



Motor & Equipment Manufacturers Association
Response to the
National Labor Relations Board
Notice of Proposed Rulemaking; Representation – Case Procedures
RIN 3142-AA08
August 22, 2011

Introduction

The Motor & Equipment Manufacturers Association (MEMA) represents over 700 companies that manufacture motor vehicle parts for use in the light vehicle and heavy-duty original equipment and aftermarket industries. MEMA represents its members through four affiliate associations: Automotive Aftermarket Suppliers Association (AASA); Heavy Duty Manufacturers Association (HDMA); Motor & Equipment Remanufacturers Association (MERA); and, Original Equipment Suppliers Association (OESA). Motor vehicle parts suppliers are the nation's largest manufacturing sector, directly employing over 685,000 U.S. workers and contributing to over 3.2 million jobs across the country. Without the contributions of the nation's parts suppliers, domestic vehicle manufacturing and maintenance would almost certainly grind to a halt, adversely affecting the way we drive and go about our daily lives. Some of the employees of MEMA member companies are represented by unions, and many others are not.

The Notice of Proposed Rulemaking (NPRM) published on June 22, 2011, would require hearings on bargaining-unit issues to begin within seven days of a petition being filed, defer pre-election litigation of disputes involving 20 percent or less of the bargaining unit until after the election, reduce the period within which employers must produce a list of eligible voters, and make NLRB review of election disputes discretionary rather than mandatory, among its other changes. The net effect of the new procedures would be to dramatically shorten the time period between the filing of a petition and the holding of an election; delay most hearings until after the conduct of an election; deprive employees and employers of a resolution on important issues that could affect their conduct before the vote; and, result in a lack of clarity that will yield an increase in litigation of representation issues. For example, employees will not know who will be in the bargaining unit before they cast their ballots, and when planning communications with employees, employers will not know whether working supervisors are eligible to vote. Unresolved questions will abound. MEMA is convinced that in many cases, confusion will reign.

The avowed purpose of the NPRM is to gain efficiency and savings by streamlining procedures (despite the fact that the agency has met its own time targets for the processing of representation cases). Denying that the objective is to facilitate union organizing efforts, the NPRM asserts that the effect the proposed changes would have is unpredictable and

immaterial to the NLRB. MEMA submits that for its members, implementation of the proposal will eliminate any hope for efficiency in responding to a representation petition, and the effects the proposed changes would have are both predictable and highly material to the businesses that will suffer from their adoption.

The American economy is fragile. The NPRM seems designed to multiply unknown and unresolved issues for employers and employees in union representation elections. For MEMA members who manage risk every day, the NPRM needlessly creates new risks, along with the potential for increased costs, and strained employee relations. Inevitably, this instability will result in delayed or cancelled expenditures, disruption to operations, and diminished profitability. MEMA finds it hard to imagine a worse time for the NLRB to move forward with this proposed rule as the mandate it creates conflicts with the Administration's continued efforts to create jobs and stabilize the economy.

These comments address two fundamental issues that the NPRM raises for MEMA members: (1) the fairness and legality of depriving employers of a fair opportunity to obtain timely advice and counsel concerning the NLRB process that will decide whether its workforce will be represented by a union, and (2) the wisdom and statutory basis for denying employers a meaningful opportunity to communicate with their employees about the important decision on union representation.

The NPRM Denies Employers a Fair Opportunity to Participate in NLRB Proceedings

MEMA's members vary widely in size and have a wide range of exposure to unions, union organizing, collective bargaining, and the purpose and procedures of the National Labor Relations Board. As a general rule, those MEMA members whose employees are not represented by unions do not devote time or resources to discussions with employees on the topic of unionization, nor do they invest in legal counsel to educate themselves about the NLRB and the legal issues presented when a union files a representation petition claiming to represent their employees. Many of these members are small businesses that have never had reason to engage a lawyer who specializes in labor relations or representing clients before the NLRB. As a consequence, when a MEMA member is served with a representation petition, it is often the company's initiation into unfamiliar administrative procedures and substantive rights and responsibilities enforced by the NLRB.

Over the years, the experience of MEMA members has shown that employers typically require at least several weeks to understand and be prepared to address the implications of a notice of a representation petition from the NLRB; to search for and retain a qualified lawyer and schedule a meeting with the lawyer; to obtain legal advice regarding NLRB processes and the rules governing employer conduct; to educate legal counsel about the business and the employees affected by the petition; to prepare to present evidence on relevant issues to the NLRB; and, to communicate with employees and answer their multitude of questions about the extraordinary decision they must make on representation.

Under the proposed rule, within seven days of learning of a petition, employers must not only understand that they must itemize and state with particularity the issues presented by the petition, but must also state the basis for raising the issues. Failure to meet these deadlines would result in forfeiture of any right to raise such matters. The condensed schedule the NLRB proposes to adopt, forcing unsuspecting employers to rush headlong

into an unfamiliar process involving the vital interests of the business and its workers, seems designed to force missteps by employers in exercising their rights and abiding by their responsibilities.

Unreasonable Deadlines Deny Due Process

In a different context, it has been observed that due process requires more than one week for an affected party to analyze pertinent evidence and marshal its forces in order to prepare for a hearing on complex issues. *Virgin Islands Hotel Ass'n (U.S.) Inc. v. Virgin Islands Water & Power Auth.*, 54 F.R.D. 377, 383 (D.V.I. 1972). Requiring unrepresented parties to act in haste is an unduly harsh and repressive decree that effectively undermines the federal policy of ensuring that parties receive administrative due process. Where parties are not represented by counsel at the outset of an administrative process, there is a serious risk that they will be unfairly penalized by very short deadlines that require them to retain counsel and make crucial decisions in an unrealistic time frame. *See Schimmel v. Spillane*, 819 F.2d 477, 482 (4th Cir. 1987). An agency may not “take precipitate action without a proper hearing on the ground that it can always cancel out and reconstruct if so advised after hearing. To act in haste, repent at leisure, is not a sound motto for an administrative agency.” *Pennsylvania Gas and Water Co. v. Federal Power Commission*, 427 F.2d 568, 575 (D.C. Cir. 1970). “Avoidance of ‘substantial delays’ is no panacea if the product of speed is a hasty denial of justice.” *Hackley v. Roudebush*, 520 F.2d 108, 156 (D.C. Cir. 1975).

The NLRB Lacks Authority to Eliminate Pre-Election Hearings

The imperative for the NLRB to provide a hearing that respects the due process rights of employers in representation proceedings is particularly pressing in view of the statutory direction contained in Section 9(c)(1), which provides: “Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . .” The NPRM purports to finesse this issue, but the reality is that the Board acknowledged shortly after the enactment of Section 9(c)(1) that the 1947 amendment “abolish[ed] . . . a practice instituted in 1945, of permitting the Regional Director in appropriate circumstances to conduct the election, upon due notice to the parties, before holding the hearing.” NLRB, THIRTEENTH ANNUAL REPORT, at 20 (June 1948). Forty-six years later, the Board again recognized the limits on its authority to do away with pre-election hearings, announcing “that the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s Rules require[] . . . ‘an appropriate hearing’ prior to finding that a question concerning representation existed and directing an election.” *Angelica Healthcare Serv. Group, Inc.*, 315 N.L.R.B. 1320, 1321 (1995). Likewise, the 1994 Dunlop Commission Report stated, “The requirement that the Board hold pre-election legal hearings prevents it from expediting the election process in a significant way.” U.S. DEP’T. OF LABOR & U.S. DEP’T. OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT, at 19 (1994).

The Statement of Position Procedure Would Cause Involuntary Waivers

The NPRM compares the proposed requirements imposed for filing a Statement of Position in a representation proceeding to the pleading rules under the Federal Rules of Civil Procedure (FRCP). The fallacy of this comparison is demonstrated by the absence of

any realistic opportunity to prepare for and respond to a representation case under the regimen of the proposed rule, concerns that do not exist under the protections provided by the FRCP. While the FRCP promote efficiency, the right of each party to investigate and discover underlying facts and to advocate the party's rights and positions is never sacrificed for the sake of a frenzied pursuit of a verdict. The pleading stage of a civil case in federal court by itself is typically longer than the current timeframes for an entire representation election, from petition filing through election – let alone the shortened deadlines being proposed by the Board. Moreover, the FRCP permit liberal amendment of pleadings. It is deceiving to analogize a requirement for employers to file a Statement of Position within seven days to the pleading requirements of FRCP requiring an answer in 21 days (a deadline that is often extended).

MEMA is concerned that its members will forfeit their right to raise important issues because of the requirement that they file position statements and supporting evidence on such a short timeline; some employers will not understand the significance of the “pleading” requirement, while others will have insufficient opportunity to explain their business to experienced legal counsel, explore the circumstances of affected employees, identify and understand the legal issues, and collect pertinent evidence. The effect will be involuntary waivers of the right to raise important issues. MEMA members that have experienced the NLRB election process in recent decades know that even under the existing time frames, a frenetic effort was often necessary to understand, plan, and participate in a representation case and union election. The proposal to significantly condense the original time frame irrationally elevates the objective of a rushed resolution over the myriad serious interests of employers and employees in a fair and informed election. Rushing to schedule union elections is sure to confuse rather than simplify the process for both employers and employees, and the end product of speed will not be fairness, but a hasty denial of justice.

The NPRM Denies Employers a Fair Opportunity to Communicate with Employees

MEMA strongly supports an approach to union elections that enables workers and management to discuss the merits and drawbacks of union representation. The time frame provided for this serious decision should be sufficient to allow a thorough exploration of the issues, a discussion with peers and supervisors, and an opportunity to reflect on the information and opinions presented. The proposed, severely truncated schedule for union elections would frustrate the ability of the employees of MEMA members to make informed decisions concerning union representation. Ten days is not a sufficient opportunity for employees to learn essential facts and digest alternative perspectives in order to make knowledgeable decisions on union representation.

After signing authorization cards during the early stages of union organizing, as a result of their employers' communications, many employees learn important additional facts, are exposed to alternative viewpoints, and as a consequence, they can reassess the wisdom of their original opinions before casting their secret ballots. The unfairness of the abbreviated opportunity allowed for employers to communicate becomes obvious when it is contrasted with the unlimited time unions can persist with their organizing campaign before filing an election petition. The reduced timetable of the NPRM precludes an opposing viewpoint from being adequately disseminated and considered.

Why rush the process? There is no justification for forcing employees to make decisions under severe time pressures, without learning different points of view, particularly when the NLRB has always followed a more reasonable schedule that allows voters to formulate opinions and consider different views without needlessly hurrying. It is in the best interest of employees to make fully informed and educated decisions. The rights of voters in NLRB elections to inquire, to hear, to speak, and to use information to reach enlightened decisions should not be sacrificed to administrative haste.

The NLRB contends in the NPRM that the purpose of its rulemaking is not to curb participation by employers in the decisions of their employees on union representation. By drastically reducing the period of time available to employers after they receive notice of a representation proceeding, however, whether it is the avowed purpose or merely the inevitable effect of the NLRB's rulemaking, the result of the proposed new rule would be to suppress an informed examination of the issues presented by union organizing, and to deprive employees of the perspective of their employers on the question of union representation.

Abrogation of Free Speech Rights

The Supreme Court has recognized that “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). In the context of national labor relations, moreover, the primary position of Free Speech rights is stated in the statute. Not only was it emphasized at the dawn of federal labor legislation that Congress “believed that both employees and employers ought to enjoy the right of peaceful persuasion with respect to joining or not joining a labor organization.” 78 CONG. REC. 10,560 (1934) (statement of Sen. Walsh), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1959), but in 1947, Section 8(c) was enacted, driven by a desire “to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.” H.R. Conf. Rep. No. 510, at 45 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 299 (1959).

In *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008), the Supreme Court illuminated the significance of the congressional decision to go beyond First Amendment guarantees for employers involved in labor relations disputes, and to expressly preserve their Free Speech rights by including Section 8(c) in the statute, explaining that:

... its enactment also manifested a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress deemed such free debate that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word...has been expressly fostered by Congress and approved by the NLRB.
(citations omitted).

Parallels have often been drawn between political elections and union elections. See *Thomas v. Collins*, 323 U.S. 516, 546 (1945) (Jackson, J., concurring) (“The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation.”). In the context of general elections, Supreme Court has stated that “the ability of the citizenry to make informed choices among candidates for office is essential.” *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*). “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010). The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989).

Employees who vote in representation elections conducted by the NLRB have rights and interests analogous to those of voters in a general election campaign. The ability of employee-voters to make responsible decisions regarding the selection of a bargaining representative depends on their access to the information relevant to that decision. The exercise of their Free Speech rights by employers and unions in an effort to inform and persuade employees about the benefits and costs of union representation ensures that employees are fully apprised of the crucial issues in the election. “It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right.” *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971). The NLRB is prohibited from preferring one side of the argument over the other. “Any procedure requiring a ‘fair’ election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice.” *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). “An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’ ” *Gissel Packing Co.*, 395 U.S. at 618.

Realizing the objectives and expectations of Congress and the federal courts for employees voting in union representation elections demands that such voters have access to the full spectrum of facts and opinions relevant to their vote. But the requirements proposed in the NPRM ignore these aspirations, leaving employers with virtually no opportunity to learn the issues of concern to employees, to obtain legal advice on what may and may not be said to employees leading up to the election, or to prepare communications to employees. The union that files a representation petition has unlimited time to contact employees and attempt to persuade them to support a choice for collective bargaining. The union also has total freedom to choose the timing for filing the petition, which may be based on achieving a certain level of voter support, the business circumstances of the employer, the organizers’ convenience, or the vacation schedules of company executives. The employer, however, is granted but a few days to communicate with his or her employees after learning of the union’s organizing effort. This schedule clearly favors the union’s message in the competition of ideas, tramples the employer’s statutory and constitutional Free Speech rights, and vexes the employees by forcing them to choose without being fully informed.

In sum, the NPRM defies the clearly stated congressional preference for Free Speech. Adoption of the proposed rule would contravene the oft articulated construction of the statute by the federal courts encouraging free debate, and promoting the uninhibited, robust, and wide-open flow of information in labor disputes. Finally, if implemented, the proposal would surely inspire legal challenges and time consuming litigation – a legacy of expense and delay, rather than administrative efficiency.

Conclusion

MEMA strongly opposes the NLRB’s proposal to significantly revise and shorten the timetable for union representation elections. The NPRM would deny employers of their due process rights to participate meaningfully in NLRB proceedings, and would abridge the Free Speech rights of employers to communicate and employees to receive information concerning union representation. The NLRB should not adopt the proposed rule.

Please feel free to contact Ann Wilson, MEMA Senior Vice President of Government Affairs at (202) 312-9246, with any questions related to our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert E. McKenna", with a long horizontal flourish extending to the right.

Robert E. McKenna
President and CEO