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Mr. Gary Shinners
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570

**RE: NLRB Notice of Proposed Rulemaking: Representative-Case Procedures [79 Fed. Reg. 7,317 (February 6, 2014)] (Docket ID No. NLRB-2011-0002)**

Dear Mr. Shinners:

On behalf of the Construction Industry Round Table (CIRT)[1], we wish to have our views included in the official record of comments regarding the above captioned proposal amending National Labor Relations Board (NLRB/Board) rules and regulations governing representative-case procedures (*aka* "union certification elections").

The design and construction firms represented by CIRT have traditionally employed both union members and open shop employees to deliver quality private and/or public sector infrastructure services to their clients. Therefore our comment is intended to be a fair assessment of the impact and consequences the proposed rule will likely have on the fundamental nature, scope, and principles of our social compact, the National Labor Relations Act, and the complex balance between employees and employers.

*Stated simply, we are a nation founded on the principle of a representative democracy determined by the free, open, full-throated discourse and debate of the competing interests . . . that has as its ultimate goal a fully informed, knowledgeable, and inspired voting parties that will then decide the outcome.*

As Thomas Jefferson rightfully observed: *"If a nation expects to be ignorant and free, (and) in a state of civilization, it expects what never was and never will be."*

Anything short of a full, robust, loud, uninhibited, and sometimes messy but beneficial participatory exchange of views, violates the sanctity of the election process and/or the very *outcome* itself.

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[1] The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design *and* construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.

The Round Table is composed of approximately 110 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million workers.

**Discussion**

Any regulatory proposal that changes, amends, tinkers-with, or otherwise restricts something as fundamental as the election process, especially after more than 75 years of NLRB practice, should not only be heavily scrutinized . . . but, must carry the burden of proof as to why such a modification is justified and fully warranted. It cannot *just* be a "rule" in search of a problem.[2]

The NLRB has failed to muster the requisite reasoning or intellectual support for such a fundamental rule change; for the following reasons:

(1) Critical Principle of Representative Governance and Sanctity of Elections:
As noted above, critically important free, open and respected elections turn on the exchange of views of informed and knowledgeable voting parties. The NLRB's stated purpose of "modernizing processes, enhancing transparency and eliminating unnecessary litigation and delay;"[3] is not compelling and certainly fails to carry the burden as to potentially undermining the sanctity of an election – no matter what the outcome. [*See also*, footnote 2 below].

The Supreme Court of the United States has weighed-in on a number of occasions to express its clear and unambiguous opinion as to the importance of the election process for NLRB proceedings. For example, the Court has pointed out that *"[a] secret ballot election is [the] most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support." NLRB v.Gissel Packing Co., Inc.*, 395 U.S. 575, 602 (1969).[4]

The election procedure is intended to be an evolutionary process or method whereby information is presented and countered as a picture emerges as to the side that should be supported. Knowledge is obtained and retained differently by different people, not all involved will understand or grasp all the important factors in the same time frame, or by the same means. To deprive these employees of their opportunity to fully comprehend the issues at stake is to deny them their right to be represented by the party they truly want.[5]

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[2] Harold P. Coxson, writing in the Ogletree Deakins blog, noted that: "*Currently, unions win an overwhelming majority of representation elections, almost all of which take place within 60 days of the union's petition for an election, with the average election taking place in fewer than 40 days after the filing of the petition. For example, unions won 65.2 percent of the 643 private sector elections held in the first six months of 2013, compared to 62.6 percent of 709 elections held in the same period in 2012.*"

[3] It is estimated that the rule change will result in a procedure which would allow voting on union representation in as few as 10 days after a petition to organize has been filed. Under the current rules, the NLRB's guidelines call for holding elections in 42 days. [*See*, discussion of this issue by Tim Gould, HRMorning.com (February 7, 2014)].

[4] *See also*, (*NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965) and (*NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) as to the importance of participatory and free elections to accurately reflect the will of the employees.

[5] Encroaching on a *fully* participatory election process, as the proposed rulemaking does, could find expression and be analogous to a rule change that permits *only* the *majority Board members* of the NLRB to be *fully staffed*. It could be contended that such a change certainly saves costs and potentially "eliminat[es] unnecessary . . . delay." Albeit, the *minority* Board members might find the new rule impinges on their ability to present their views and possibly influence the outcome of a board vote.

(2) Legislative Purpose and Mandate:
Tidiness and time/cost savings are not the purpose of a NLRA election. If so, simply not holding certification elections would be even more efficient[6] – BUT that is not the legislative mandate to NLRB.

The organic statute, the National Labor Relations Act, is replete with a series of dictates that direct the NLRB to oversee, conduct or otherwise ensure the selection of the bargaining unit by an election. [*See*, NLRA, Section 9 (§159)]. The Act states: "Employees shall have the right to . . . bargain collectively . . . through *representatives of their own choosing*." (Emphasis added) [NLRA, Section 7 (§157)].

It is implicit that "of their own choosing" is to be done through an election. It is also axiomatic that to make such a "choosing" the employees doing the choosing or selection must be educated as to the choices, and knowledgeable as to the various points of view – anything less or short of that is to do damage to the fundamental process of "choosing" as required and expected by the National Labor Relations Act.

The proposed rulemaking does not take into full account the legislative importance and value placed on the election "process" and thereby fails to carry the burden to warrant such a change.

(3) Labor Harmony and Economic Well-Being:
Stated in the findings and overall purpose of the National Labor Relations Act, is the notion of labor harmony and economic well-being of the nation.[7] The objective of the election process is not efficiency, but rather to satisfy the parties involved that they had a fair, open, rigorous and full opportunity to make their case, so that the employees could then select the "representatives of their own choosing". . . whether it be a new union or the company management.

To understand this statutory construct, is to understand the importance of holding elections that are not tainted or viewed as one-sided or biased in any way for one party. The NLRB must be perceived, and in fact be, a neutral fair arbiter of the process. Unfortunately, the proposed amendments cloud the perception of many as to the fairness and neutrality of the Board.[8] For this reason alone, the proposed amendments should be withdrawn.

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[6] The 111th Congress attempted to alter the time honored and legislative mandated NLRA representative election procedure in 2009, all in the name of "streamlining union certification." (See, Section 2). Congress **rejected** the stated purpose of The Employee Free Choice Act to "*amend the NLRA to establish an efficient system* [by eliminating the secret ballot (i.e., elections)] *to enable employees to form, join or assist labor organizations (unions) . . .*" (Bracketed information added).

[7] The NLR Act's Findings state (in part):
*It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.* [Findings and Principals, NLRA 49 Stat. 449, 29 U.S.C.§151-169]

[8] The mere fact the proposed amendments passed the Board on a straight party-line 3:2 vote, after over 75-years of accepted procedures, suggests that the changes are deeply derisive and flawed. They put in jeopardy the "honest broker" role of the NLRB and may taint the perceived fairness of election outcomes . . . to the detriment of labor harmony and commerce.

**Conclusion**

In sum, the proposed amendments to the rules and regulations regarding representative-case procedures/the certification election process, undercut the very purpose and goals of the National Labor Relations Act, both as to specific objectives and overall findings.

More importantly, the proposed rulemaking ill-serves and denies the employees the opportunity to fully understand the ramifications and potential impacts of an election outcome . . . all in the name of *claimed* efficiency and modernization.[9]

Given the Act, the Board's purpose, and the election process are intended to benefit "*the employees*," the shortcomings and flaws in the proposed rulemaking are serious and indeed fatal to the proposal.

For the reasons stated above, and most critically for the perceived validity of future representative elections, the Construction Industry Round Table (CIRT) strongly urges the National Labor Relations Board to abandon the proposed rulemaking aforementioned.

Sincerely,

Mark A. Casso, Esq.
President, CIRT

[9] Former NLRB Board member, Brian Hayes, unambiguously contends: "Make no mistake, the principal purpose for 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 quoted in story at: http://www.ogletreedeakins.com).