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WORKFORCE DEMOCRACY AND FAIRNESS ACT

NOVEMBER 10, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitting the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3094]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3094) to amend the National Labor Relations Act with respect to representation hearings and the timing of elections of labor organizations under that Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workforce Democracy and Fairness Act".

SEC. 2. TIMING OF ELECTIONS.

Section 9 of the National Labor Relations Act (29 U.S.C. 159) is amended—

(1) in subsection (b), by striking "The Board shall decide" and all that follows through "*Provided,* That the" and inserting: "In each case, prior to an election, the Board shall determine, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining. Unless otherwise stated in this Act, and excluding bargaining unit determinations promulgated through rulemaking effective before August 26, 2011, the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training; (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production

process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry. To avoid the proliferation or fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity. The"; and

(2) in subsection (c)(1), in the matter following subparagraph (B)—

(A) by inserting ", but in no circumstances less than 14 calendar days after the filing of the petition" after "hearing upon due notice";

(B) by inserting before the last sentence the following: "An appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon. Relevant and material pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or which may reasonably be expected to impact the election's outcome. Parties may raise independently any relevant and material pre-election issue or assert any relevant and material position at any time prior to the close of the hearing.";

(C) in the last sentence—

(i) by inserting "or consideration of a request for review of a regional director's decision and direction of election," after "record of such hearing"; and

(ii) by inserting "to be conducted as soon as practicable but not less than 35 calendar days following the filing of an election petition" after "election by secret ballot"; and

(D) by adding at the end the following: "Not earlier than 7 days after final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all eligible voters to be made available to all parties, which shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing.".

PURPOSE

H.R. 3094, the Workforce Democracy and Fairness Act, seeks to narrowly preempt the National Labor Relations Board's (NLRB or Board) June 22, 2011, rulemaking on election procedures and reverse its August 26, 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, which limits employee free choice and employer free speech, and will fracture the workforce. This bill will codify the traditional standard for determining an appropriate bargaining unit and the traditional standard used to challenge a petitioned-for bargaining unit, require the Board to rule on challenges to composition of the bargaining unit prior to the election, ensure employers have at least 14 days to prepare for a pre-election hearing, allow parties to raise relevant and material pre-election issues as the pre-election hearing record is developed, ensure parties may request pre-election Board review of regional director's decisions, provide employees with at least 35 days to consider whether they wish to be represented by a union, and permit employees to choose what personal information is provided to the union. The Workforce Democracy and Fairness Act will ensure employee free choice, employer free speech, and workforce cohesion.

COMMITTEE ACTION

Subcommittee hearing highlights concerns about the NLRB's harmful actions

On February 11, 2011, the Subcommittee on Health, Employment, Labor and Pensions held a hearing examining the "Emerging Trends at the National Labor Relations Board." The hearing examined controversial and precedent-changing NLRB holdings and invitations for briefs (including *Specialty Healthcare*), the NLRB's December 22, 2010, Notice of Proposed Rulemaking mandating employers hang a vague and biased poster regarding union rights at work, and new policies issued by Acting NLRB General Counsel Lafe Solomon. Witnesses at this hearing included Mr. Philip A. Miscimarra, Partner, Morgan, Lewis & Bockius LLP, Chicago, Illinois; Mr. Arthur Rosenfeld, Former National Labor Relations Board General Counsel, Alexandria, Virginia; Mr. G. Roger King, Partner, Jones Day, Columbus, Ohio; and Ms. Cynthia Estlund, Professor of Law, New York University School of Law, New York, New York.

Full committee hearing investigates NLRB's unprecedented rulemaking

On July 7, 2011, the Committee on Education and the Workforce held a hearing entitled "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice," on the NLRB's proposed election procedure regulation. Witnesses before the committee agreed that the cumulative changes of the proposal would significantly hinder an employer's ability to communicate with his or her employees and cripple an employee's right to choose whether to be represented by a labor organization. Witnesses before the panel were The Honorable Peter C. Schaumber, Former NLRB Chairman, Washington, D.C.; Mr. Larry Getts, Tube Press Technician, Dana Corporation, Garrett, Indiana; Mr. John Carew, President, Carew Concrete & Supply Company, Appleton, Wisconsin, testifying on behalf of himself and the National Ready Mixed Concrete Association; Mr. Michael J. Lotito, Attorney, Jackson Lewis LLP, San Francisco, California; and Mr. Kenneth Dau-Schmidt, Professor, Indiana University, Maurer School of Law, Bloomington, Indiana.

Full committee hearing explores NLRB's decision to disenfranchise employees in union elections

On September 22, 2011, the Committee on Education and the Workforce held a hearing on the "Culture of Union Favoritism: Recent Actions of the National Labor Relations Board." At the end of August 2011, the NLRB issued a number of biased anti-worker decisions, including *Specialty Healthcare, Lamons Gasket*, and *UGL–UNICCO*. Additionally, the Board finalized a rule requiring almost every employer to post a vague, union-biased notice on employee National Labor Relations Act (NLRA) rights. The Board's unbridled overreach of authority demanded a complete examination by the committee. Witnesses before the committee included Mr. Curtis L. Mack, Partner, McGuire Woods LLP, Atlanta, Georgia; Ms. Barbara A. Ivey, Employee, Kaiser Permanente, Keizer, Oregon; Mr. Arthur J. Martin, Partner, Schuchat, Cook & Werner, St. Louis,

Missouri; and Mr. G. Roger King, Partner, Jones Day, Columbus, Ohio.

Committee introduces legislation

On October 5, 2011, Chairman Kline introduced H.R. 3094, the Workforce Democracy and Fairness Act with 26 cosponsors. Recognizing that the NLRB has gone far beyond an adjudicative body designed to implement congressional intent under the NLRA, legislation was necessary to: (1) reinstate the traditional standard for determining which employees make up an appropriate bargaining unit; (2) ensure employers are able to participate in a fair union election; (3) guarantee workers have the ability to make a fully informed decision in a union election; and (4) safeguard employee privacy by allowing workers to decide the type of personal information provided to a union.

Legislative hearing considers bill in statutory context

On October 12, 2011, the committee held a legislative hearing on H.R. 3094, the "Workforce Democracy and Fairness Act." Witnesses testified that the Board had overturned decades of precedent to facilitate union organizing at the cost of employee free choice and employer free speech. These actions could have devastating economic consequences for the country. Witnesses included the Honorable Charles Cohen, Senior Counsel, Morgan, Lewis and Bockius LLP, and Former Member, National Labor Relations Board, Washington, D.C.; Mr. Robert Sullivan, President, RG Sullivan Consulting, Westmoreland, New Hampshire, testifying on behalf of the Retail Industry Leaders Association; Mr. Michael J. Hunter, Partner, Hunter, Carnahan, Shoub, Byard and Harshman, Columbus, Ohio; and Mr. Phillip Russell, Attorney, Ogletree Deakins, Tampa, Florida.

Committee passes H.R. 3094, Workforce Democracy and Fairness Act

On October 26, 2011, the Committee on Education and the Workforce considered H.R. 3094, the Workforce Democracy and Fairness Act. Chairman Kline offered an amendment in the nature of a substitute, clarifying that years of labor policies affecting the acute health care industry remain in place; limiting pre-election issues to those that are relevant and material; and reaffirming the Board's responsibility to grant or deny requests for review of regional directors' decisions before the election. Nine additional amendments were offered and debated; however, no additional amendments were adopted. The committee favorably reported H.R. 3094 to the House of Representatives by a vote of 23–16.

SUMMARY

The Workforce Democracy and Fairness Act, H.R. 3094, would codify the traditional standard for determining an appropriate bargaining unit and the traditional standard used to challenge a petitioned-for bargaining unit, require the Board to rule on challenges to composition of the bargaining unit prior to the election, ensure employers have at least 14 days to prepare for a pre-election hearing, allow parties to raise relevant and material pre-election issues as the pre-election hearing record is developed, ensure parties may

request pre-election Board review of a regional director's decisions, provide employees with at least 35 days to consider whether they wish to be represented by a union, and permit employees to choose what personal information is provided to the union.

The legislation is designed to be a narrow reversal of the NLRB's August 26, 2011, decision in *Specialty Healthcare and Rehabilitation Center of Mobile* and preempt the NLRB's June 22, 2011 proposed election procedures without upsetting any other current law. The legislation will ensure cohesion in the workplace, employee free choice, and employer free speech.

COMMITTEE VIEWS

In 1935, Congress passed the National Labor Relations Act (NLRA), guaranteeing the right of most private sector employees [1] to organize and select their own representative. Twelve years later, in 1947, Congress passed the most significant amendment of the NLRA, the Taft-Hartley Act,[2] abandoning "the policy of affirmatively encouraging the spread of collective bargaining . . . striking a new balance between protection of the right to self-organization and various opposing claims." [3] Among other things, the Taft-Hartley Act made clear that employees had the right to refrain from participating in union activity,[4] created new union unfair labor practices,[5] codified employer free speech,[6] and made changes to the determination of bargaining units.[7]

The NLRA established the National Labor Relations Board (NLRB), an independent federal agency, to fulfill two principal functions: (1) prevent and remedy employer and union unlawful acts (called unfair labor practices or ULPs), and (2) determine by secret ballot election whether employees wish to be represented by a union. In determining whether employees wish to be represented by a union, the NLRA is wholly neutral.[8]

CURRENT REPRESENTATIONAL ELECTION PROCESS

Section 9 of the NLRA broadly lays out the rules under which employees exercise their right to select or reject a union through a secret ballot.[9] In general, NLRB rulings, regulations, or internal policies establish specific representational election procedures.[10]

The representation election process begins when employees, an employer, or a labor organization files a petition for an investigation and certification of the representatives (petition) with the NLRB's regional office.[11] If filed by employees or a labor organization, the petitioner should present within 48 hours of filing evidence that 30 percent of employees in the proposed bargaining unit

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[1] The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the Railway Labor Act (airlines and railroads), agricultural labor, and supervisors are not covered by the act. 29 U.S.C. § 152(2).

[2] 29 U.S.C. § 141 et seq.

[3] Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1974,* 61 Harv. L. Rev. 1, 4 (1947).

[4] 29 U.S.C. § 157.

[5] *Id.* § 158.

[6] *Id.* § 158(c).

[7] *Id.* § 159(d).

[8] *NLRB v. Savair Mfg*, 414 U.S. 270, 278 (1973).

[9] 29 U.S.C. § 159.

[10] 76 Fed. Reg. 36812 (June 22, 2011).

[11] National Labor Relations Board Casehandling Manual ¶ 11002.2–11002.3.

support the petition, typically through signed and dated authorization cards.[12]

Upon receipt of the petition, the regional director[13] issues a notice of hearing and serves the following on the employer: the petition, a Notice to Employees, a generic notice of employees' rights, and a Questionnaire on Commerce, which seeks information relevant to the Board's jurisdiction.[14] Additionally, the regional director will ordinarily request a list of employees in the petitioned-for unit with their job classifications to determine whether 30 percent of employees are interested in representation and the employer's position as to the appropriateness of the unit described in the petition.[15] To limit delay, if the list is untimely or not filed, absent unusual circumstances, the Board will assume the number of unit employees estimated is accurate and the individuals are among those employed in the unit.[16]

These official requests by the regional director are followed up by telephone consultations, personal meetings, and joint conference calls with the parties before the pre-election hearing to resolve outstanding issues and secure an election agreement.[17] If parties can agree on representational issues, they may enter into one of three types of election agreements: the consent election agreement, the stipulated election agreement, and the full consent election agreement.[18] In consent agreements, post-election issues are decided by the regional director.[19] In stipulated agreements, they are determined by the Board.[20] In 2010, 92.1 percent of initial NLRB representational elections were held pursuant to agreement of the parties.[21]

In those rare cases, less than 10 percent, in which parties cannot reach an election agreement, a Board agent will hold a pre-election hearing to develop record evidence upon which the Board may discharge its duties under Section 9 of the NLRA.[22] The hearing is investigatory and non-adversarial.[23] Parties may present evidence on issues including the Board's jurisdiction, the existence of any bars to an election, the appropriateness of the unit, and eligibility of particular employees to vote.[24] The employer may petition for inclusion of additional employees in the bargaining unit by showing that the additional employees share a "sufficient community of interest" with the petitioned-for unit. To expedite the process, in general, the hearing is held on consecutive days until completion[25]

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[12] *Id.* ¶ 11003.1 and 11023.1.

[13] While the Board is responsible for conducting secret ballot elections, in 1961, it delegated the bulk of its authority over election cases to its regional directors. The regional directors: (1) decide whether a question concerning representation exists; (2) determines the appropriate bargaining unit; (3) directs the election; (4) certifies the results of the election; and (5) makes findings and issues rulings on objections and challenged ballots.

[14] *Id.* ¶ 11009.

[15] *Id.* ¶ 11009.1.

[16] *Id.* ¶ 11009.2.

[17] *Id.* ¶ 11012.

[18] *Id.* ¶ 11084.

[19] *Id.* ¶ 11084.1.

[20] *Id.*

[21] General Counsel Memorandum 11–03, 5 (Jan. 10, 2011).

[22] National Labor Relations Board Casehandling Manual ¶ 11181.

[23] *Id.*

[24] 76 Fed. Reg. 36812, 36818 (June 22, 2011).

[25] National Labor Relations Board Casehandling Manual ¶ 11008.

and issues are limited to pre-election issues [26] that are genuinely in dispute.[27] Postponement requests are granted only under the most compelling circumstances.[28]

In most cases, the regional director issues a decision based on the record developed at the pre-election hearing.[29] Within the decision, the Board is statutorily obligated to determine the appropriate bargaining unit.[30] In general, the Board applies the "sufficient community of interest" standard to determine the appropriateness of the bargaining unit. To determine whether employees share a sufficient community of interest, the Board evaluates a number of factors, including whether the employees are organized into a separate department and skills and training.[31] After finding the unit shares a sufficient community of interest, the Board proceeds to determine whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.[32] In most cases, the regional director will either direct an election or dismiss the petition. Under these procedures, in 2009, the median time between: (1) the notice of hearing and the close of the pre-election hearing was 13 days, and (2) the close of the pre-election hearing and the regional director's decision was 19 days.[33] In 2010, regional directors issued 185 pre-election decisions in contested representations cases in a median of 37 days.[34]

Within seven days of the regional director's pre-election decision or approval of the election agreement, the employer must file the "Excelsior list" with the regional director.[35] The list must include the full names and addresses of all employees who will vote in the election.[36] The regional director makes the list available to all parties. Unless waived, the non-employer parties, including the union(s) seeking representation, must have at least 10 days to review the list prior to the election.[37]

To ensure uniform and consistent application, parties may appeal the regional director's pre-election decision by filing a request for review with the Board within 14 days of the issuance of the decision.[38] The Board will grant the request if a "compelling reason" exists.[39] To ensure the Board has an opportunity to rule on a re-

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[26] Excludes issues such as alleged violations of federal statutes, the adequacy of the showing of interest, and alleged unfair labor practices, unless such matters are material to the issue of whether a question concerning representation exists.

[27] If a party refuses to state its position on an issue and no controversy exists, the party may be foreclosed from presenting evidence on that issue. *Mariah, Inc.* 322 NLRB 586 (1996); *Bennett Industries,* 313 NLRB 1363 (1994).

[28] National Labor Relations Board Casehandling Manual ¶ 11207.

[29] *Id.* ¶ 11273.

[30] *Allen Health Care Services,* 332 NLRB No. 134 (2000).

[31] *Kalamazoo Paper Box Corp.,* 136 NLRB 134, 137 (1962); *United Operations Inc.,* 338 NLRB No. 18 (2002).

[32] *Seaboard Marine, Ltd.,* 327 NLRB No. 108 (1999), Brand Precision Services, 313 NLRB 657 (1994); *Transerv Systems,* 311 NLRB 766 (1993).

[33] Seventy Fourth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 2009, National Labor Relations Board, page 152, available at *http://www.nlrb.gov/sites/default/files/documents/119/nlrb2009.pdf.*

[34] General Counsel Memorandum 11–03, 7 (Jan. 10, 2011).

[35] National Labor Relations Board Casehandling Manual ¶ 11312.

[36] *Id.* ¶ 11312.

[37] *Id.*

[38] National Labor Relations Board Casehandling Manual ¶ 11274 and 11364.5.

[39] NLRB Rules and Regulations 102.67(c), requests may be granted only upon one or more of the following grounds:

(1) A substantial question of law or policy is raised because of the absence of or the departure from officially reported Board precedent;

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quest for review, the regional director "will normally not schedule an election until a date between the 25th and 30th day after the date of the decisions." [40]

While complicated, the current Board process has been effective in expediting the resolution of questions concerning representation while maintaining the rights of both employees and employers. For all petitions filed in 2010, the average time from the filing of a petition to an election was 31 days,[41] and the median time was 38 days.[42] More than 95 percent of all initial elections were conducted within 56 days of the filing of the election petition.[43] Acting NLRB General Counsel Solomon has described these results as "outstanding." [44] Unions won almost two-thirds of representational elections in calendar year 2010.[45]

NEW REPRESENTATIONAL ELECTION PROCESS

Despite the success of the existing election procedures, on June 22, 2011, the NLRB proposed significant changes to the representational election process that will dramatically shorten the time between the filing of the petition and the representational election, and limit the opportunity for a full evidentiary hearing or Board review on contested issues.[46] Two months later, on August 26, 2011, the NLRB majority, overturning decades of precedent, articulated a new standard for determining employee bargaining units that will fragment the workplace. Taken together, the Board's actions will limit employee free choice and employer free speech, and fracture the workforce.

June 22, 2011, Proposed Rulemaking

According to the Board, it has proposed the new representational election process to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." [47] To achieve these ends, in addition to some minor changes, such as electronic filing, the Board will replace the Questionnaire on Commerce Information with a Statement of Positions, set pre-election hearings to begin seven days after the petition is filed, delay voter eligibility issues until after the election, eliminate pre-election Board review, and revise the Excelsior list to require employers to provide greater employee information in a shorter timeframe.[48]

The Questionnaire on Commerce Information, which seeks information relevant to the Board's jurisdiction, will be replaced by a Statement of Positions. The Statement of Positions will solicit the parties' position on the Board's jurisdiction; the appropriateness of

(2) The regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
(4) Compelling reasons exist for reconsideration of an important Board rule or policy.

[40] 29 CFR 101.21(d).
[41] Notice of Proposed Rulemaking, Representation—Case Procedures, 76 Fed. Reg. 36812, 77 (June 22, 2011). Available at *http://www.nlrb.gov/sites/default/files/documents/525/2011-15307_pi_2.pdf*.
[42] General Counsel Memorandum 11–03, 7 (Jan. 10, 2011).
[43] General Counsel Memorandum 11–03 at "introduction" (Jan. 10, 2011).
[44] *Id.*
[45] NLRB Graphs & Data, available at *http://www.nlrb.gov/chartsdata/petitions#chart9tag* (last visited on Nov. 2, 2011).
[46] 76 Fed. Reg. 36812, 36831 (June 22, 2011).
[47] *Id.* at 36817.
[48] *Id.* at 36812.

the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the types, dates, times, and locations of the election; and any other issues that a party intends to raise at the hearing.[49] With few exceptions, issues that are not raised in the Statement of Position will be waived.[50] The Statement of Positions would be due no later than the date of the pre-election hearing, that is, seven days from the filing of the petition.[51] In the Board's opinion, these changes will "assist parties in identifying issues that must be resolved at a pre-election hearing and thereby facilitate entry into election agreements." [52]

Under the proposed rule, resolution of disputes concerning the eligibility or inclusion of individual employees that represent less than 20 percent of the unit will be resolved, if necessary, after the election.[53] According to the Board, the "adoption of a bright-line numerical rule requiring that questions concerning the eligibility or inclusion of individuals constituting no more than 20 percent of all potentially eligible voters be litigated and resolved, if necessary, post-election, best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process." [54]

The proposed rule would eliminate pre-election Board review.[55] All pre-election rulings, if not rendered moot, would remain subject to Board review post-election.[56] Regional directors would no longer be required to provide at least 25 days between the issuance of the decision and the election for Board review.[57] The Board anticipates "that the proposed amendments would eliminate unnecessary litigation concerning issues that may be and often are rendered moot by the election results and thereby reduce the expense of participating in representation proceedings for the parties as well as the government." [58]

To facilitate communication between unions and employees, the Board has proposed adding additional information to the "Excelsior list" and cutting the timeframe for its production.[59] In addition to employee names and addresses, the employer must provide unit employee phone numbers, email addresses, work locations, shift information, and classification.[60] Absent extraordinary circumstances or party agreement, this information must be provided to the union within two days of the regional director's decision or approval of the election agreement.[61]

On June 22, 2011, the Board majority "announced its intent to provide a more expeditious preelection process and a more limited postelection process that tilts heavily against employers' rights to engage in legitimate free speech and to petition the government for

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[49] *Id.* at 36821.
[50] *Id.*
[51] *Id.*
[52] 76 Fed. Reg. at 36821.
[53] 76 Fed. Reg. at 36823.
[54] 76 Fed. Reg. at 36825.
[55] *Id.* at 36826
[56] *Id.*
[57] 29 C.F.R. 101.21(d).
[58] 76 Fed. Reg. at 36826.
[59] *Id.* at 36820.
[60] *Id.* at 36820.
[61] *Id.* at 36821.

redress."[62] The Board's majority asserts the proposed rule has been implemented to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation."[63] However, the Board has made no "attempt to identify particular problems in cases where the process has failed."[64] Based on Member Hayes's experience, "vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systematic procedural problems or obstructionist legal tactics."[65] Former NLRB Chairman Peter Schaumber agreed that the election process was not the source of delays.[66] According to Member Hayes, the "problem" the Board seeks to address with this rule "is not that the representation election process generally takes too long, [i]t is that unions are not winning more elections . . . The [Board] majority [has] act[ed] in apparent furtherance of the interests of a narrow constituency, [unions], and at the great expense of undermining public trust in the fairness of Board elections."[67]

Specialty Healthcare and Rehabilitation Center of Mobile

On August 26, 2011, in *Specialty Healthcare and Rehabilitation Center of Mobile*,[68] the NLRB majority articulated a new standard for determining the composition of bargaining units. Under the new standard, if the union-proposed bargaining unit is made up of a readily identifiable group[69] and the Board finds the employees in the group share a community of interest, the Board will find the proposed unit appropriate.[70] Any party seeking to enlarge the unit must demonstrate that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit.[71] The Board will no longer determine whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.[72] While the underlying case dealt specifically with non-acute health care, the Board decision significantly affects all industries.[73] NLRB regional offices "will have little option but to find almost any petitioned-for unit appropriate."[74] In the opinion of former NLRB region 10 director Curtis Mack, "a regional director looking at a representation petition would be compelled to hold a representation election for any unit supported by the union."[75] Under the new standard, unions will organize into units as small as possible and

[62] *Id.* at 36831.
[63] *Id.* at 36817.
[64] *Id.*
[65] *Id.* at 36831.
[66] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the House Education and the Workforce Committee, 112th Cong., 1st Sess. at 77 (2011).
[67] Notice of Proposed Rulemaking, Representation—Case Procedures, 76 Fed. Reg. 36812, 80 (June 22, 2011), available at *http://www.nlrb.gov/sites/default/files/documents/525/2011-15307_pi_2.pdf.*
[68] 357 NLRB No. 83 (Aug. 26, 2011).
[69] Such as employees that make up a job classification, department, or work locations.
[70] 357 NLRB No. 83, 12 (Aug. 26, 2011).
[71] *Id.* at 6.
[72] *Id.* at 12.
[73] *Id.* at 18.
[74] *Id.* at 20.
[75] Culture of Union Favoritism: Recent Actions of the National Labor Relations Board, Hearing before the House Education and the Workforce Committee, 112th Cong., 1st Sess. at 13 (2011) (written testimony of Curtis Mack) [hereinafter Mack Testimony].

"it [will be] virtually impossible for a party opposing th[e] unit to prove that any excluded employees should be included." [76]

IMPLICATIONS OF THE NEW REPRESENTATIONAL ELECTION PROCEDURE

The June 22, 2011, NLRB rulemaking will restrict an employer's ability to communicate with his or her employees, cripple an employee's ability to make an informed decision as to unionization, increase litigation and decrease election agreements, and encroach on employee privacy. The August 26, 2011, *Specialty Healthcare* decision will fracture workplaces, increasing labor costs and decreasing employee opportunities.

Limited opportunity for a robust debate and employee free choice

Congress recognized the value of employer speech and a robust debate when it added section 8(c) to the NLRA.[77] The Supreme Court noted Congress's express protection of free debate:

From one vantage, §8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80–105, pt. 2, pp. 23–24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). 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." *Letter Carriers v. Austin,* 418 U.S. 264, 272–273, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).[78]

While non-coercive, non-threatening employer speech will continue to be protected by section 8(c) of the NLRA, the proposed election procedures will effectively eliminate an employer's opportunity to communicate with its employees. Under the proposed election procedures, representational elections will be held in as little as 10 days.[79] The employer will spend the first seven days finding legal representation and preparing for the pre-election hearing, leaving as little as three days to educate employees and rebut misinformation.

In contrast, the union seeking to organize employees will have weeks, maybe months, to covertly sell the union's position while collecting authorization cards. Unlike the employer, the union can promise employees increased wages, benefits, vacation time, etc.

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[76] *Id.* at 19.

[77] 29 U.S.C. § 158(c). 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 [subchapter], if such expression contains no threat of reprisal or force of promise of benefit.

[78] *Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008).

[79] 76 Fed. Reg. 36831.

with few restrictions under the law.[80] While employees are likely to receive extensive information from the union on the benefits of unionization, the employee is unlikely to receive information from the union on the union's political or social agenda, dues, or the effects unionization can have on their employer's profitability or market competitiveness.[81] When the union has garnered sufficient support, it selects the date and time for filing the petition.[82]

At the House Education and the Workforce Committee's July 7, 2011, hearing, entitled "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice," John Carew, president of Carew Concrete and Supply Co., described his experience with a union organizing drive and election. In mid-September 1999 during one of his company's busiest times of year, the NLRB informed Carew Concrete that a union was attempting to organize their entire employee base.[83] This was the first time Mr. Carew had heard about the organizing drive.[84] During the organizing drive at Carew Concrete:

> [E]mployees would receive mail containing not enough information, misinformation, and misleading information on issues such as striking, health care insurance, wages and pensions. At times employees were inaccurately told they would receive increased wages, similar to cities with higher wages nearly 100 miles away.[85]

Mr. Carew was forced to temporarily shut down portions of his business to educate supervisors and managers, ensure they did not violate the NLRA, and counter misinformation.[86]

At the same hearing, Larry Getts, an employee of the Dana Corporation, described his experience with union organizers:

> [Organizers stated] that our shop would make the same as the workers in the other—much larger—Fort Wayne plant. . .[T]hat did not seem plausible because we were making twelve dollars an hour, and in Fort Wayne they were making twenty-one dollars an hour. Of course, much of what they told us proved to be false, but it's fair to say we weren't lacking information from union officials.[87]

While Mr. Getts stated that he and his fellow employees would have appreciated hearing the views of his employer, he did not benefit from a robust debate.[88] His employer had signed a neutrality agreement.[89] Since they were not hearing opposing points of view, Mr. Getts took it upon himself to research and verify everything they were told.[90]

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[80] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 15 (2011) (written testimony of Peter Schaumber) [hereinafter Schaumber Testimony].
[81] *Id.*
[82] *Id.*
[83] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 3 (2011) (written testimony of John Carew) [hereinafter Carew Testimony].
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 2 (2011) (written testimony of Larry Getts) [hereinafter Getts Testimony].
[88] *Id.*
[89] *Id.*
[90] *Id.*

The expedited timeframe for representational elections contemplated in the June 22, 2011, rulemaking will effectively eliminate employer speech and deprive employees of the right to make a fully informed decision on whether to be represented by a labor organization.

Increased controversy during representational elections

The new Statement of Positions, combined with the new timeframe for the start of the pre-election hearing and delays in unit composition determinations, will increase controversy during representational elections and decrease election agreements, increasing costs for employers and taxpayers.

As outlined above, the June 22, 2011, proposed rule will require parties to complete a Statement of Positions within seven days of receiving the election petition. With few exceptions, failure to state a position will preclude a party from raising the issue at the pre-election hearing. Robert Sullivan, testifying on behalf of the Retail Industry Leaders Association (RILA) at the October 12, 2011 hearing, stated that these requirements "will wreak havoc with small and large employers."[91] Small employers will have access to factual information, but they will not have in-house experts to evaluate the legal issues.[92] In contrast, large employers will have the advantage of having in-house experts or access to outside experts, but their size will complicate legal issues.[93]

With only seven days to prepare the Statement of Positions for the start of the pre-election hearing, there is little opportunity for election agreements.[94] To ensure no issues are waived, employers will spend their time preserving their positions rather than working with the regional director to reach a voluntary election agreement.[95] Former NLRB Chairman Schaumber stated that "the sum total of these rules is you are going have far fewer pre-election agreements.[96] Unable to secure election agreements, the NLRB will be forced to hold more pre-election hearings on every possible issue in controversy, increasing both taxpayer and employer legal costs.

Delaying unit composition issues until after the election could increase the number of rerun elections. Pro-union activity by supervisors may taint the election if employees falsely conclude that the employer favors the union or employees support the union out of fear of retaliation.[97] In these cases, the Board may set aside an election. Undoubtedly, pro-union activity by supervisors improperly included in the bargaining unit will be more common under the proposed rules, resulting in more elections being set aside. In cases where the character or scope of the bargaining unit changes significantly, a number of courts have ordered a new election, finding that employees were effectively denied the right to make an in-

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[91] H.R. 3094, The Workforce Democracy and Fairness Act, Hearing before the Committee on Education and the Workforce, 112th Cong., 1st Sess. at 8 (2012) (written testimony of Robert Sullivan) [hereinafter Sullivan Testimony].

[92] *Id.*

[93] *Id.* at 9.

[94] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 44 (2011).

[95] *Id.*

[96] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 78–79 (2011).

[97] *Fall River Sav. Bank v. NLRB,* 649 F.2d 50, 56 (1st Cir. 1981).

formed choice in the representational election.[98] Every rerun election and unfair labor practice charge will cost taxpayer dollars and increase employer legal costs.

Encroach on employee privacy

The inclusion of employee phone numbers and email addresses will unnecessarily encroach on employee privacy. Under current rules, labor organizations have multiple avenues through which they may contact employees to encourage union support. In general, employees may solicit support in the workplace during nonwork time, including breaks and lunch.[99] Given the fact that unions win almost two-thirds of representational elections, employee phone numbers and email addresses are not essential to secure employee support.

Many, if not all, employees would object to an employer providing their phone number and email address to any third party. Not surprisingly, Mr. Getts stated that he would object to his employer providing his phone number and email address to a union.[100] While not a perfect analogy, the "Do Not Call" list gives some insight into American sentiment on this issue. In 2007, 72 percent of Americans had registered on the "Do Not Call" list.[101]

Fragmentation of the Workforce

The new standard for determining the composition of an appropriate bargaining unit, adopted in *Specialty Healthcare*, will allow unions to gerrymander the bargaining unit, encourage incremental organizing of the smallest units possible, and lead to fragmentation in the workplace. As noted above, under the new standard, regional directors will be compelled to approve any unit supported by the union and employer challenges will be difficult, if not impossible, permitting unions to limit organizing to those employees that support the union.[102] Instead of one unit, employers will be faced with multiple small units.

Additionally, fragmentation will increase labor costs. As the number of units within a business increases, labor costs and the risk of strikes increase. Rather than negotiating once every three years, the employer may be forced to negotiate collective bargaining agreements every year or multiple times a year. Each negotiation includes the possibility of a strike, disrupting operations and damaging customer relations.[103]

Moreover, this proposal is detrimental to workers. Drawing lines between departments limits flexibility and employee opportunities. As explained by Robert Sullivan during the October 12, 2011, House Education and the Workforce Committee hearing, if employees are divided by department, such as sporting goods and housewares, employers will not be able to move employees between departments in response to changes in demand and employees will not be able to pick up shifts in other departments.[104] Additionally,

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[98] *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294 (9th Cir. 1985); *NLRB v. Beverly Health and Rehabilitation Services,* 120 F.3d 262 (4th Cir. 1977).
[99] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).
[100] Getts Testimony at 2–3.
[101] 2009 Economic Report of the President at 244, White House (2009), available at *http://georgewbush-whitehouse.archives.gov/cea/ERP_2009_Ch9.pdf.*
[102] *Specialty Healthcare,* 357 NLRB No. 83 at 19.
[103] Sullivan Testimony at 4.
[104] *Id.*

opportunities for advancement into management would be limited without cross-training.[105]

LEGISLATION IS NEEDED TO ADDRESS THE ACTIONS OF THE NATIONAL LABOR RELATIONS BOARD

Congress is responsible for establishing and amending as necessary our national labor law. The NLRB's decision is *Specialty Healthcare and Rehabilitation Center of Mobile* and its June 22, 2011, proposed election procedures will limit employee free choice and employer free speech, and fragment the workforce. Congressional action is necessary to reverse the NLRB's actions. H.R. 3094, the Workforce Democracy and Fairness Act, is designed to be a narrow reversal of the NLRB's August 26, 2011, decision in *Specialty Healthcare and Rehabilitation Center of Mobile* and preempt the NLRB's June 22, 2011, proposed election procedures changes, without upsetting any other current law.

To limit proliferation and fragmentation of bargaining units, unless otherwise stated in the Act and excluding bargaining unit determinations promulgated through rulemaking effective prior to August 25, 2011 (acute health care facilities), the legislation codifies the test used prior to the Board's holding in *Specialty*. Bargaining units will again be made up of employees that share a "sufficient community of interest." In determining whether employees share a "sufficient community of interest" the Board will weigh eight factors, including similarity of wages, working conditions, and skills. The Board will not exclude employees from the unit unless the interests of the group sought are sufficiently distinct from those of included employees to warrant the establishment of a separate unit.

To ensure parties can dispute union proposed bargaining units, the Workforce Democracy and Fairness Act will codify the test used prior to *Specialty*. Any party seeking to enlarge the proposed bargaining unit must demonstrate that employees in the larger unit share a "sufficient community of interest" with those in the proposed unit, not an "overwhelming community of interest." Taken together these provisions of the Workforce Democracy and Fairness Act will limit fragmentation, ensure employer flexibility and greater employee opportunities, and reduce labor costs.

The Workforce Democracy and Fairness Act will also address the shortcomings of the NLRB's June 22, 2011, proposed changes to union election procedures. More specifically, the Act will address:

Voter eligibility

To ensure employees and employers know who will be in their bargaining unit and avoid complications on eligibility, i.e. whether an employee is a supervisor, the Board shall determine the appropriate bargaining unit prior to an election.

Scheduling of pre-election hearing

The regional director will have discretion as to when the pre-election hearing shall begin, but parties will have at least 14 days to prepare for the pre-election hearing. Employers will have at least 14 days to hire an attorney, identify issues, and prepare their case

[105] *Id.*

for pre-election hearing. Additionally, it gives unions, employers, and the NLRB an opportunity to compromise and reach an election agreement.

Identifying issues in dispute

Allows employers and unions to raise independently any relevant and material issue or assert any relevant and material position at any time prior to the close of the hearing. Employers and unions will be free to raise issues as the hearing record develops, ensuring a fair and effective pre-election hearing. However, to ensure parties do not inappropriately delay elections, issues traditionally excluded from pre-election hearings, such as the eligibility of employees for union membership, may not be raised.

Pre-election Board review

To ensure uniformity and due process, parties may petition the Board for pre-election review of the regional director's decision.

Timing of election

In 2010, the average time from the filing of a petition to an election was 31 days, and the median time was 38 days.[106] Under the legislation, the NLRB will conduct an election as soon as practicable, but no less than 35 calendar days following the filing of an election petition. Employers will have time to educate employees and employees will have time to effectively judge whether they wished to be represented by a union.

Excelsior list

Seven days after the final determination by the Board, employers will be required to provide a list of eligible employees. The list shall include the employee names, and one additional piece of personal information. The additional piece of information, such as personal phone number, email address, or home address, will be chosen in writing by employees. This will ensure employees can choose how to be contacted by the union and protect employee privacy.

These provisions of The Workforce Democracy and Fairness Act will ensure that employers have adequate time to communicate with their employees and employees have the time and information necessary to make a fully-informed decision as to unionization.

CONCLUSION

Over the last several months, the NLRB has issued multiple decisions and rules intended to unbalance labor relations to benefit organized labor. The most significant of these actions was the Board's holding in *Specialty Healthcare* and the June 22, 2011, proposed rulemaking regarding election procedures. Together, these actions will fragment workplaces, increasing labor costs and strife, and limit employer free speech and employee free choice. The Workforce Democracy and Fairness Act will return balance to labor relations by creating a fair election process for unions, employers, and employees, protecting employer free speech, and ensuring em-

[106] Notice of Proposed Rulemaking, Representation–Case Procedures, 76 FR 36812, 77 (June 22, 2011). Available at *http://www.nlrb.gov/sites/default/files/documents/525/2011-15307_pi_2.pdf*.

ployees have an opportunity to make an informed decision as to whether they want to be represented by the union.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Chairman Kline and reported favorably by the Committee.

Section 1. Provides that the short title is the "Workforce Democracy and Fairness Act."

Section 2. Amends the National Labor Relations Act in order to reverse the National Labor Relations Board's decision in *Specialty Healthcare and Rehabilitation of Mobile* and preempt its June 22, 2011, proposed changes to representational election procedures.

First, this section outlines the test used to determine the appropriate bargaining unit prior to the election. To determine whether employees share a sufficient community of interest the Board will consider eight factors: (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training; (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry. To avoid the proliferation or fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Second, it sets dates upon which the pre-election hearing may begin and the representational election may be held. Parties will have at least 14 days from the date of the filing of the petition to prepare for the pre-election hearing. Secret ballot elections will be held as soon as practicable, but no less than 35 days following the filing of an election petition.

Third, it lays out certain aspects of the pre-election hearing and allows parties to seek pre-election Board review. The pre-election hearing shall be non-adversarial. The hearing officer is charged with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon. The scope of relevant and material pre-election issues is defined. Finally, it makes clear that parties may raise any relevant and material pre-election issue at any time prior to the close of the hearing.

Fourth, this section establishes the composition of and timetable upon which the employer must provide a list of eligible voters. Seven days after the final determination by the Board of the appropriate bargaining unit, the Board shall acquire the list of eligible employees from the employer and make it available to all parties. The list shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing.

EXPLANATION OF AMENDMENTS

The only amendment adopted, the amendment in the nature of a substitute, is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 3094 preempts the National Labor Relations Board's rulemaking on election procedures and reverses its decision in *Specialty Healthcare*. H.R. 3094 would have no direct impact on the Legislative Branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 3094 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), (f), (g) of House rule XXI.

ROLLCALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 3094

Disposition: Adopted by a vote of 23 to 17

Sponsor/Amendment: Mr. Roe / motion to table the appeal of the ruling of the chair

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. MILLER (CA) (Ranking)		X	
Mr. PETRI (WI)	X			Mr. KILDEE (MI)		X	
Mr. McKEON (CA)	X			Mr. PAYNE (NJ)		X	
Mrs. BIGGERT (IL)	X			Mr. ANDREWS (NJ)		X	
Mr. PLATTS (PA)	X			Mr. SCOTT (VA)		X	
Mr. WILSON (SC)	X			Ms. WOOLSEY (CA)		X	
Mrs. FOXX (NC)	X			Mr. HINOJOSA (TX)		X	
Mr. GOODLATTE (VA)	X			Mrs. McCARTHY (NY)		X	
Mr. HUNTER (CA)	X			Mr. TIERNEY (MA)		X	
Mr. ROE (TN)	X			Mr. KUCINICH (OH)		X	
Mr. THOMPSON (PA)	X			Mr. HOLT (NJ)		X	
Mr. WALBERG (MI)	X			Mrs. DAVIS (CA)		X	
Mr. DesJARLAIS (TN)	X			Mr. GRIJALVA (AZ)		X	
Mr. HANNA (NY)	X			Mr. BISHOP (NY)		X	
Mr. ROKITA (IN)	X			Mr. LOEBSACK (IA)		X	
Mr. BUCSHON (IN)	X			Ms. HIRONO (HI)		X	
Mr. GOWDY (SC)	X			Mr. ALTMIRE (PA)		X	
Mr. BARLETTA (PA)	X						
Mrs. NOEM (SD)	X						
Mrs. ROBY (AL)	X						
Mr. HECK (NV)	X						
Mr. ROSS (FL)	X						
Mr. KELLY (PA)	X						

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 2 Bill: H.R. 3094 Amendment Number: 2

Disposition: Defeated by a vote of 16 to 22

Sponsor/Amendment: McCarthy / amendment regarding the community of interest test for bargaining unit determinations

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)			X	Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 Bill: H.R. 3094 Amendment Number: 3

Disposition: Defeated by a vote of 16 to 22

Sponsor/Amendment: Mr. Tierney / amendment to strike language allowing open-ended litigation in pre-election hearings

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)			X	Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 4 Bill: H.R. 3094 Amendment Number: 5

Disposition: Defeated by a vote of 16 to 22

Sponsor/Amendment: Mr. Kildee / to amend the timing and content of voter information list

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)			X	Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 5 Bill: H.R. 3094 Amendment Number: 6

Disposition: Defeated by a vote of 15 to 22

Sponsor/Amendment: Ms. Woolsey / amends the substitute to direct NLRB to issue a rule for the conduct of electronic voting

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)			X	Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)			X
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 6 en bloc Bill: H.R. 3094 Amendment Number: 7

Disposition: Defeated by a vote of 16 to 23

Sponsor/Amendment: Mr. Andrews / amends the substitute prohibiting captive audience meetings after an election is ordered, except where there is an agreement between the employer and the union

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)		X		Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 6 en bloc Bill: H.R. 3094 Amendment Number: 8

Disposition: Defeated by a vote of 16 to 23

Sponsor/Amendment: Mr. Bishop / amends the substitute to sanction frivolous and vexatious filings

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)		X		Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 6 en bloc Bill: H.R. 3094 Amendment Number: 9

Disposition: Defeated by a vote of 16 to 23

Sponsor/Amendment: Mr. Andrews / amendment to strike the requirement for mandatory consideration of all pre-election appeals and restores current law

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)		X		Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 6 en bloc Bill: H.R. 3094 Amendment Number: 10

Disposition: Defeated by a vote of 16 to 23

Sponsor/Amendment: Mr. Andrews / amends the substitute and eliminates the mandatory 35 day waiting period for an election

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)	X		
Mr. PETRI (WI)		X		Mr. KILDEE (MI)	X		
Mr. McKEON (CA)		X		Mr. PAYNE (NJ)	X		
Mrs. BIGGERT (IL)		X		Mr. ANDREWS (NJ)	X		
Mr. PLATTS (PA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Ms. WOOLSEY (CA)	X		
Mrs. FOXX (NC)		X		Mr. HINOJOSA (TX)	X		
Mr. GOODLATTE (VA)		X		Mrs. McCARTHY (NY)	X		
Mr. HUNTER (CA)		X		Mr. TIERNEY (MA)	X		
Mr. ROE (TN)		X		Mr. KUCINICH (OH)	X		
Mr. THOMPSON (PA)		X		Mr. HOLT (NJ)	X		
Mr. WALBERG (MI)		X		Mrs. DAVIS (CA)	X		
Mr. DesJARLAIS (TN)		X		Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)		X		Mr. BISHOP (NY)	X		
Mr. ROKITA (IN)		X		Mr. LOEBSACK (IA)	X		
Mr. BUCSHON (IN)		X		Ms. HIRONO (HI)	X		
Mr. GOWDY (SC)		X		Mr. ALTMIRE (PA)	X		
Mr. BARLETTA (PA)		X					
Mrs. NOEM (SD)		X					
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mr. ROSS (FL)		X					
Mr. KELLY (PA)		X					

Date: October 26, 2011

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 7 Bill: H.R. 3094

Disposition: Ordered favorably reported, as amended, to the House by a vote of 23 to 16

Sponsor/Amendment: Mr. Petri / motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass

Name and State	Aye	No	Not Voting	Name and State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. MILLER (CA) (Ranking)		X	
Mr. PETRI (WI)	X			Mr. KILDEE (MI)		X	
Mr. McKEON (CA)	X			Mr. PAYNE (NJ)		X	
Mrs. BIGGERT (IL)	X			Mr. ANDREWS (NJ)		X	
Mr. PLATTS (PA)	X			Mr. SCOTT (VA)		X	
Mr. WILSON (SC)	X			Ms. WOOLSEY (CA)		X	
Mrs. FOXX (NC)	X			Mr. HINOJOSA (TX)		X	
Mr. GOODLATTE (VA)	X			Mrs. McCARTHY (NY)		X	
Mr. HUNTER (CA)	X			Mr. TIERNEY (MA)		X	
Mr. ROE (TN)	X			Mr. KUCINICH (OH)		X	
Mr. THOMPSON (PA)	X			Mr. HOLT (NJ)		X	
Mr. WALBERG (MI)	X			Mrs. DAVIS (CA)		X	
Mr. DesJARLAIS (TN)	X			Mr. GRIJALVA (AZ)			X
Mr. HANNA (NY)	X			Mr. BISHOP (NY)		X	
Mr. ROKITA (IN)	X			Mr. LOEBSACK (IA)		X	
Mr. BUCSHON (IN)	X			Ms. HIRONO (HI)		X	
Mr. GOWDY (SC)	X			Mr. ALTMIRE (PA)		X	
Mr. BARLETTA (PA)	X						
Mrs. NOEM (SD)	X						
Mrs. ROBY (AL)	X						
Mr. HECK (NV)	X						
Mr. ROSS (FL)	X						
Mr. KELLY (PA)	X						

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 3094 is to codify the traditional standard for determining an appropriate bargaining unit and the traditional standard used to challenge a petitioned-for bargaining unit, require the Board to rule on challenges to composition of the bargaining unit prior to the election, ensure employers have at least 14 days to prepare for a pre-election hearing, allow parties to raise relevant and material pre-election issues as the pre-election hearing record is developed, ensure parties may request pre-election Board review of regional director's decisions, provide employees with at least 35 days to consider whether they wish to be represented by a union, and permit employees to choose what personal information is provided to the union. The Committee expects the National Labor Relations Board to comply with these provisions and implement the changes to the statute in accordance with these stated goals.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 3094 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 2011.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3094, the Workforce Democracy and Fairness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3094—Workforce Democracy and Fairness Act

H.R. 3094 would amend the National Labor Relations Act to define how the National Labor Relations Board should determine a unit for purposes of collective bargaining. In addition, it would pro-

vide minimum and maximum time frames in which action should be taken in response to the filing of petitions.

CBO estimates that enacting H.R. 3094 would have no budgetary effect. Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

H.R. 3094 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3094. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) * * *

(b) [The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the] *In each case, prior to an election, the Board shall determine, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining. Unless otherwise stated in this Act, and excluding bargaining unit determinations promulgated through rulemaking effective before August 26, 2011, the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training; (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and*

(8) the bargaining history in the particular unit and the industry. To avoid the proliferation or fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity. The Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) * * *

* * * * * * *

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*, but in no circumstances less than 14 calendar days after the filing of the petition*. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *An appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon. Relevant and material pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or which may reasonably be expected to impact the election's outcome. Parties may raise independently any relevant and material pre-election issue or assert any relevant and material position at any time prior to the close of the hearing.* If the Board finds upon the record of such hearing *or consideration of a request for review of a regional director's decision and direction of election,* that such a question of representation exists, it shall direct an election by secret ballot *to be conducted as soon as practicable but not less than 35 calendar days following the filing of an election petition*

and shall certify the results thereof. *Not earlier than 7 days after final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all eligible voters to be made available to all parties, which shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing.*

* * * * * * *

MINORITY VIEWS

H.R. 3094 IS AN ATTACK ON THE INTERESTS OF AMERICAN WORKERS AND FAILS TO SOLVE THE JOBS CRISIS

Committee Democrats strongly oppose and voted unanimously to reject the deceptively named "Workforce Democracy and Fairness Act" (H.R. 3094). This bill is designed to deny private-sector workers a right to a free and fair union representation election, creates delay for the sake of delay, and encourages frivolous litigation. It is more aptly named the "Election Prevention Act."

H.R. 3094 harms our economy in two fundamental ways. First, it ignores the jobs crisis. The recession of 2007 to 2009 has been the most severe in this country since the 1930s. After adjusting for inflation, gross domestic product declined by 5.1 percent and the national unemployment rate peaked at 9.5 percent. While the recession officially ended in June 2009, the U.S. economy has experienced a weak recovery. The official unemployment rate stands at 9 percent. According to the Economic Policy Institute, "the U.S. is currently 6.6 million jobs below where it was when the recession started."[1] This legislation doesn't do anything to grow the economy. Second, it makes a strong and sustained economic recovery less likely. By impeding the ability of workers to organize, it depresses wages, squeezes the middle class, and undermines consumer demand.

With over 25 million Americans unemployed or underemployed, this Committee has yet to consider any jobs bills.[2] Despite proposals under our jurisdiction, the Majority has taken no action on teacher jobs, no action on construction jobs, and no action on the long-term unemployed since they took office in January. The Wall Street Journal has stated "the main reason U.S. companies are reluctant to step up hiring is scant demand . . ."[3] Demand is scarce in part because wages are stagnant. The Chief Investment Officer at JP Morgan Chase states "U.S. labor compensation is now at a 50-year low relative to both company sales and U.S. GDP."[4]

Committee Democrats support measures proposed by the American Jobs Act, which would directly tackle the problem of lack of demand and build the foundation for sustained growth by enacting a National Infrastructure Bank, rehiring 280,000 teachers, modernizing 35,000 schools, providing tax credits for hiring the long term unemployed, offering tax incentives to stimulate short term hiring—all as part of an effort to rebuild the middle-class for the long

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[1] Heidi Shierholz, *Miserably low job growth,* Economic Policy Institute (October 7, 2011). *Available* at: *http://www.epi.org/publication/october-jobs-picture/*.

[2] Heidi Schierholz, Labor Market in Full Retreat, Economic Policy Institute (July 8, 2011).

[3] Phil Izzo, *Dearth of Demand Seen Behind Week Hiring,* Wall St. Journal (July 19, 2011).

[4] Harold Meyerson, *Corporate America's Chokehold* on Wages, Washington Post (July 20, 2011).

term.[5] Democrats have written the Majority requesting a hearing on this bill, which was the subject of a September 8, 2011, address by the President of the United States to a Joint Session of Congress.[6] To date, no hearings have been scheduled. While this pattern of inaction and studied indifference towards the needs of the unemployed may benefit the Majority's political objectives, it betrays Congress's obligation to help solve the nation's #1 problem: jobs.

Instead of stimulating demand and incentivizing hiring, H.R. 3094 delays union elections in the hopes of discouraging workers from organizing. Insofar as H.R. 3094 is an attack on labor unions, it is an attack on the strength of our economy. Unions help workers achieve higher wages. Between 2004 and 2007, "unionized workers" wages were on average 11.3 percent higher than non-union workers with similar characteristics." More money in consumers' pockets means more money to stimulate demand and improve our economy.[7]

Any suggestion that today's massive unemployment is due to unions is utterly misplaced, as unions represent only 8 percent of the private workforce. The root of the economy's ills are directly traceable to a financial crisis brought on by a failure to regulate Wall Street, the misdirection of productive resources into reckless financial engineering which artificially inflated a now-burst housing bubble, and the subsequent collapse in the availability of credit to small business. The majority's agenda with this special interest legislation is evident. It follows in the footsteps of legislation (H.R. 2587) which passed the House that will weaken workers' bargaining power by allowing employers to outsource jobs in retaliation for union activity. In this bill, the majority extends its attack on unions by thoroughly undermining workers' ability to organize a union and have an election in a timely manner. Neither of these bills will create a single job, but both will drive down American workers' bargaining and purchasing power.

AN EFFECTIVE NATIONAL LABOR RELATIONS ACT SUPPORTS OUR ECONOMY BY ALLOWING WORKING FAMILIES TO BARGAIN FOR GREATER PURCHASING POWER

Depreciation of wages, egregious inequality, and excessive corporate power which undermined the ability of the average worker to make a living wage spurred passage of the National Labor Relations Act (NLRA). U.S. Senator Robert F. Wagner, the author of the National Labor Relations Act of 1935 (NLRA), reviewed economic conditions leading up to the Great Depression in a May 15, 1935 speech to the Senate:

> "By 1929, 200 huge corporations owned one-half of our total corporate wealth. Two years later, 100 general indus-

[5] Fact Sheet: The American Jobs Act, Office of the Press Secretary, The White House (September 8, 2011). Available at: *http://www.whitehouse.gov/the-press-office/2011/09/08/fact-sheet-american-jobs-act.*

[6] Address by the President to a Joint Session of Congress, Office of the Press Secretary, The White House (September 8, 2011). *Available* at: *http://www.whitehouse.gov/the-press-office/2011/09/08/address-president-joint-session-congress.*

[7] David Madland and Karla Walter, *Unions Are Good for the American Economy,* Center for American Progress (February 18, 2009). *Available* at: *http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html.*

> trial corporations out of a total of 300,000 controlled one third of the general industrial wealth of the Nation. As a natural corollary, the wage earners' share in the product created by manufacturing has declined steadily for nearly a century. . . .
>
> Sixteen million families, or 60 percent of the people, had annual incomes below the $2,000 per year necessary for the basic requirements of health and decency. And nearly 20,000,000 families, constituting 71 percent of all America, received less than $2,500 a year. At the same time, in the highest income bracket, one-tenth of 1 percent of the families in the United States were earning as much as the 42 percent at the bottom."[8]

The economic conditions of the 1930's mirror many of the same conditions today. Now is not the time to impede workers' rights under the NLRA. Doing so would hurt our fragile economic recovery. As unions have declined, wage growth has declined, and income disparities have increased. A recent study from Northeastern University found that, between 2009 when the economic recovery began and the end of 2010, national income rose by $528 billion with $464 billion of that growth going to corporate profits and $7 billion to wages and salaries.[9] Better wages mean workers have money to spend on their families, which is good for local businesses and good for job creation.

THE CURRENT STATE OF NLRB ELECTION PROCEDURES AND PROPOSED CHANGES

1. THE CURRENT NLRB ELECTION PROCESS ALLOWS FOR UNNECESSARY DELAY

The current union election procedures allow employers to draw out and delay the process in their favor, to the detriment of employee interests. During such delays, employers can hold captive audience meetings to convey anti-union messages at any time during the work day, while unions are shut out of the workplace altogether. Election delays further provide employers opportunity to engage in threats, coercion, and intimidation of voters and introduce unnecessary conflict and disruption into the workplace. Such tactics can force workers to wait months or years before having an election—in some extreme cases, elections have been delayed upwards of 13 years.

When a group of workers petitions for an election, the NLRB regional director determines whether the election is supported by at least 30 percent of employees in the bargaining unit. Among cases in which this threshold is met, the majority of election petitions proceed to a vote with the consent of employees and employer. Where there is consent, no pre-election hearings are needed. However, when an employer does not consent and there are issues in

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[8] *The Wagner Act: Its Origin and Current Significance,* Leon H. Keyserling, 29 George Washington Law Review 199 (1960–1961).

[9] Andrew Sum, et al., *The "Jobless and Wageless" Recovery from the Great Recession of 2007–2009: The Magnitude and Sources of Economic Growth Through 2011 I and Their Impacts on Workers, Profits, and Stock Values,* Northeastern University (2011). *Available* at: *http://www.clms.neu.edu/publication/documents/Revised__Corporate__Report__May__27th.pdf.*

dispute, the NLRB schedules a pre-election hearing. Employers can currently stall the elections process by refusing to consent to the election and requesting a pre-election hearing even over frivolous issues.

Additional election delays are available to employers following pre-election hearings. For example, employers can request a Board review of a regional director's decision within 14 days after the pre-election hearing. In these cases, the regional director will normally not schedule an election until a date between the 25th and 30th day after the date of the decision in order to permit the Board to rule on any request for review which may be filed. After an election occurs, parties can raise objections with the election itself within one week after ballots have been counted. If issues of material fact exist, the regional director will schedule a post-election hearing. A party may then appeal the regional director's decision to the full Board. All of these levels of review and appeal allow employers opportunity to counter and frustrate employees' unionization efforts.

The many opportunities for delay included in the current Board processes invite lawlessness and undermine the integrity of the election process. Intentionally dilatory tactics are allowed to trump "employees" free exercise of their statutory right to decide whether to be represented by a union." [10]

2. THE NLRB'S PROPOSED RULES WOULD STREAMLINE THE ELECTION PROCESS

The NLRB issued proposed rules on June 21, 2011, designed to improve current election procedures. These proposals, which are neutral on the subject of unionization, would reduce unnecessary litigation and delays, and improve the ability of workers to hear from employers and unions alike.[11] The proposed rules would standardize the time frame for parties to resolve or litigate issues before and after elections, while reducing waste by requiring parties to identify issues and describe evidence to be raised at the hearing ahead of time. Currently, parties raising objections to the filing of a petition do not have to state the issues they intend to raise at a hearing before the hearing commences.

The NLRB's proposed rules would also remove barriers to the election process by allowing for electronic filing of election petitions and other documents, and ensure that employees, employers and unions receive and exchange timely information to understand and participate in the representation case process. As part of this effort, employers would be required to provide a final voter list in electronic form two days after the direction of an election, including voters' telephone numbers and e-mail addresses when available.

Finally, the NLRB's proposed rules would help make the election process more fair and less subject to dilatory manipulation by deferring litigation of most voter eligibility issues until after elections are held, eliminating a 25–30 day delay associated with awaiting the Board determination on whether it will accept a case for review regarding pre-election matters, and consolidating all election-re-

[10] Testimony of Professor Kenneth G. Dau-Schmidt, Hearing before the Committee on Education and the Workforce, U.S. House of Representatives, July 7, 2011, Serial No. 112–31.

[11] Proposed rule was published June 22, 2011 at 76 *Federal Register* 36812.

lated appeals to the Board into a single post-election appeals process.

3. HOW AN APPROPRIATE BARGAINING UNIT IS DETERMINED

Generally, the standard for determining the appropriateness of a bargaining unit is whether the employees in the unit share a "community of interest."[12] To determine whether there is a "community of interest" the Board examines a wide host of factors. These may include whether the employees:[13]

- Are organized into a separate department;
- Have distinct skills and training;
- Have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
- Are functionally integrated with the employer's other employees;
- Have frequent contact with other employees;
- Interchange with other employees;
- Have distinct terms and conditions of employment; and
- Are separately supervised.

The Board looks at other factors as well in determining a community of interest. These may include common situs, employee desires, and the extent of organizing. Currently, the law requires the NLRB to determine if there is "an appropriate" unit, based on the petition of employees and the flexible principles outlined above for determining a community of interest. Various units are potentially "appropriate." The union need only petition for an appropriate unit, not the single *most* appropriate one or even the *largest* one.

H.R. 3094 IS A MISGUIDED ASSAULT ON WORKERS' RIGHTS

1. H.R. 3094 ENABLES EXCESSIVE DELAYS, INVENTIVIZES FRIVOLOUS LITIGATION, AND IMPOSES ARBITARY MINIMUM WAITING PERIODS

Unnecessary election delays while board considers whether or not to grant review

H.R. 3094 is designed to delay and ultimately prevent union elections. It accomplishes this goal by codifying arbitrary delays, overriding proposed NLRB rules which would eliminate avoidable delays, incentivizing frivolous litigation, and empowering employers to gerrymander bargaining units.

Currently under the NLRA, an election proceeds with the employees' choices registered and ballots impounded while the Board decides whether or not to undertake review of the pre-election hearing. In contrast under H.R. 3094, elections are delayed indefinitely until the Board considers whether or not to grant such a review. Even after the Board decides to grant review of a pre-election hearing, H.R. 3094 mandates delay of elections until the Board reaches a final decision on such appeal. This is especially troubling given that the average delay for an election to be held in this circumstance is 551 days.

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[12] *N.L.R.B. v. J.C. Penney Co.,* 620 F.2d 718, 719 (9th Cir. 1980).
[13] *United Operations,* 338 NLRB 123 (2002).

Lengthy delay in the elections process is especially likely to occur under H.R. 3094, given the prospect of the NLRB losing a quorum due to gridlock over Presidential nominations to the NLRB. The NLRB is prohibited from issuing decisions if it lacks a quorum of at least three out of five members.[14] The NLRB had no quorum for 27 months between 2008 and 2010. The loss of a quorum is looming again beginning on January 1, 2012, when the term of Board Member Craig Becker expires and the NLRB faces the prospect of having only two members. The foreseeable loss of a quorum in combination with the delays built into H.R. 3094 for mandatory consideration of requests for review of pre-election hearings will bring elections to a screeching halt. A quorum could be lost even sooner if Republican Board Member Brian Hayes honors requests or succumbs to pressure from special interests to resign his position in order to "incapacitate" the Board.

With a new way to further delay elections, H.R. 3094 incentivizes employers to file requests for review in representation cases without regard to merit. This new opportunity will give employers even more time to pressure employees. Currently, over 98% of requests for Board review of representation cases are deemed meritless. Between 2002 and 2009, the NLRB granted only 1.3% of these requests for review, but there are no sanctions for frivolous appeals. By incentivizing requests for review without regards to merit, it is likely that the Board's review process will become backlogged, resulting in yet further delays of elections.

Open-ended litigation

H.R. 3094 allows for open-ended litigation by expansively allowing nearly any issue to be raised to be litigated at any time prior to the close of a hearing. The original H.R. 3094 bill provided employers the right to raise any issues that "may reasonably be expected to impact the election's outcome" at "any time prior to the close of a hearing." The Majority's substitute modified the original bill by setting the scope of review to "relevant and material pre-election issues," but exacerbated the problem by defining "relevant and material pre-election issues" to include "any other issue" reasonably expected to impact the election's outcome, effectively defining frivolous issues as relevant and material.

By kicking open the door to a wide array of issues that could be litigated, H.R. 3094 allows any workplace issue to become the subject of pre-election litigation and issues could be raised at any point without notice to the NLRB or the opposing party. Employers could raise issues having no bearing on whether there is an appropriate bargaining unit in order to extend hearings for weeks on end to buy time to chill the workers' organizing drive or pressure them from organizing. Unions facing decertification campaigns could use the same delaying tactics. Any issues even remotely work-related, from unfair treatment by supervisors to the accuracy of campaign flyers, can be considered "reasonably expected to impact the election's outcome" and can therefore be raised during a hearing. It is foreseeable that the NLRB will be burdened with a docket clogged

[14] In *New Process Steel, L.P. v NLRB,* 130 S. Ct. 2635 (2010), the Supreme Court found the NLRB lacked authority to issue decisions with only 2 members.

with cases containing irrelevant issues having nothing to do with whether to conduct an election or how to define a bargaining unit. This will further stall review efforts, which in turn will prevent elections from being held and favor the interests of employers over those of employees.

H.R. 3094 Establishes Minimum Waiting Periods To Create Delay for Delays Sake

35-Day waiting period if there is a pre-election dispute

H.R. 3094 mandates that an election will always be delayed at least 35 days from filing a petition for an election. It is a one-size-fits-all mandate which guarantees a minimum 35-day delay, even when a hearing is concluded quickly, or the parties resolve matters by consent without a hearing. The bill places no limits on how long an election may be delayed, such as when the employer raises frivolous issues in the pre-election hearing process to buy time.

To justify the 35-day delay, the Majority contends that proposed NLRB rules will allow "ambush" elections in as few as 10 days. There is nothing in the proposed NLRB rule that would mandate an election in as few as 10 days. The majority references as its authority a dissent by Board Member Brian Hayes to the proposed rulemaking, where he states: "Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition."[15] Member Hayes provides no support for the claim that hearings could be held in 10 days.

A quick review of the process reveals just the opposite. First, no contested election can take place until there is notice of a hearing which takes 7 days. Second, once a hearing is held, it takes the Regional Director 14–21 days to issue a decision and direct an election. Another 3 days are needed to notice a hearing. This adds up to 24–31 days under the proposed NLRB rule. Not 10. Even management side lawyers who support this bill seem to agree. Michael Lotito, a lawyer at the Jackson Lewis law firm which advises employers, said the lead time could be shaved to between 19 and 23 days under the NLRB proposal.[16]

The majority contends that setting a minimum of 35 days before any election can be held is not unreasonable, because the median time between the filing of a petition and election has been 37–38 days over the past decade.[17] However this figure is an average that includes both uncontested and contested elections, and obscures delays in contested elections. A recent U.C. Berkeley study found that workers have to wait an average of 124 days where an em-

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[15] Notice of Proposed Rulemaking, Representation—Case Procedures, 76 FR 36812, 77 (June 22, 2011). Available at *http://www.nlrb.gov/sites/default/files/documents/525/2011_15307_pi_2.pdf*.

[16] Melanie Trottman and Kris Maher, Plan to Ease Way for Unions, Wall Street Journal (June 22, 2010) .

[17] *Federal Register*. Vol. 76, No. 120. Wednesday, June 22, 2011, pp. 36814.

ployer forces a pre-election hearing.[18] In the most extreme cases, elections have been delayed upwards of 13 years.

14-Day waiting period before a hearing can be held

H.R. 3094 delays the pre-election hearing process by mandating that no pre-election hearing can take place less than 14 calendar days after a petition for an election has been filed. This legislation is targeted at the NLRB's proposed rule, which would have the Regional Director set a pre-election hearing 7 days after a hearing notice is served, absent special circumstances. Currently, some NLRB regions regularly schedule hearings in as few as 7 days, and the NLRB's proposed rule normalizes this practice.[19]

7-Day waiting period to provide voter contact list

H.R. 3094 creates new delays in NLRB procedures set forth in its 1966 *Excelsior* decision,[20] and makes securing employee contact information more onerous. It does this by requiring that the union wait *at least 7 days* for a voter contact list after the determination of a bargaining unit by the Board. H.R. 3094 goes further and limits access to only one of three forms of potential contact information—a mailing address, e-mail address or telephone number—to be selected by each employee and provided to their supervisor.

The Majority's goal is to overturn a part of the NLRB's proposed election rule issued on June 22, 2011, which requires that employers provide the union with the names, home addresses, telephone numbers and e-mail within 2 days of the NLRB directing an election. The Majority claims it aims to protect employee privacy. However, the employer has this information already. The Majority is aiming to keep voter information from one party—the union—while the other party enjoys distinct and overwhelming advantages in access to the voters.

2. H.R. 3094 ALLOWS EMPLOYERS TO GERRYMANDER BARGAINING UNITS

The bill establishes an entirely new regime which gives employers, instead of employees, the dominant voice in determining who should be included in *an* "appropriate" bargaining unit. This bill does this in several ways.

The bill makes it harder to trigger an election. It does so by empowering employers to cram the pool of eligible voters with employees who had expressed no interest in joining a union, as a way to dilute the percentage of employees interested in forming a union below the 30% threshold required for a showing of interest, and thus head off an election.

H.R. 3094 also favors employer efforts to stuff the ballot box with "no" votes. If an election occurs under the bill, the ballot box will be stuffed with votes from workers who had no interest in forming

[18] John Logan, Erin Johansson and Ryan Lamare, *New Data: NLRB Process Fails to Ensure a Fair Vote* (Jun. 2011). The *median* time for a contested election is 67 days from the filing of a petition and the election, according to NLRB staff.

[19] Under *Croft Metal, Inc.* 337 NLRB 688 (2002), the NLRB established a rule that "absent unusual circumstances or clear waiver by the parties," parties "receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays."

[20] In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board considered whether "a fair and free election [can] be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor.

a union at the outset, but were added to the voter pool to advance the employer's efforts to defeat the union.

This bill shifts the burden of proof to employees to justify why the employer cannot simply dilute a proposed bargaining unit with workers who had no interest in organizing. This approach jettisons 75 years of Supreme Court and NLRB precedent in determining an appropriate bargaining unit.

The practical impact of this bill is that employers are going to find it much easier to gerrymander bargaining units to determine who can vote in a union election (presumably to either prevent an election or reduce the chances of a union victory).

This bill also overturns the NLRB's recent *Specialty Healthcare decision,*[21] and the many appeals court decisions upon which it is based, The question before the NLRB in the *Specialty Healthcare* case was a demand by a nursing home operator to add 33 maintenance assistants, cooks, data entry clerks, business office clericals, and receptionists to a petitioned-for unit of 53 certified nursing assistants (CNAs). The CNAs had specialized training, mandatory certification, worked 3 shifts, and had distinct supervision, uniforms, pay rates, primary duties, and work areas. However, the other non-professional employees only worked 2 shifts, had different pay rates, did not require specialized training and certification, and did not interact with patients. Based on these facts, the regional director concluded that the petitioned-for unit of CNAs shared a "community of interest," and excluded the other non-professional employees from the unit.

The full Board's *Specialty Healthcare* decision upheld the traditional principles of unit determination and longstanding court precedent. It requires that if an employer wants to add employees to a bargaining unit, the employer has the burden of showing that there is an "overwhelming community of interest" between the employees they want to add and those in the petitioned-for bargaining unit.

The NLRB adopted well-established federal court precedents regarding unit determination, including *Blue Man Vegas*, a case where the D.C. Circuit Court of Appeals addressed the question of what standard should be applied when an employer contends that the smallest appropriate unit contains employees who are not in the petitioned-for unit. In this case, the employer argued that the NLRB erred in finding that a bargaining unit of stage hands proposed by the Union was "appropriate," even though it excluded certain technicians who dealt with musicians. In an opinion authored by Judge Douglas Ginsburg, a well regarded conservative jurist, the Court stated:

> A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it. That the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit. If, however, the excluded employees share an over-

[21] *Specialty Healthcare of Mobile*, 357 NLRB 83 (2011).

> whelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit.[22]

The majority argues that the *Specialty* decision will lead to the Board approving "micro" bargaining units that would be uneconomic and disruptive to employers. However, no evidence was presented at the October 12 legislative hearing to support this contention. Moreover, micro units have not been proliferating since *Blue Man Vegas*; the size of the average new bargaining unit has remained steady over the past decade at about 23–29 employees. The bargaining unit of CNAs at the Specialty Healthcare facility contained 53 employees, which comprised over 50% of the workforce and is twice the average size of all new bargaining units under NLRB elections over the past decade (average was 23–26 employees). This decision did not create a micro unit.

The Majority also alleges that the *Specialty Healthcare* decision will effectively mandate that the NLRB must accept a union's petitioned-for unit. This already is expressly outlawed. Section 9[c][5] of the NLRA states: "the extent to which employees have organized shall not be controlling" in determining whether a bargaining unit "is appropriate." With that law on the books, as it has been for decades, the Majority must have another reason for enacting provisions to address a concern that the law already explicitly and robustly addresses.

Ironically, no objections were raised about an alleged culture of union favoritism at the D.C. Circuit Court of Appeals when *Blue Man Vegas* was decided; however, this charge was leveled when the current NLRB adopted this case in the *Specialty* decision. The only policy change forged by the *Specialty Healthcare* decision is that the traditional community of interest test will be applied to non-acute health care facilities, instead of an obsolete hybrid model set forth in the Board's 1991 *Park Manor* decision, which had adopted a special test for bargaining unit determinations just for nursing homes, rehabilitation centers, and other non-acute health care facilities.

The Majority misreads the *Specialty Healthcare* decision to accomplish things it does not, and having done so, it opportunistically advances radical changes to the NLRA to cure an illusory problem as part of its agenda to weaken the ability of unions to organize.

3. THE FORGOTTEN JOBS CRISIS: WHAT H.R. 3094 NEGLECTS

The primary reason H.R. 3094 is misguided is because of what it neglects, namely, the jobs crisis. In an August 29, 2011 memo to House Republicans, Majority Leader Cantor wrote of a "regulatory relief agenda" and cited the proposed NLRB elections rule on a list of the "Top 10 Job-Destroying Regulations."[23] The memo crystallizes the Majority's economic thinking that "job-killing regulations" are the principle force holding back economic recovery, and

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[22] *Blue Man Vegas LLC* v. *NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). This decision echoes the views of the 7th Circuit Court of Appeals: "[I]t is not enough for the employer to suggest a more appropriate unit; it must show that the Board's unit is clearly inappropriate." *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999).

[23] Eric Cantor, Memo On Upcoming Jobs Agenda, (August 29, 2011). Available at: *http://majorityleader.gov/blog/2011/08/memo-on-upcoming-jobs-agenda.html*.

to justify their attack on labor unions, as well as consumer and environmental protections.

The Republicans have moved 15 bills, most of which roll back labor, consumer protection or environmental regulations. Non partisan economists, such as Macroeconomic Advisors point out that: "Regulation does not prevent the economy from achieving full employment. After all, the economy wasn't that much less regulated in 2007 when the unemployment rate was 4.5%, half of today's reading."[24] The *New York Times* reported that "economists at private-sector forecasting firms agreed" with President Obama that Republican proposals would not help the economy in the short term.[25] Mark Zandi, chief economist at Moody's Analytics said that the Republican proposals "won't mean much for the economy and job market in the next year" and stressed that "it is vital for Congress and the administration to provide some near-term support to the economy."[26]

According to the Bureau of Labor Statistics (BLS), which tracks mass layoffs, the percentage of employers who have singled out "government regulation/intervention" as the cause for firings since 2008 has been approximately 0.2% while the percentage blaming lack of demand has been between 29 and 39%. The table below presents the bureau's data.

PERCENT OF MASS LAYOFFS CAUSED BY GOVERNMENT REGULATION

Reason for layoff	2008	2009	2010	2011/First half
Government regulation	5,505	4,854	2,971	1,119
Percentage of layoffs	0.4	0.2	0.2	0.2
Lack of demand	516,919	824,834	384,565	144,746
Percentage	34.1	39.1	30.6	29.7
Total private nonfarm separations	1,516,978	2,108,202	1,257,134	486,482

Source: Bureau of Labor Statistics, Mass Layoff Statistics.

As the chart above illustrates, the number of mass layoffs nationwide attributed by some employers to government regulation is minuscule and this cause of job loss is not getting worse during the Obama administration. Lack of demand for business products and services is vastly more important. These results are buttressed by surveys. During June and July, Small Business Majority asked 1,257 small-business owners to name the two biggest problems they face. Only 13 percent listed government regulation as one of them. Almost half said their biggest problem was uncertainty about the future course of the economy—another way of saying a lack of customers and sales.[27]

By contrast, Democrats have offered a plan that would actually create jobs, and deals with the very real problems facing everyday Americans. Committee Democrats recently conducted an E-Forum and released a report detailing the personal accounts and rec-

[24] Macroeconomic Advisors, (October 21, 2011), *Available at: http://macroadvisers.blogspot.com/2011/10/man-up-ajobsa-vs-jobstga.html.*

[25] Jackie Calmes, Making *Case for Jobs Bill, Obama Cites Europe's Woes*, New York Times, (October 6, 2011).

[26] *Id.*

[27] *Misreprentations, Regulations and Jobs,* Bruce Bartlett, New York Times Economix Blog (Oct. 4, 2011).

ommendations of over 700 workers affected by the economic crisis. For example:

• Katharine from Saint Simons Island, GA wrote: "I am a certified teacher who has been out of work since 6/2010. Absolutely no one is hiring. I've even gotten to the point where I apply for anything if it is full time."

• Michaeline from Crest Hill, IL wrote about her son—"an operating engineer [who] has not been called to work for two years while our streets and roads are getting dangerous with all the cracks and holes. Isn't it time we put America back to work?"

The "American Jobs Act" (AJA) speaks directly to these concerns. It is estimated that the American Jobs Act would "give a significant boost to GDP and employment over the near-term," increasing GDP by 1.3% by the end of 2012 and increasing employment by 1.3 million by the end of 2012.[28] The AJA "would help avoid a return to a recession by maintaining growth and pushing down the unemployment rate next year, according to economists surveyed by Bloomberg News."[29]

Committee Republicans have chosen to take up Committee time with H.R. 3094 instead of legislation to improve the lot of millions of unemployed Americans. Rep. Andrews summarized this disconnect at the Committee's October 26 markup:

> "[F]or the record, because I think we have consistently said this all day, the context of this discussion again strikes me as almost bizarre that . . . tomorrow will be the day a lot of Americans have their homes foreclosed on and lose their home, tomorrow will be the day a lot of people get their last unemployment check, tomorrow will be the day a lot of businesses close shop for the last time because they can't survive, and we are arguing about how many days there ought to be between a union petition being filed and election. I just don't think that that is the argument that the country needs."[30]

Instead of working to grow and strengthen the middle class, Washington Republicans have been working overtime to take away those rights that made this nation great. They have used their majority to attack the National Labor Relations Board, the agency that enforces private-sector workers' rights, nearly 50 times. In comparison, the Majority has brought a grand total of zero immediate, direct job creation bills to the floor.

COMMITTEE DEMOCRATS OFFER AMENDMENTS TO FIX FLAWS IN H.R. 3094

Democrats offered the following amendments to the Amendment in the Nature of a Substitute to H.R. 3094 which was introduced by Chairman Kline as the base text at the beginning of the markup

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[28] Macroeconomic Advisers Blog Entry, American Jobs Act: A Significant Boost to GDP and Employment (September 8, 2011). *Available* at: *http://macroadvisers.blogspot.com/2011/09/american-jobs-act-significant-boost-to.html*.

[29] Timothy R. Homan, Obama Jobs Plan Prevents 2012 Recession in Survey of Economists, Bloomberg (September 28, 2011). *Available* at: *http://www.bloomberg.com/news/2011-09-28/obama-jobs-plan-prevents-2012-recession-in-survey-of-economists.html*.

[30] Statement of the Hon. Robert Andrews, Committee Markup Transcript, October 26, 2011, p. 123.

(for purposes of the discussion below, that substitute is designated as Amendment 1.)

Amendment 2.—Amends the Substitute To Restore the Traditional Community of Interest Criteria for Determining an Appropriate Bargaining Unit

Representative Carolyn McCarthy proposed an amendment to delete text in the substitute that would have allowed employers to gerrymander bargaining units as a way to impact the outcome of union elections. The amendment reinstated the "traditional community of interest" test for determining an appropriate bargaining unit that has been in place for 75 years.

This bill empowers employers to dictate with whom employees may associate for purposes of representation, by creating a presumption that employers are free to add employees to a petitioned-for bargaining unit, unless employees who want to form a union can show that these additional employees would belong in a completely separate bargaining unit because they have a "separate and distinct" community of interests from the group petitioning for the union.

This bill overturns current law, which requires only that there be *an* appropriate unit which meets the traditional "community of interest" test, not the *largest*, or what the employer thinks might be the *most* appropriate unit. Historically, Board's precedent has approved the *smallest* appropriate unit which meets the community of interest test.

This bill introduces concepts utterly foreign to the precedents established over the 75 years that the NLRA has been the law of the land. It is fundamentally undemocratic, because it completely overrides the initiative of the employees who petitioned for a specific bargaining unit, which the NLRB has historically considered, and empowers employers to determine who is allowed to vote in union elections as a way to defeat employee free choice. As noted during markup, this bill "is irrational [and] it is reactionary in response to the *Specialty Healthcare*".[31]

The amendment preserved current law, and prevented employer gerrymandering of bargaining units. The amendment was rejected 16–22.

Amendment 3.—Strikes Language in the Substitute Allowing Open-Ended Litigation in Pre-Election Hearings.

In order to ensure that pre-election hearings are focused on resolving genuine disputes, Representative John Tierney proposed an amendment striking the text in the substitute which authorizes parties to raise "any other issue . . . reasonably expected to impact the election's outcome." Pre-election hearings are for setting election ground rules—such as defining the appropriate bargaining unit, or resolving issues that may eliminate the need for an election. They are not for concocting litigation over "any other issue" that could impact the election's outcome.

[31] Statement of the Hon. Lynn Woolsey, Committee Markup Transcript, October 26, 2011, p.49.

The substitute allows ambush hearings by allowing parties "to raise any issue or assert any position at any time prior to the close of the hearing." The NLRB proposed election rules require parties to declare all of the issues to be litigated at the outset of a hearing, as is commonly done in civil litigation, to assure orderly proceedings. H.R. 3094 seeks to overturn that proposal. The substitute amended the base text of H.R. 3094 to provide that matters to be covered in pre-election hearings are limited to those which are "relevant and material." On its face, that would be an appropriate limitation. However, the substitute defines "relevant and material pre-election issues" to include "any other issue . . . which may reasonably be expected to impact the election's outcome." This will require hearing officers to broaden the scope of pre-election hearings to matters far beyond what is allowed today, and enable meritless litigation contrived solely for purposes of delaying elections.

The amendment was rejected 16–22.

Amendment 4.—Amends the Substitute To Provide Assistance for the Modernization, Renovation, and Repair of Elementary and Secondary School Buildings

Representative Susan Davis offered an amendment which would have invested $25 billion to provide assistance for the modernization, renovation, and repair of elementary and secondary school buildings in public school districts across America in order to support the achievement of improved educational outcomes in those schools.

The amendment would modernize 35,000 American schools, while dealing with the nation's economic woes by creating hundreds of thousands of jobs for construction workers, engineers, maintenance staff, and electrical workers.

The American Society of Civil Engineers (ASCE) awarded the United States a 'D' for the condition of its public school infrastructure. The average public school building in the United States is over 40 years old, and many are much older. Critical repairs and renovation projects are desperately needed now. Not only could Congress have made a long-term investment in our nation's long-term economic prosperity by investing in education, but it could have put unemployed workers on the job now.

Representative Phil Roe raised a point of order that the amendment was not germane, which was sustained by Chairman Kline. Representative Robert Andrews appealed the ruling, but was denied an opportunity to speak on the appeal. Representative Roe then moved to table the appeal, which was sustained 23–17. This vote cut off any future consideration of the Davis measure.

Amendment 5.—To Amend the Timing and Content of Voter Information List

In order to ensure that employee contact information is provided to unions in a timely manner and to assure adequate modes for communication, Representative Dale Kildee offered an amendment to reduce the waiting period for employers to provide the union with the *Excelsior* list of eligible voters within 2 days of the direction of an election, instead of 7 days provided in the bill. The

amendment cures another defect in the legislation which limits employee contact information to only a mailing address, or a phone number, or an e-mail, but not all three. This amendment assures unions have access to all three modes of contact information, if they are available. The amendment adopts the approach in the NLRB's proposed rule to modernize election procedures.

The Majority's bill is intended to override the NLRB's proposed rule to modernize provision of voter contact information.

The purpose of the *Excelsior* rule is to ensure that all voters have access to information to make an informed and reasoned choice. Employers use all three modes of communications to reach employees to convey their views about unionization. At a minimum, there is no reason unions should not have access to the same contact information as employers, if the goal is to assure that employees are able to make a fully informed and reasoned decision. Multiple modes of communications are appropriate to assure timely contact, especially when there are *Excelsior* lists with a substantial number of errors in one mode of contact, such as home address.

The Majority opposes the amendment on the grounds that allowing unions to have information that would allow them access to employees outside the workplace would violate employee privacy rights. The NLRB's *Excelsior* decision rejected the time worn argument that employees would be subjected to harassment and coercion by allowing the union to contact employees at home, especially since, unlike employers, unions have no right to contact voters in the workplace. Whether employees can be contacted within 7 days or 2 days of the direction of an election has no bearing on privacy considerations. Likewise, providing e-mail or phone information is no different than information used by political campaigns, including the Majority's, to contact voters before an election.

The amendment was rejected 16–22.

Amendment 6.—Amends the Substitute To Direct NLRB To Issue a Rule for the Conduct of Electronic Voting

In order to modernize union election practices, Representative Lynn Woolsey offered an amendment directing the NLRB to issue an interim rule allowing electronic voting in NLRB-supervised representation elections and to implement the necessary infrastructure to provide for secure, tamperproof electronic balloting which fully protects the privacy of employees. Under this amendment, the NLRB would provide for a secure online or telephonic voting process, whereby employees could vote away from their workplace in the privacy of their home and where voting may be most convenient. The amendment required vote security and integrity safeguards.

Under current NLRB procedures, elections usually take place on company property using paper ballots, and in cases where the workforce is widely dispersed, elections take place by mail-in ballot. Electronic ballots are commonly used in union representation elections conducted by other federal agencies. The National Mediation Board (NMB), which regulates union elections under the Railway Labor Act (covering airline and railroad industries), and the Federal Labor Relations Authority which oversees most federal employee unions, already use electronic voting. Last February, the

Federal Labor Relations Authority used e-voting in an election for employees of the U.S. Department of Navy.

Almost all publicly traded companies allow shareholders to conduct elections for corporate board members and ratification of auditors via electronic voting.

The Majority objected that this provision would leave employees open to coercion, intimidation and fraud, and unions could subject employees to "intense pressure" to cast electronic ballots in their homes.[32] This problem has not arisen in the NMB and FLRA supervised secret ballot elections.

The amendment was rejected 15–22.

Amendment 7.—Amends the Substitute To Prohibit Captive Audience Meetings After an Election Is Ordered

To prevent coercion and intimidation by employers during the election process, Representative Robert Andrews proposed an amendment to prohibit captive audience meetings between the date an election is ordered and the time of election. Should an employer violate this provision, the election can be invalidated and a new election ordered upon the filing of valid objections. The amendment provided an exception where there is an explicit written agreement between the employer and union.

Captive audience meetings are compulsory meetings held by employers and are conducted on an employee's paid time to dissuade or pressure employees against unionizing. Under current law, employees who refuse to attend or speak out at the meeting without permission can be legally fired by their employer. Unions are not provided equal time at these meetings, nor do they have any right to enter the employer's worksite to provide information.

Such forced meetings have been found by the NLRB to be intimidating and tend to destroy freedom of choice. Since 1953, the NLRB has prohibited employer captive audience meetings in the 24-hour period immediately preceding an election because: (1) the use of company time for pre-election speeches and (2) the delivery of such speeches . . . tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held.[33] The amendment extends this existing rule to cover the period beginning on the date that the NLRB orders the election, instead of a mere 24 hours before the election.

This amendment simply ensures that employers campaign using similar ground rules as unions, and will help ensure that employees have a fully informed choice untainted by attendance at forced meetings. The amendment does not restrict the employer's ability to hold voluntary and unpaid meetings with employees—these are the same terms on which unions are already forced to campaign.

The amendment was rejected 16–23.

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[32] Statement of the Hon. Todd Rokita, Committee Markup Transcript, October 26, 2011, pp. 108–109.

[33] Peerless Plywood Company, 107 NLRB 427 (1953).

Amendment 8.—Amends the Substitute and Adds a Provision to Sanction Frivolous and Vexatious Filings

In order to deter frivolous filings, Representative Tim Bishop proposed an amendment to provide the Board with the authority to impose sanctions on a party for presenting a frivolous or vexatious filing during any stage of a representation proceeding. Potential sanctions included reimbursement of attorney fees and costs, using criteria in Rule 11 of Federal Rules of Civil Procedure. In addition, if the Board determines that a party presented a frivolous filing for purposes of delaying an election, the Board shall direct an election in not less than 7 days after such determination. The NLRB has no sanction procedures with regards to representation proceedings.

The Majority opposed the amendment. They contended that the amendment would allow unions to game the system by making frivolous filings to force the NLRB to trigger an election within 7 days. However, the amendment text explicitly states:

> "If at any time the Board determines that a party has raised a frivolous matter or presented a frivolous filing for purposes of delaying an election, the Board shall immediately direct that an election be conducted not less than 7 days after such determination."

Under the text of the amendment, if the Board simply found that a union presented a frivolous filing it would not trigger a certification election. The Board would also have to determine that the frivolous filing was for "purposes of delay." Since unions would, in general, have no interest in delaying a certification election, the Board would not find that this type of misconduct was for "purposes of delay."

This provision is worded in a neutral manner to sanction frivolous litigation by any party. Thus, if a union presented a frivolous filing for purposes of delaying a decertification election, the same sanctions would apply to the union, including the direction of an election not less than 7 days after such determination.

The amendment was rejected 16–23.

Amendment 9.—Amends the Substitute and Strikes the Requirement for Mandatory Consideration of All Pre-Election Appeals Prior to Ordering an Election and Restores Current Law

To ensure that requests for Board review of pre-election hearings are not used as a means to delay elections, Representative Robert Andrews proposed an amendment to strike a provision that will prevent elections until after the Board considers whether or not to grant a review.

Under the NLRA, an election currently goes forward while the Board decides whether or not it will undertake a review, and, if granted, while such review is underway. In these cases, the employee's choice is registered and the ballots are then impounded to preserve that choice until there is Board determination.

Under the language in the substitute, the election would be held-up until the NLRB considered whether to grant or deny the request for review. These delays could be brief, or they could last years. In fact, under this language, elections could come to a screeching halt

if there is no quorum at the NLRB to make decisions on whether or not to grant a review. The amendment removes unnecessary delay and restores the process to where it has been for the past 75 years.

The amendment was rejected 16–23.

Amendment 10.—Amends the Substitute and Eliminates the Mandatory 35 Day Waiting Period for an Election

In order to prevent needless delays in conducting elections, Representative Robert Andrews proposed an amendment to strike the text which requires that an election must be delayed for at least 35 days from the date the petition was filed. This amendment would restore current law. While the Majority wants to prescribe minimum delays, there is no provision in H.R. 3904 to limit the time that an election can be delayed.

The deletion of the 14 words in this amendment would ensure that an election would be conducted as soon as practicable following the pre-election hearing, consistent with the facts determined by the Regional Director.

By setting a floor that an election will always be held at least 35 days from the filing of a petition, H.R. 3094 imposes delay for delays sake, even if an election could practically be scheduled before 35 days from the filing of a petition. A witness testified at the Committee's October 12 hearing on this bill that:

> "This [35 day delay] would apply even where the union and employer are willing to stipulate to an earlier date. Other than facilitating an employer in ramping up an anti-union campaign, it does not appear to have any meaningful purpose." [34]

This amendment was rejected 16–23.

[34] Testimony of Michael Hunter, Esq, before the Committee on Education and the Workforce, U.S. House of Representatives, October 12, 2011.

CONCLUSION

H.R. 3094 should be called the "Election Prevention Act" because its effect will be to delay and ultimately prevent union elections. This special interest bill is a misguided effort to divert the committee's attention away from creating jobs and focus on weakening laws that protect workers' rights, at a time when 25 million Americans are unemployed or underemployed. Undermining workers' rights will further weaken an already struggling economy by resulting in depressed wages and reduced consumer demand—the primary reason that U.S. companies are reluctant to hire new employees.[35] Committee Democrats are united in opposition to H.R. 3094 and will continue to fight for the rights of workers and middle class families.

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[35] Phil Izzo, Dearth of Demand Seen Behind Weak Hiring, Wall Street Journal (Jul. 19, 2011).