UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	**RIN 3142-AA08**
	)	
	)	**(76 Fed. Reg. 15037**
	)	**and 76 Fed. Reg. 37291)**
NOTICE OF PROPOSED	)	
	)	
RULEMAKING	)	
	)	
Representation Case Procedures	)	

<u>Reply Comments of the National Association of Manufacturers to the Rules Proposed By the National Labor Relations Board Regarding Representation Case Procedures</u>

Now comes the National Association of Manufacturers ("NAM") and respectfully submits the following Reply to the comments submitted to the rules proposed by the National Labor Relations Board ("NLRB" or "Board") regarding representation case procedures.

I. THE BOARD MUST CONSIDER EACH OF THE PUBLIC COMMENTS SUBMITTED IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING IN ORDER TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

NAM respectfully submits that it is imperative that the Board consider each and every one of the public comments submitted in response to the Notice of Proposed Rulemaking.

As set forth in NAM's original comments, the Board has failed to comply with the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601 *et seq.* 1980 ("RFA"). Assuming, *arguendo*, that the Board attempted to satisfy the RFA, failure to give due

consideration to the public comments would nonetheless render promulgation of the Proposed Rules and the rules themselves arbitrary and capricious for failing to address significant concerns related to various defects in the Proposed Rules. See *United States v. Meade Corp.*, 533 U.S. 218 (2001); *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). Absent due consideration of all of the comments, the Board would be unable to certify that it has examined and considered all relevant arguments and data related to the Proposed Rules nor could the Board articulate "a rational connection between the facts found and the choice(s) made" regarding the Proposed Rules. See *Motor Vehicle Mfg. Assn. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

NAM submits that an analysis of each and every one of the public comments reveals there is absolutely no evidence the proposed election rules are necessary. There is no clear evidence the present timeframe for conducting representation elections is either too long or otherwise flawed. There is no evidence contradicting the Board's own data showing that the present timeframes are among the most expeditious in the Board's history.

Indeed, the public comments confirm unreasonable delays in the resolution of representation petitions are the exception, not the norm. Further, none of the comments present evidence the causes of any such delays would be remedied by the Proposed Rules.

Accordingly, in light of (a) the complete dearth of evidence supporting a need to truncate the median timeframe between the filing of a representation petition and the conduct of a representation election from 38 days to between 10 to 21 days, and (b) the complete absence of evidence showing the manifest benefits of requiring employers to submit a statement of position within seven days of filing the representation petition or any benefits related to any other facets

of the Proposed Rules, issuance of the rules would be arbitrary, capricious and without a rational basis in fact or precedent.

II. THE OVERWHELMING NUMBER OF PUBLIC COMMENTS SUBMITTED IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING DEMONSTRATES THAT THE BOARD HAS FAILED TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

The sheer volume of public comments submitted in response to the Notice of Proposed Rulemaking unequivocally confirms that the Board failed to comply with the RFA when the Agency Chairman certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

Tens of thousands of separate comments were filed in response to the Notice of Proposed Rulemaking. The volume of comment was despite the fact the timeframe allowed by the Board for review and comment was wholly inadequate given the magnitude of the changes contemplated by the Board. Indeed, the Proposed Rules were announced on June 22, 2011 and public hearings thereon were conducted barely four weeks thereafter. Comments were due only four weeks after that and the entire period for public consideration was only 74 days. Nonetheless, the magnitude of the Proposed Rules changes to election procedures was perceived by the public as so consequential that, despite the narrow timeframe, tens of thousands more comments were submitted than for the recent rulemaking concerning posting of employee rights, which the NAM contends is beyond the authority of the Board.

When the impact of Proposed Rules is significant and effects a substantial number of small entities, the Board must:

1. seek the views of small businesses;
2. seek input from the Small Business Administration;
3. publish an Initial Regulatory Flexibility Analysis in the Federal Register;
4. certify that the regulations will have no significant impact on small businesses;
5. seek less burdensome alternatives to the proposed regulations; or
6. detail why less burdensome alternatives are infeasible.

The tens of thousands of public comments submitted in response to the Notice of Proposed Rulemaking shred the Board's conclusion that the rules "will not effect a substantial number of small entities" of credibility. Thus, the NAM believes the certification is profoundly flawed.

The thousands of public comments submitted are undoubtedly a mere fraction of the number of small entities that expect to be affected by the Proposed Rules. Consequently, the Board should rescind or toll the Notice of Proposed Rulemaking until such time as it complies with the RFA *i.e.*, by seeking the views of small businesses, the input of the Small Business Administration, publishing an initial regulatory flexibility analysis in the Federal Register, certifying that the regulations have no significant impact on small businesses, seeking less burdensome alternatives or showing why such alternatives are infeasible. See *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Circuit 1999).

III. CONCLUSION.

For the reasons set forth above, NAM respectfully submits that the Board must certify that it has read and duly considered each and every one of the comments submitted in response to the Notice of Proposed Rulemaking. Because such comments reveal that there is no demonstrable need for the Proposed Rules, such rules should be withdrawn in their entirety.

Respectfully submitted,

s/Peter N. Kirsanow

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