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NLRB Proposes New Election Rules *Un*-Blocking Charges and Protecting Employee Rights After Voluntary Recognition

By Morris Hawk

On August 9, 2019, the National Labor Relations Board ("NLRB") announced proposed rules[1] to change three aspects of the Board's union election procedures: 1) the treatment of unfair labor practice charges filed after a petition for representation is filed; 2) the rights of employees and rival unions when an employer voluntarily recognizes a union; and, 3) the required showing necessary to bar an election petition when an employer in the construction industry voluntarily recognizes or enters into a collective bargaining agreement with a union. The proposed rules are designed to protect employees' statutory right of free choice to decide whether or not to be represented by a union. Below is a summary of the proposed changes.

No More Blocking Charges

Traditionally, a party to a representation proceeding could delay the election date by filing an unfair labor practice charge alleging unlawful election-related misconduct (a "blocking charge"). As the Board notes in its Introduction to its proposed rule, blocking charges have generally been filed by unions seeking to delay decertification elections. Blocking charges have long been a source of frustration to employers and employees as they are often just a ploy to wait out any employee dissatisfaction by serially delaying an election. The Board's proposed rule would "un-block" unfair labor practice charges filed concerning a petition for an election. The rule proposes a "vote-and-impound" procedure permitting an election to proceed even if a charge has been filed and, if the charge cannot be resolved prior to the election, impounding the ballots until there is a final determination regarding the charge and its effect, if any, on the fairness of the election.

Voluntary Bar Standard – Back to *Dana*

In 2007, the Board ruled in *Dana Corp.*[2] that, when an employer voluntarily recognizes a union based on a showing of the union's majority status, the voluntary recognition will not bar a new petition for an election unless: 1) the employer posts a notice informing employees that they have the right, during a 45-day window period, to file a decertification or rival union petition; and, 2) the 45 days pass without a new petition being filed. In 2011, the Board overruled *Dana* and concluded in *Lamons Gasket*[3] that an employer's voluntary recognition of a union barred an election petition for a reasonable period of not less than six months and not more than one year during which collective bargaining could occur. The Board's proposed rule would reinstate the *Dana* 45-day notice standard, giving employees the right to seek a secret ballot election when their employer voluntarily recognizes a union.

Proof of Majority Support Required For 9(a) Relationship

In the construction industry, employers and unions are permitted to enter into pre-hire agreements under Section 8(f) of the NLRA without a vote by employees. The law permits these agreements

[1] 84 FR 39930,(08/12/2019).
[2] 351 NLRB 434 (2007).
[3] 357 NLRB 739 (2011).

because of the project-based nature of construction projects and in recognition that skilled trades employees have traditionally worked for multiple employers on multiple projects. Pre-hire agreements, unlike traditional 9(a) collective bargaining agreements, can be repudiated by either party when the project expires and do not give rise to a continued bargaining obligation by the employer. In *Staunton Fuel*[4], the Board held that an employer and a union could transform an 8(f) relationship into a 9(a) relationship simply by executing a contract containing Section 9(a) recognition language – with no evidence that the affected employees were in favor of continuing union representation. The Board's proposed rule would overrule *Staunton* and require a contemporaneous showing of support for the union from a majority of employees in the bargaining unit to establish a Section 9(a) relationship.

The Board is seeking public comments regarding these proposed rules. Comments must be received on or before October 11, 2019. We will keep you updated on the status of these rules as well as any additional proposals by the Board for changes to its election procedures.

If you have any questions regarding these changes, we encourage you to contact one of the listed Roetzel attorneys.

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[4] 335 NLRB 717 (2001).

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