COALITION FOR A
DEMOCRATIC WORKPLACE

Statement of Charles I. Cohen
At the National Labor Relations Board
Open Meeting on Proposed Election Rules

July 18, 2011

I am appearing here today on behalf of the Coalition for a Democratic Workplace, an organization composed of some of the most significant employer associations in the country. Even though I am here in my representative capacity, I intend to structure my presentation, with the Coalition's consent and with the Board's indulgence, on the basis of personal observations over the years.

My entire professional career, spanning 40 years, has been spent working under the National Labor Relations Act. For the first eight of those years, I worked at the NLRB, both in Washington and in two regional offices. During that time, I personally conducted NLRB elections, served as a hearing officer, litigated in the Courts of Appeal, and performed the myriad other functions of a Board agent, supervisor, and deputy regional attorney. From 1994-96, I had the honor of serving as a Member of the Board. The remainder of my professional time has been spent representing employers in a traditional labor practice.

I appreciate the difficulty and inherent tensions in working under the NLRA. The statute guarantees the right to engage in union activities. It also ensures the right to refrain from such activities.

These tensions, since the early years of my career, have played out in ways that have become much more political, engrained, and contentious. In those beginning years, there tended to be slightly different emphases in NLRA interpretation based upon the prisms through which the appointees at the Board viewed the Act. Over four of the last five Presidential Administrations, the proverbial envelope has been pushed. Appointees supported by Republicans and Democrats bear some measure of responsibility for the increased polarization. But, the proposed rules that have brought us here today do not push the envelope. Rather, they blow up that envelope and do violence to the fair administration of the Act.

Please let me explain. In virtually every controversial initiative that I have witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or game the system. Unlike any of these other initiatives, this one transparently seeks to deprive law-abiding and nongames-playing employers of their rights to communicate under

Section 8(c) of the Act. The entire employer community is presumed to be on the wrong side standing ready to trample the rights of employees. The proposal also deprives employees of their right to receive key information from all sides in order to be fully informed on how and whether to exercise their Section 7 rights.

I want to emphasize some points that I believe you, the Board, and I know to be the case.

- Union density in the private sector has been on a decline and is currently below seven percent of the private sector workforce. Whatever the cause, the scope of which is beyond this debate, it is deeply distressing to organized labor.

- Over the past 15 years, unions have been seeking alternatives to winning secret ballot elections, typically through neutrality and card check procedures, often obtained through the pressure of corporate campaigns.

- Unions have unsuccessfully sought legislation, through the Employee Free Choice Act, that would have functionally eliminated secret ballot elections conducted by the Board.

- It is commonly known that the longer the period of time between the filing of an election petition and an election, the less likely it is that the employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred.

- There have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

At the time I served as a Member of the Board, there were calls for more rapid elections and to change the Board's procedures. However, after considering this the Board concluded the requirement of a pre-election hearing prevented the Board from having an unfettered right to accelerate the election process. *Angelica Healthcare Services*, 315 N.L.R.B. 1320 (1995); *Barre National, Inc*., 316 N.L.R.B. 877 (1995). The simple point was that the statute guaranteed a pre-election hearing. That pesky detail was viewed realistically by the Board as a bar to ordering elections without an effective opportunity for employers to campaign.

So what has the Board now come up with? It has proffered the gimmick of an emasculated hearing, summary judgment standards, offers of proof, preclusive rules to limit issues, regional director decisions devoid of explanation at the time of issuance, and frenetic time deadlines that disregard other obligations of employers and their counsel, all in an attempt to get to that election as soon as humanly possible and without giving the employer time to communicate with its employees. There will, of course, be no tears shed for unrealistic burdens on employer counsel.

Indeed, the Department of Labor's proposed Persuader Rules are designed to deprive employers of representation in the first place.

What is it, one might ask, that draws the Board into this cauldron? To me, it is explainable as a rational act only if one subscribes to the long-held philosophic beliefs that representation procedures and decisions are the sole province of employees and unions, and the only conceivable choice that informed employees would make is to choose unionization, with the employer having no say and no stake. This view has, of course, been espoused as a philosophic view by some union adherents and academics. But, those academic ideas are not the law of the land. Open and free non-coercive speech is the law of the land.

In his dissent, Member Hayes has taken the unusual step of calling out his fellow colleagues on his view of the true reasons for the Board in proposing these rules. As Member Hayes stated: "Make no mistake, the principal purpose of this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." As a former Board Member, I appreciate how difficult it is to make a statement like this about one's colleagues.

The majority has denied those motives to be true, stating that these rules are about efficiency and savings, asserting that the effect on the outcome of elections is unpredictable and irrelevant. Only the individual Board members know in their hearts and consciences what the true motivation is. But, I feel compelled to observe that—if the Board itself were called upon to assess motive (or mixed motives) as it is often called upon to do—the present circumstances clearly would support an inference of outcome-determinative rulemaking. The "on cue" issuance of Swiss cheese academic studies calling for quickie elections only reinforces this conclusion.

Over my 40 years under the Act, nearly all of the important representation case initiatives, including squeezing the games out of the system, have been spearheaded by the General Counsel—the individual who supervises the representation process with the dedicated help of the Regional Directors and Board agents who execute those policies. Although those initiatives have not always been welcome, they have been extremely effective in effectuating the policies and purposes of the Act. In making this point, I am not, at this moment, questioning the Board's authority in the representation case area, although this question of authority is clearly raised by some aspects of the proposed rule. My point here is that the Board has inserted itself, in an unprecedented way, into what will surely impact the day-to-day working lives of the dedicated staff in the regional offices. The proposed rule—together with the process by which it is being adopted—will add further fuel to a perception that the Board is casting its own vote in favor of union representation rather than safeguarding the process by which employees can make this choice for themselves after having a reasonable opportunity to get information from all sides.

I wish it did not have to be the case, but my time spent with the Act informs me that no public good will come from these proposed regulations. Proposed budget cuts, Congressional backlash

with appropriations riders and increased oversight, and more politicization of the NLRB are likely to occur. This is neither good nor fair for the NLRB as an institution, its staff, or indeed the country. As President Obama observed on June 29, 2011: "We can't afford to have labor and management fighting all the time, at a time when we're competing against Germany and China and other countries that want to sell goods all around the world." This proposed action by the Board will result not only in increased fights between labor and management. It will embroil the United States government in a most unfortunate way.

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