Senate HELP Testimony Transcript

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Thank you, Chairman Alexander, Ranking Senator Murray and Senators of this Committee, for inviting me to testify on this very important and time-sensitive topic.

My name is Mark Carter. I am the Labor Practice Group Chair and a partner with the law firm of Dinsmore & Shohl LLP. I am appearing today as the designee of the United States Chamber of Commerce.

I have practiced law for nearly 29 years focusing on labor relations law and the regulation at issue today is, without question, the most dramatic revision of that law I have ever confronted. With your permission, Mr. Chairman, I hope to describe for the Committee some of the challenges which will confront employers in not only complying with the regulation, but more importantly, the insurmountable challenge of exercising their rights as created by Congress in the National Labor Relations Act while complying with the regulation.

In my career I have represented employers. This does not mean I never agree with unions. In fact, during my seven year tenure as a member of the Federal Service Impasses Panel during the administration of President George W. Bush, I frequently voted for unions in matters brought before the Panel. However, because I have represented employers in my private practice of law, I have a better ability to testify regarding their perspective and posture as it relates to this regulation.

The regulation is known in the management community as the “ambush election” regulation. The National Labor Relations Board has described the regulation as the “final rule governing representation-case procedures.” It has been referred to as the “ambush election” regulation because the regulation reduces the timeframe of a representational organizing campaign by a labor union from approximately 40 days to as little as 10 days. The dramatically shorter timeframe is seen by employers as an “ambush” in that the employer is unprepared for and unable to effectively respond to the petition for representation in the very short timeframe mandated by the new regulation.

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

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

Section 8(c) of the National Labor Relations Act[1] states that:

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

The statute clearly anticipates that employers, unions and employees have a right to communicate regarding the benefits of or negative impact resulting from union organizing drives. The United States Supreme Court has recognized that §8(c) of the Act reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 US 60, 67-68 (2008). Similarly, our Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575, 617 (1969) recognized that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board."

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

Upon the effective date of the ambush election regulation, labor unions will be highly encouraged to organize by stealth. A labor union enjoys a distinct advantage in persuading employees regarding the benefits of union membership without the

[1] 29 USC §158(c)

employer's knowledge of their effort because the employer is then unaware of any reason to communicate its views on the subject and is unable to rebut arguments that it is unaware of. The union is thereby in a posture to campaign toward an election that the employer is unaware of.

Ultimately, the employer becomes aware that an organizing campaign has been underway, and that mechanism will be the same as under the current regulations. The employer will receive a copy of a petition for a representational election. However, the burdens upon the employer from that point will be dramatically more difficult to accomplish at every successive step of the process.

By way of illustration, the following scenario will confront employers. It is important to recall in reviewing this testimony that the median number of employees in a bargaining unit petitioning for representation before the NLRB from 2004 through 2013 was 23 to 28.[2] Employers who employ this volume of employees, in my experience, do not retain in-house counsel much less counsel with experience practicing before the NLRB. Indeed, most of the employers whom I have served of this relative size were unfamiliar with any attorneys who focused on, or merely had experience practicing law before, the NLRB. As such, the first task facing an employer who desires to respond appropriately to a representational petition is the task of locating and retaining competent counsel. An ordinary timeframe for that task, in my experience, is approximately 3 business days (if the petition was filed on a Friday and/or holiday weekend that could extend the period to 5 or 6 calendar days.)

Under the final rule, the NLRB will schedule a representational hearing within 7 calendar days of the date the petition is filed. At that hearing the employer must present a statement of position articulating, *inter alia.*, **all** of the possible legal arguments it desires the NLRB to consider regarding the petition or those arguments are **waived**.[3] The scope of issues which a hearing officer would consider at the hearing is not precisely defined, in part, because the necessary form the Respondent – or Employer – would be required to complete identifying the issues has not been published. The

[2] 79 Fed Reg. at 7377 n. 46

[3] See, §102.63(b)(v) (The employer who fails to identify objections regarding the propriety of a described bargaining unit will be prohibited "from contesting the appropriateness of the petitioned for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing.")

regulation anticipates the publication of a "Statement of Position" form. However, to date, one has not been available. As such, we are unaware of what the form will actually compel an employer to provide but we do know two certainties: 1) if the Statement of Position form does not contain a position of the employer regarding the representational election process, the employer will be precluded from supplementing a new position subsequent to that hearing 7 days after the petition was filed;[4] and 2) the general description of the information that the form should include will be time-consuming to assemble during that 7 day period.

There are 13 types of information and/or positions the employer is required to gather and present in the 7 days following a petition. They are:

1. **Whether the employer agrees that the NLRB has jurisdiction.** This is a legal issue that an employer or lawyer unfamiliar with the Act would need to research.

2. **Whether the employer is in "interstate commerce" as defined by the Act.**

3. **Whether the employer agrees with the proposed bargaining unit.** This answer requires a legal analysis of the description and the propriety of the types of employees [statutory employee or supervisory] who are described.

4. **If not, the basis for the employer's contention that the unit is not appropriate.** This response requires a blended factual and legal argument focused on the type of work accomplished by the individuals who work within the described unit and a legal basis why certain employees should not be included, certain locations should not be included, or why the unit should be expanded to include other employees.

5. **Description of the most similar unit that the employer concedes is appropriate.** This response would require the employer to describe a unit of its own making that is "most similar' to the unit described by the union

[4] §102.66(c)

and **admit** that the unit is appropriate, again, precluding the employer from challenging the propriety of the forced admission of an "appropriate" unit.

6. **Identify any individuals occupying classifications in the petitioned for unit whose eligibility to vote the employer intends to contest and the basis for each such contention.** To respond to this would be practically impossible in a large unit. Employers can object to the inclusion of workers being included in a unit for a variety of reasons. They may be supervisors, employed by contractors, professionals, or meet other descriptions. Given the cumulative obligations of the final rule, and the absence of a real opportunity to investigate, this burden is unrealistic and not likely to be complied with in any but the most modest of proposed units.

7. **Raise any election bar.** This response will require legal analysis and factual analysis involving previous union representation at the facility or past representational election history.

8. **State the employer's position concerning the type, dates, times and locations of the election and the eligibility period.** This response requires an understanding of what the final unit will be. The unit may involve two or more locations of an employer's business and where that issue is not resolved, an employer will be precluded from making a predictive or useful response.

9. **Describe all other issues the employer intends to raise at the hearing.** This response requires a comprehensive factual and legal identification of any objection or issue the employer **could** articulate and if it fails to do so, the issue is waived. This aspect of the required position is the most single unjust of the requirements of the position statement.

10. **Name, title, address, telephone number, fax number and e-mail address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the**

representational proceeding. This response will ordinarily require retention of counsel or a representative.

11. **Full names, work locations, shifts and job classification of all individuals in the proposed unit.** Beyond being a laborious task (for example, many non-union represented employees do not have job "classifications") §102.63(b)(iv) will require the employer to disclose the employees' telephone numbers, home addresses and e-mail addresses. This disclosure subjects employees, at a minimum, to the inconvenience of potentially unwanted and uninvited home visits from union organizers or telephone calls. However, given the history of labor organizing, the risks associated with divulging this personal information are greater.

12. **Full names, work locations, shifts and job classifications of all individuals in the most similar unit the employer concedes is appropriate.** As with number 5 above, this section requires the employer to identify and concede the propriety of the "most similar" unit to the unit identified by the petitioning union. Not only is the concession required, but an identification of the employees, their shifts and classifications is required.

13. **The list of names shall be alphabetized and in an electronic format approved by the Board's Executive Director unless the employer certifies that it does not possess the capacity to produce the list in the required form.**

Cumulatively the obligations recited above are in and of themselves onerous given the allotted time for a response; but two specific factors make them worse than onerous. First, the Statement of Position must be presented at the representational hearing which must occur **within** 7 calendar days. "Within" 7 days means 7 days (not business days) is the longest period an employer would have to gather and record the information required. The NLRB also has discretion to schedule the hearing **before** the 7th calendar day. It is, therefore, within the discretion of the NLRB to receive a petition

on a Friday and schedule the representational hearing on a Monday or Tuesday, or 3 or 4 days after receipt of the petition. The employer would then have to retain counsel, research and review all of the information mandated in one or two business days, as well as prepare witnesses to testify to support its factual allegations. This scenario is untenable. The second reason the regulation is more than onerous is that during the period it is preparing this information, it is presumed that the employer is simultaneously: a) continuing to operate its business; and b) exercising its rights under §8(c) of the Act to communicate with its employees regarding the petition to further the robust and full debate regarding the petition amongst its employees that is the goal of the statute. The reality is that neither is likely to happen. The employer will be so consumed with populating the Agency's file regarding the petition that its rights to operate its business and communicate with its employees are at best frustrated if not flatly eliminated by the requirements of the regulation.

But the employer's obligations do not end there. Within two days of the receipt of a direction of election, which should follow the hearing in rapid fashion, the regulation requires the employer to produce a final voter eligibility list. The list[5], in many respects, is anticipated by the Statement of Position, but here the regulation is very clear that the list must contain the employees' home address, telephone number, and e-mail address. This information currently is not required to be produced under NLRB regulation. This sensitive and personal information must be provided regardless of whether the employee authorizes its production.

The regulation also eliminates the 25 day limitation on the scheduling of an election. Currently, the NLRB prohibits the scheduling of an election for at least 25 days after the conclusion of a representational hearing. Further, the parties may currently seek review of a Regional Director's order of an election as of right on a variety of legal determinations such as who the eligible voters will be and what the proper bargaining unit voting will be. Under the final rule, there is no pre-election review as of right and the Regional Director is free to order an immediate election within his or her discretion as the 25-day period has been removed. Theoretically, the Regional Director could

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

direct the election to take place the day after the hearing, or, only 10 days after the petition was filed.

The sum and substance of this regulation is that it:

1) Makes it highly unlikely an employer can obtain legal advice to compile and present mandatory positions within the maximum 7 days between a representational petition and representational hearing;

2) Simultaneously frustrates or prohibits the employer from operating its business while it is gathering and preparing the mandatory statement of position;

3) Denies the employer meaningful review of pre-election legal determinations by a Regional Director; and

4) Frustrates or prohibits the employer from exercising its §8(c) rights to communicate with its employees prior to the election.

However, as onerous as the regulation is to employers, it is most damaging to employees. Employees, seemingly by design, are likely to receive only one candidate's perspective in an organizing campaign instead of the full and robust debate of the issues anticipated by Congress in creating the Act. They will be compelled to make this profoundly important decision on the basis of "half" of the facts in direct contravention to the purposes and policies behind the law. Moreover, in the process, their privacy rights will necessarily become diluted and the risks attendant to that status will multiply. The "level playing field" that Congress has sought to preserve in the area of labor relations will be abandoned in a plain effort to provide labor unions with the upper hand, and this imbalance will be the work product of a regulatory agency without any involvement by Congress itself.

Read more about Mark Carter