading) data to substantiate [the agency's] decision and provide interested commentators with the opportunity to assess the proposed rule."). An agency's reliance on inaccurate data represents a "critical defect" in the rulemaking process. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data." *Id*. at 393. That is even more true of erroneous data.

Second, by not correcting the gross errors in the data presented in the NPRM, despite being informed about them, the Board intentionally withheld data that undermined its rationale for the rule or, at a minimum, did not provide the public with critical information. *See American Relay Radio League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (court held that agency's hiding of contradictory data was incompatible with the APA's notice requirements). "'[I]n order to allow for useful criticism, it is especially important for the agency to identify and make available . . . *data* that it has employed in reaching the decisions to propose particular rules.'" *Id*. (*quoting Conn. Light & Power Co. v. Nuclear Regulatory Comm'n,* 673 F.2d 525, 530 (D.C.Cir.1982)).

Third, changing the data relied on between the issuance of the NPRM and the Final Rule violated the APA. *See American Iron Steel Inst. v. OSHA,* 939 F.2d 975, 1009-1010 (D.C. Cir. 1991) (agency violated the APA by basing finding of economic feasibility on post-comment data inconsistent with "all other important evidence in the record"). What the NLRB did here is even worse because it not only relied on different data in issuing the Final Rule than it did in issuing the NPRM, it failed to disclose the data it relied on in issuing the Final Rule, saying only "the remaining undisputed statistics substantiate the continuing existence of a systemic delay that supports our policy choice[.]" 85 Fed. Reg. 18337. But the Board's failure to disclose what it

considered to be "the remaining undisputed statistics" left parties to guess at how radically the Board departed from the data it relied on in issuing the NPRM and, more fundamentally, to guess about what the Board actually relied on in issuing the Final Rule.

Fourth, the NLRB violated the notice requirement by failing to disclose data that the agency relied on in its Final Rule. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 907-08 (D.C. Cir. 2006). The statement in the Final Rule that suggested the Board relied on "the remaining undisputed statistics" is clearly insufficient.

Finally, the Board violated the notice and comment requirement because it failed to respond to substantive, well-supported comments. The agency did not adequately respond to the AFL-CIO's demonstration that the vast majority of blocking charges, and even a greater percentage of the delay caused by such charges, do not involve the type of delay that the Board described in the NPRM, *i.e.,* delay that saps the petition of "momentum." AFL-CIO Comment at 6-7. "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *HBO*, 567 F.2d at 35-36 (footnote omitted). "[S]ignificant" points are those that, "if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [and] cast doubt on the reasonableness of a position taken by the agency" and are not "purely speculative" but rather "disclose the factual or policy basis on which they rest." *Id*. at 35 n. 58. A comment requiring a response both identifies "a particular mistake" and "show[s] why the mistake was of possible significance in the results[.]" *Portland Cement*, 486 F.2d at 394. The AFL-CIO's point was without question "significant," and the agency wholly failed to respond to its central thrust.

The Board's presentation of grossly inaccurate data in the NPRM, its failure to correct the errors (thereby withholding corrected data), its shift in the data relied on between the NPRM

and the Final Rule, its failure to disclose what data it relied on in the Final Rule, and its failure to respond to the AFL-CIO's comment concerning the data, violated the APA's notice requirement. For those reasons, the Board should take the opportunity to repeal § 103.20.

2. Failure to Correct the Errors was Arbitrary, Capricious and an Abuse of Discretion

It was arbitrary and capricious for the Board not to correct the gross errors in the data it presented in the NPRM or at any time thereafter for three reasons.

First, presentation of grossly inaccurate data – data that in some respects was inaccurate on its face and that the Board was informed was inaccurate – is the essence of arbitrary and capricious action. It is the opposite of the rational and open rulemaking process envisioned by the APA. *Missouri Public Service Commission v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). ("Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking."); *Resolute*, 187 F.Supp.3d at 123 ("where an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data *was* relied upon, its decision is arbitrary and capricious and should be overturned."). Here, the Board did not simply fail to ascertain the accuracy of the data, it ignored the facial evidence of errors as well as the dissenting Member's warning, press reports, and comments.

Second, the Board did not present a rational explanation for the rule or a rational evaluation of its costs and benefits because it did not disclose accurate data in either the NPRM or the Final Rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" and that an agency action is arbitrary and capricious if the agency "offered an explanation for its decision

that runs counter to the evidence before the agency.") (*quoting Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962)).

The Board appears to have anticipated this argument because, after presenting extensive, albeit inaccurate, data to support the proposed rule, the Board attempted to suggest in the preamble to the Final Rule that no data is necessary to support its decision. The Board stated:

> As the AFL–CIO candidly acknowledges, ''[b]locking elections delays elections. That is undeniably true and requires no 'statistical evidence' to demonstrate.'' We agree. Furthermore, anecdotal evidence of lengthy blocking charge delays in some cases, and judicial expressions of concern about this, remain among the several persuasive reasons supporting a change that will assure the timely conduct of elections without sacrificing protections against election interference.

85 Fed. Reg. 18377. Yet, despite that attempt to suggest that statistical evidence was unnecessary, the Board continued to assert that the problem of delay caused by blocking charges is *quantitatively* significant and *outweighs* other concerns. "*In a significant number of cases*, the [current blocking charge] policy denies employees the right to have their votes, in a Board-conducted election . . . 'recorded . . . efficiently and speedily.'" 85 Fed. Reg. 18367 (emphasis added and citation omitted). "[D]elay in employees' exercise of free choice [attendant on current blocking charge policy] . . . is far too great a price for employees to pay." 85 Fed. Reg. 18378. Those statements are without foundation absent accurate data that was not presented in the NPRM or the Final Rule.

Third, the Board expressly stated in the preamble to the Final Rule that it weighed the benefits of reducing delay caused by blocking charges against the costs of altering the blocking charge rule. In fact, the Board expressly "reject[ed] the assertion of some commenters that we have not attempted to balance, *or even quantify*, the burden and the benefit in adopting these revised procedures." 85 Fed. Reg. 18380 (emphasis added). *See also id.* at 18378 ("any consequential costs are worth the benefits secured"); *id*. ("any

burden on the Regions in conducting elections where the ballots may never be counted is outweighed by the critical benefits of ensuring employee free choice"). But the benefits obviously cannot be weighed or compared to the costs and they certainly cannot be "quantif[ied]" without accurate data on the delay caused by blocking charges and the Board failed to provide such data in the NPRM or the Final Rule. "[T]he notice required by the APA, or information subsequently supplied to the public, must disclose *in detail* the . . . data upon which th[e] rule is based." *HBO*, 567 F.2d at 35 (emphasis added). The Board simply failed to do that at any time here.

For each of those reasons, the Board's actions were arbitrary, capricious and an abuse of discretion, which again counsels for repeal of the Rule.

B. The Final Rule's Complete Elimination of Blocking Charges in Most Cases Was Not a Logical Outgrowth of the NPRM and the Board Stated No Rationale for the Key Classification in the Final Rule

In the NPRM, the Board did not propose eliminating the blocking charge policy or even reducing the category of charges that could be the basis for blocking an election. Rather, the Board proposed a change only in the consequences of a blocking charge. But the Final Rule drastically departed from this proposed change. The Final Rule was not a logical outgrowth of the proposed rule, and therefore violates the APA. Moreover, the Board did not present a reasoned basis for either shrinking the category of charges that can serve as the basis for blocking an election or the counting of the ballots or for how it drew the lines around that new category.

1. The Final Rule is Not a Logical Outgrowth of the Proposed Rule

In a section of the NPRM titled "Substitution of a Vote and Impound Procedure for Current Blocking Charge Policy," the Board explained that it was "inclined to believe, subject to

comments, that the current blocking charge policy impedes, rather than protects, employee free choice." 84 Fed. Reg. at 39937. Based on this belief, the Board stated that, "[h]aving preliminarily reviewed numerous suggestions for revision or elimination of this policy, the Board proposes to adopt the vote and impound procedure suggested by the General Counsel[.]" *Id*.

The Board expressed its belief that the "proposed vote-and-impound rule … satisfies the goal of protecting employee free choice" better than the Board's current blocking charge policy. *Id*. at 39938. The Board explained, "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." *Id*. (emphasis added).

The vote-and-impound procedure was the only alternative to the Board's current blocking charge policy proposed in the NPRM. The Board proposed vote-and-impound after it "preliminarily reviewed numerous suggestions for revision or elimination of th[e blocking charge] policy," none of which were mentioned in the NPRM or otherwise made public.

Yet in the Final Rule, the Board instead adopted "a vote-and-count procedure for most categories of charges, and a vote-and-impound procedure for some limited categories of charges[.]" 85 Fed. Reg. 18380. In other words, rather than change the effect of the filing of unfair labor practice charges as proposed in the NPRM, the Final Rule wholly eliminates the blocking charge policy in most cases, leaving only a narrow category of charges that can serve even to block the counting of ballots. The Final Rule is not a logical outgrowth of the proposed rule, and, therefore, violates the APA. *Int'l Union, United Mine Workers of Amer. v. MSHA*, 407 F.3d 1250, 1260 (D.C. Cir. 2005) (final rule is not a logical outgrowth where "interested parties

would have had to divine the Agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule") (cleaned up); *CSX Transp. Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (there can be no finding of logical outgrowth "where the proposed rule gave no indication that the agency was considering a different approach") (cleaned up). The Board should repeal § 103.20 for this reason.

2. The Board Failed to Offer Any Rationale for the Categories of Charges That Can and Cannot Block An Election Under the Final Rule

As explained above, between issuing the NPRM and the Final Rule, the Board decided that it would entirely prevent most types of unfair labor practice charges from blocking either the election or the tally of ballot, leaving only a narrow category of charges that can block the counting of ballots. The Board provided no explanation of this categorization in the Final Rule.

Under the Final Rule, the only category of charges that can block the counting of ballots are charges

> that allege violations of section 8(a)(1) and 8(a)(2) or section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, or a charge is filed that alleges an employer has dominated a union in violation of section 8(a)(2) and seeks to disestablish a bargaining relationship.

85 Fed. Reg. at 18399 (new § 103.20). But one searches the preamble to the Final Rule in vain for an explanation of why the Board decided to carve out that category of charges as the only charges that can still block even the counting of ballots. The closest the Board comes to an explanation is when it states, "some types of unfair labor practice charges speak to the very legitimacy of the election process in such a way that warrants different treatment—specifically, those that allege violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, and those that allege that an employer has dominated a union in violation

of Section 8(a)(2) and that seek to disestablish a bargaining relationship." 85 Fed. Reg. at 18380. But that is merely a conclusion without an explanation. Why do those charges "speak to the very legitimacy of the election process in such a way that warrants different treatment?" What is that "way"? Moreover, employer domination of a union in no way goes to the "legitimacy of the election process" any more than an employer's credible threat to fire anyone who votes for union representation. Finally, the Board offers no reason why this category of unfair labor practice allegations "warrants different treatment" from all other charges. The APA requires that an agency include with final rules "a concise general statement of their basis and purpose." 5 U.S.C. §553(c). Here, the Board simply failed to do so in respect to the line the Final Rules drew between the category of unfair labor practice allegations that can block the counting of ballots and the category that cannot. The Board should now repeal § 103.20 due to this failure.

C. Experience Under § 103.20 Further Supports its Repeal

On September 28, 2021, the Board issued an Order granting the Employer's Request for Review of the Regional Director's Supplemental Order Granting Union's Request to Block Further Processing of Petition in *Troy Grove Quarry*, 25-RD-269960. In granting the Employer's Request for Review, the Board ordered the Region to hold a hearing on pending objections and challenges, and to continue to process the decertification petition through all steps short of issuance of certification.

This case illustrates how the Board's changes to the blocking charge policy, in the words of Chairman McFerran, "were ill-advised and contrary to the policies of the Act." Order, sl. op. 2 n. 2. As Chairman McFerran explained, in requiring the Region to continue litigation of the objections and challenges prior to the disposition of related unfair labor practice charges, the Region must now "consume its valuable resources on a proceeding which may be rendered moot

in whole or in part by that disposition[.]" *Id*. Additionally, the Board then had to address, "perhaps prematurely," issues raised by the Union in its own Request for Review of the Regional Director's decision on the objections and challenges. *Id*; *see* Order granting in part and denying in part Union's Request for Review of the Regional Director's Decision on Challenged Ballots and Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections, 25-RD-269960 (September 28, 2021).

This experience is just an example of how the Board's adoption of § 130.20 was ill-advised, and should be repealed.

II. The Board Should Repeal § 103.21, as the Board, in Violation of the APA, Failed to Respond to Significant Points Raised in Comments

In promulgating § 103.21's requirement that an employer post a notice after it lawfully voluntarily recognizes a union that informs employees of that recognition and the employees' right to file a petition to decertify the union within 45 days, the Board failed to address a significant comment submitted by the AFL-CIO. That failure violated the APA, and counsels the Board to repeal this section of its Rules and Regulations.

In its comments on the NPRM, the AFL-CIO pointed out that, together with existing notice requirements and standing alone, the proposed notice was inconsistent with the statutory requirement that the Board remain strictly neutral on the question of whether employees should support or oppose representation. The Board failed to address that significant comment.

The AFL-CIO's comments pointed out:

> The Act requires that the Board be strictly neutral. The Board acts as an impartial "referee" because the "Act is wholly neutral when it comes to [employees'] basic choice" of whether to be represented. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union." *NLRB v. Savair Mfg. Co*., 414 U.S. 270, 280 (1973).

AFL-CIO Comment at 36-7.

The comments then explained that the proposal to require a notice only after employees obtain representation (*i.e.*, after a majority has made "the choice of a union") would be inconsistent with the requirement of neutrality. The AFL-CIO comments stated:

> Setting aside the neutral notices informing employees that a petition has been filed and that an election will be held, *see* 29 C.F.R. §§ 102.63(a)(2), 102.67(b), if the proposed rule is adopted, the Board will require that notice be given to employees of only two of their many rights under the NLRA: the right not to join a union and to object to paying full union dues[5] and the right to file a petition to decertify a recently and lawfully recognized union. The majority in no way explains why it has chosen to require notice of only those two rights or why, in administering an Act under which employees have a right to engage in concerted activity such as supporting and choosing to be represented by a union and to refrain from such activity, the only notices the Board requires inform employees of their right to refrain.

Id. at 37.[6]

The Board did not address those central points in the AFL-CIO's comments. The Board addressed the question of bias, but only bias on the part of individual Board members, not bias in the proposal itself. 85 Fed. Reg. 18371-72. The Board addressed the question of neutrality, but merely by asserting that the notice is neutral, not by addressing when the Board requires notice or why it requires notice only of employees' right to refrain from supporting unions. The preamble to the Final Rule states:

> Some commenters assert that the proposed notice-posting policy is contrary to the Board's role as a neutral. We disagree. The rule is merely an attempt to provide for greater protection of employee free choice in selection of a representative; it has no effect on what that choice will be.

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[5] *See California Saw & Knife Works*, 320 NLRB 224, 233 (1995), *enf'd. sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998*), cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998).

[6] The AFL-CIO's comments even provided a specific example of the lack of neutrality by contrasting the situation addressed in the Final Rule with the situation where an employer voluntarily withdraws recognition upon a showing of majority support for removal of the union. AFL-CIO Comment at 37-38. In that scenario, the Board requires no posting of a notice informing employees of their rights to petition for an election to regain representation.

85 Fed. Reg. 18386. But that statement is not responsive to the AFL-CIO's comment concerning when the Board has chosen to provide notice. The Board does not explain why it is not "contrary to the Board's role as a neutral" to "provide for greater protection of employee free choice in selection of a representative" only after employees have done so.

The Board further states:

> Some commenters assert that requiring notices only in the context of voluntary recognition is arbitrary: Notices are not required when an employer withdraws recognition from a certified union, or when a one-year election bar expires; non-union employers are not required to post notices to employees about how to obtain Board recognition of a union; and in no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights. It may or may not be true that notices should be required in some of these other contexts. But the rule is not arbitrary merely because it does not address those other contexts.

85 Fed. Reg. 18383 (footnote omitted). But the AFL-CIO's point was not that the proposal was arbitrary or merely underinclusive, but that it was inconsistent with the Board's neutrality. The Board does not address the central point that it is only requiring notice of employees' right not to support unions. The Board states, "we decline to decide, in the context of this rulemaking, that postings should be required in contexts outside the scope of this rule." *Id*. But the Board had a duty to respond to the comment that requiring notice only in this context is inconsistent with its role as a neutral. The Board failed to do so.[7]

[7] Presumably in response to the example described *supra* in footnote 4, the Board stated, "Consequently, [our recent decision on employer withdrawal of recognition in *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019)] established a process parallel to the one we adopt here in the final-rule." 85 Fed. Reg. 18382. But the "process" is not at all "parallel" in the respect pointed out in the AFL-CIO's comment – the Board requires the posting of notice informing employees that they can petition for an election when an employer recognizes a union but not when an employer withdraws recognition from a union. The Board did not address this lack of parallel treatment.

As described above, under the APA, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *HBO*, 567 F.2d at 35-36 (footnote omitted). The AFL-CIO's point that the requirement of notice only after employees obtain representation compromises the Board's statutorily mandated neutrality was without question "significant" and the agency wholly failed to respond to its central thrust. Accordingly, § 130.21 was promulgated in violation of the APA, and the Board should grant this petition in order to repeal it.[8]

III. The Board Should Repeal § 103.22, as that Rule's Overruling of *Casale Industries* was not a Logical Outgrowth of the NPRM

In its NPRM, the Board proposed to "overrule *Staunton Fuel*[, 335 NLRB 717 (2001)], to adopt the D.C. Circuit's position that contract language alone cannot create a 9(a) bargaining relationship in the construction industry, and to incorporate the requirement of extrinsic proof of contemporaneous majority support." 84 Fed. Reg. 39930. That is, the Board proposed to overrule its doctrine on how a 9(a) bargaining relationship may be formed in the construction industry.

The NPRM did not, however, propose to overrule *Casale Industries*, 311 NLRB 951 (1993), which held that challenges to a union's 9(a) majority status in the construction industry, regardless of whether the challenge is made in the context of a representation petition or unfair labor practice charge, would not be allowed if more than six months have passed from when the employer granted 9(a) recognition. Indeed, the NPRM does not even mention *Casale*'s timing requirements for challenging 9(a) status in the construction industry. In fact, nowhere in the

[8] Petitioners further believe that the Rule compromises the Board's statutorily mandated neutrality, and is therefore inconsistent with the Act and invalid. Petitioners welcome the opportunity to further address this point in comments in a rulemaking to repeal the Rule.

NPRM is *Casale*, Section 10(b), or any limitations period cited, let alone discussed.

In the Final Rule's preamble, the Board stated that, not only was it overturning *Staunton Fuel*, but it was also overruling *Casale*, meaning that a purported 9(a) relationship in the construction industry may now be challenged at any time – even decades after the relationship was allegedly formed. 85 Fed. Reg. 18391 (Board "overrules *Casale* to the extent that it is inconsistent with the [Final] [R]ule."). In particular, the Board "overrule[d] *Casale*'s holding that the Board will not entertain a claim that majority status was lacking at the time of recognition where a construction-industry employer extends 9(a) recognition to a union and 6 months elapse without a petition." *Id.*

The Board also overruled *Casale*'s application in the unfair labor practice context. Although the Board recognized that its Final "[R]ule addresses only representation proceedings," the Board nonetheless discarded "Section 10(b)'s applicability to challenges to a construction-industry union's purported 9(a) status." *Id*.

The Board's decision to overturn *Casale* is not a logical outgrowth of its NPRM, meaning the Rule was promulgated in violation of the APA. *See United Mine Workers of Amer.*, 407 F.3d at 1260 (final rule is not a logical outgrowth where "interested parties would have had to divine the Agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule") (cleaned up); *CSX Transp. Inc.*, 584 F.3d at 1081 (there can be no finding of logical outgrowth "where the proposed rule gave no indication that the agency was considering a different approach") (cleaned up).

The Board's NPRM did not advise the public that it was contemplating overruling *Casale*. The NPRM stated the Board's intention only to "overrule *Staunton Fuel*" and instead require more than contract language to create a 9(a) relationship, and "to incorporate the

requirement of extrinsic proof of contemporaneous majority support in a new Section 103.21(b) of the Board's Rules." The Board then explained only its reasons for overruling *Staunton Fuel*. At no point did the Board mention *Casale* or the applicable limitations period. Instead, the NPRM focused exclusively on the Board's intention to overrule *Staunton Fuel* and to require positive proof of majority support when parties in the construction industry purport to create a Section 9(a) relationship. Accordingly, commenters had no opportunity to present their views on the continued validity of *Casale* because the NPRM did not give so much as a hint that the Board would overrule *Casale*. As doing so was not a logical outgrowth of the NPRM, the Final Rule violates the APA. The Board, therefore, should now repeal § 103.22.

IV. Conclusion

For the reasons stated above, the Board should grant this Petition for Rulemaking, and issue an NPRM that proposes the repeal of §§ 103.20 – 103.22 of its Rules and Regulations.

Respectfully submitted,

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