

## NATIONAL LABOR RELATIONS BOARD

### 29 CFR Part 103

RIN 3142-AA16

#### Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships

**AGENCY:** National Labor Relations Board.

**ACTION:** Final rule.

**SUMMARY:** As part of ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board or the NLRB) hereby makes three amendments to its rules and regulations governing the filing and processing of petitions for a Board-conducted representation election and proof of majority support in construction-industry collective-bargaining relationships. The amendments effect changes in current procedures that have not previously been incorporated in the Board's rules. The Board believes that the amendments made in this final rule will better protect employees' statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret-ballot election.

**DATES:** This rule will be effective on June 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. The Act

The NLRA sets forth a number of rights and responsibilities that apply to employers, employees, and labor organizations representing employees, in furtherance of the Act's overarching goals of protecting employees' right to designate or select "representatives of their own choosing," or to refrain from doing so;<sup>1</sup> ensuring that, except in situations covered by Section 8(f) of the Act, exclusive representatives are "designated or selected for the purposes of collective bargaining by the majority

of employees" in an appropriate bargaining unit;<sup>2</sup> and promoting labor-relations stability.<sup>3</sup> As discussed further below, Section 8(f) allows "an employer engaged primarily in the building and construction industry to make an agreement covering" certain employees "with a labor organization of which building and construction employees are members," even if it has not been established that the labor organization represents a majority of the employees that it represents.<sup>4</sup> In addition, while it is well established that the Act permits voluntary recognition of labor organizations, the Act also requires the Board—when the necessary prerequisites are met—to direct and conduct secret-ballot elections and certify the results thereof.<sup>5</sup>

###### B. Notice of Proposed Rulemaking (NPRM)

On August 12, 2019, the Board issued the NPRM. The Board set an initial comment period of 60 days, with 14 additional days allotted for reply comments. Thereafter, the Board extended these deadlines twice: First for 60 days, and then for an additional 30 days. Various aspects of the NPRM are summarized below.

###### 1. Summary of the Proposed Rule

In the NPRM, the Board proposed to make three amendments to its current practices. The first amendment, § 103.20, proposed to modify the Board's current practices that permit a party to block an election based on pending unfair labor practice charges. The proposed amendment provided that a blocking charge would not delay the conduct of the election and that the ballots would be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition or the fairness of the election.

The second amendment, § 103.21(a), proposed to modify the Board's existing procedures providing for an immediate election bar following an employer's voluntary recognition of a union as the majority-supported collective-bargaining representative of the employer's employees. The proposed amendment provided for a post-recognition open period of 45 days within which election petitions could be filed and processed.

The third amendment, § 103.22(b), proposed to redefine the evidence

required to prove that an employer and a labor organization in the construction industry have established a voluntary majority-supported collective-bargaining relationship that could bar an election. Under the Board's current practice, certain contract language, standing alone, is sufficient to prove such a relationship. The proposed amendment would require positive evidence that the union unequivocally demanded recognition as the majority-supported exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit.

###### 2. Reasons for Rulemaking

In the NPRM, the Board acknowledged that it historically has made most substantive policy determinations through case adjudication, but stated that it interpreted section 6 of the Act, 29 U.S.C. 156, as authorizing the Board to engage in this informal notice-and-comment rulemaking. In addition, the Board found that using such rulemaking in this context was desirable because (1) it would enable the Board to solicit broad public comment on, and to address in a single proceeding, three related election-bar issues that would not likely arise in the adjudication of a single case; (2) rulemaking does not depend on the participation and argument of parties in a specific case, and it cannot be mooted by developments in a pending case; and (3) by establishing the new standards in its Rules and Regulations, the Board would enable employers, unions, and employees to plan their affairs free from the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process.

###### 3. Reasons for Proposed Changes to Blocking-Charge Policy

As discussed in greater detail in the NPRM, through adjudication the Board created the blocking-charge policy, which permits a party to block an election indefinitely by filing unfair labor practice charges that allegedly create doubt as to the validity of an election petition or the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. This policy can preclude holding the petitioned-for election for months or even years, if at all. See, e.g., *Cablevision Systems Corp.*, Case 29-RD-138839, <https://www.nlr.gov/case/29-RD-138839> (as

<sup>2</sup> Sec. 9(a) of the Act, 29 U.S.C. 159(a).

<sup>3</sup> Sec. 1 of the Act, 29 U.S.C. 151.

<sup>4</sup> Sec. 8(f) of the Act, 29 U.S.C. 158(f).

<sup>5</sup> Sec. 9(c)(1)(B) of the Act, 29 U.S.C. 159(c)(1)(B); Sec. 9(e) of the Act, 29 U.S.C. 159(e).

<sup>1</sup> Sec. 7 of the Act, 29 U.S.C. 157.

noted by *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018), blocking charge followed by regional director's misapplication of settlement-bar doctrine delayed processing until December 19, 2018, of valid decertification (RD) petition filed on October 16, 2014; employee petitioner thereafter withdrew petition).

As the Board noted, and as discussed further in Section III.E. below, courts of appeals have criticized the blocking-charge policy's adverse impacts on employee RD petitions, as well as the potential for abuse and manipulation of that policy by incumbent unions seeking to avoid a challenge to their representative status. See *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971); *NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958).

The potential for delay is the same when employees, instead of filing an RD petition, have otherwise expressed to their employer a desire to decertify an incumbent union representative. In that circumstance, the blocking-charge policy can prevent the employer from being able to seek a timely Board-conducted election to resolve the question concerning representation raised by evidence of good-faith uncertainty as to the union's continuing majority support. Thus, the supposed "safe harbor" of filing an employer (RM) petition that the Board majority referenced in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726 (2001), as an alternative to the option of withdrawing recognition (which the employer selects at its peril) is often illusory.

Additionally, concerns have been raised about the Board's regional directors not applying the blocking-charge policy consistently, thereby creating uncertainty and confusion about when, if ever, parties can expect an election to occur. See Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1896–1897 (2014).

The Board stated that it was inclined to believe, subject to comments, that the blocking-charge policy impedes, rather than protects, employee free choice. In a significant number of cases, the policy denies employees the right to have their votes, in a Board-conducted election on questions concerning representation, "recorded accurately, efficiently and speedily." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946). Unnecessary delay robs an election-petition effort of

momentum, and many of the employees ultimately voting on the issue of representation may not even be the same as those who were in the workforce when the petition was filed. Additionally, the Board stated, the blocking-charge policy rests on a presumption that even an unlitigated and unproven allegation of any one of a broad range of unfair labor practices justifies indefinite delay because of a discretionary administrative determination regarding the potential impact of the alleged misconduct on employees' ability to cast a free and uncoerced vote on the question of representation. Moreover, the current policy of holding petitions in abeyance for certain pre-petition "Type I" blocking charges<sup>6</sup> "represents an anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections [to an election], because it occurs outside the critical election period, would nevertheless be the basis for substantially delaying holding any election at all." Representation—Case Procedures, 79 FR 74308, 74456 (Dec. 15, 2014) (2015 Election Rule) (Dissenting Views of Members Miscimarra and Johnson) (citing *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961)).

For these reasons, in the NPRM the Board proposed, subject to comments, to eliminate the current blocking-charge policy and to adopt a "vote-and-impound" procedure. Under that proposed procedure, regional directors would continue to process a representation petition and would conduct an election even when an unfair labor practice charge and blocking request have been filed. If the charge has not been resolved prior to the election, the Board proposed, the ballots would remain impounded until the Board makes a final determination regarding the charge.<sup>7</sup>

<sup>6</sup> Type I blocking charges are charges that allege conduct that interferes with employee free choice (but does not call into question the validity of the election petition itself). See NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11730.2 (Jan. 2017).

<sup>7</sup> We note that nothing in the proposed rule purported to alter the existing requirements in 29 CFR 103.20 that only a party to the representation proceeding may file the request to block the election process; only unfair labor practice charges filed by that party may be the subject of a request to block; that party must file a written offer of proof as well as the names of witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony; and that party must promptly make available to the regional director the witnesses identified in the offer of proof. As noted further below, the final rule also does not affect any of those existing requirements.

#### 4. Reasons for Proposed Changes to Voluntary-Recognition Bar

As discussed in greater detail in the NPRM, employers may voluntarily recognize unions based on a union's showing of majority support; a Board election is not required. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595–600 (1969); *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956). Over time, the Board developed a rule that an employer's voluntary recognition of a union would immediately bar the filing of an election petition for a reasonable period of time following recognition. See *Sound Contractors Assn.*, 162 NLRB 364 (1966). Then, if the parties reached a collective-bargaining agreement during that reasonable period, the Board's contract-bar doctrine would continue to bar election petitions for the duration of the agreement, up to a maximum limit of 3 years. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

In *Dana Corp.*, 351 NLRB 434 (2007), a Board majority found that the existing immediate voluntary-recognition-bar policy "should be modified to provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." *Id.* at 437. Thus, the *Dana* majority held that voluntary recognition would not bar an election unless (a) affected bargaining-unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly supported petition. *Id.* at 441. The Board further stated that, "if the notice and window-period requirements have not been met, any postrecognition contract will not bar an election." *Id.*

Then, in *Lamons Gasket Co.*, 357 NLRB 739 (2011), a new Board majority overruled *Dana Corp.* and reinstated the immediate voluntary-recognition election bar. Additionally, the Board defined the reasonable period of time during which a voluntary recognition would bar an election as no less than 6 months after the date of the parties' first bargaining session and no more than 1 year after that date. *Id.* at 748.

As the NPRM noted, "[a]t least since *Lamons Gasket*, the imposition of the immediate recognition bar, followed by the execution of a collective-bargaining agreement, can preclude the possibility of conducting a Board election contesting the initial non-electoral recognition of a union as a majority-

supported exclusive bargaining representative for as many as four years.” 84 FR at 39934 (August 12, 2019). In response to a 2017 Board Request for Information, some respondents contended that the Board should eliminate the voluntary-recognition bar or, in the alternative, should reinstate the *Dana* notice and open-period requirements.

In the NPRM, the Board proposed, subject to comments, to overrule *Lamons Gasket* and to reinstate the *Dana* notice and open-period procedures following voluntary recognition under Section 9(a). In this connection, the Board cited the justifications set forth by the *Dana* Board majority and the dissenting Member in *Lamons Gasket*. As the Board stated, while voluntary recognition is undisputedly lawful, secret-ballot elections are the preferred method of ascertaining whether a union has majority-employee support. See *NLRB v. Gissel Packing Co.*, 395 U.S. at 602. The Board further noted that, in conjunction with the contract bar, an immediate recognition bar could deny employees an initial opportunity to vote in a secret-ballot Board election for as many as 4 years—or even longer, because the reasonable period for bargaining runs from the date of the first bargaining session, which, to be lawful, must come after voluntary recognition.

The Board also stated that the Board election statistics cited in *Lamons Gasket* supported, rather than detracted from, the need for a notice and brief open period following voluntary recognition. In this connection, quoting the *Lamons Gasket* dissent, the Board stated that the statistics showed that (1) *Dana* served the intended purpose of assuring employee free choice in those cases where the choice made in the preferred Board electoral process contradicted the showing on which voluntary recognition was granted; (2) in those cases where the recognized union’s majority status was affirmed in a *Dana* election, the union gained the additional benefits of Section 9(a) certification, including a 1-year bar to further electoral challenge; (3) there was no substantial evidence that *Dana* had any discernible impact on the number of union voluntary-recognition campaigns, or on the success rate of such campaigns; and (4) there was no substantial evidence that *Dana* had any discernible impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements were reached after voluntary recognition.

Thus, the Board concluded, subject to comments, that it was necessary and

appropriate to modify the Board’s current recognition-bar policy—now currently set forth in the rules and regulations—by reestablishing a notice requirement and 45-day open period for filing an election petition following an employer’s voluntary recognition of a labor organization as employees’ majority-supported exclusive collective-bargaining representative under Section 9(a) of the Act. Along with the other changes in this rule, the Board stated that it believed, subject to comments, that the immediate imposition of a voluntary-recognition bar is an overbroad and inappropriate limitation on the employees’ ability to exercise their fundamental statutory right to the timely resolution of questions concerning representation through the preferred means of a Board-conducted election.

#### 5. Reasons for Proposed Changes to Policy Regarding Proof of Majority-Based Recognition Under Section 9(a) in the Construction Industry

As discussed in greater detail in the NPRM, based on the unique characteristics of the construction industry, Congress created an exception to the majoritarian principles that govern collective-bargaining relationships in other industries. Thus, as noted above, Section 8(f) of the Act permits a construction-industry employer and labor organization to establish a collective-bargaining relationship in the absence of support from a majority of employees. However, unlike collective-bargaining relationships governed by Section 9(a), the second proviso to Section 8(f) provides that any agreement that is lawful only because of 8(f)’s nonmajority exception cannot bar a petition for a Board election. Accordingly, there cannot be a contract bar or a voluntary-recognition bar to an election among employees covered by an 8(f) agreement.

As recounted in the NPRM, the Board has used various tests over the years to determine whether a bargaining relationship or collective-bargaining agreement in the construction industry is governed by Section 9(a) majoritarian principles or by Section 8(f) and its exceptions to those principles. Beginning in 1971, the Board adopted a “conversion doctrine” under which a bargaining relationship initially established under Section 8(f) could convert into a 9(a) relationship by means other than a Board election or a majority-based voluntary recognition. See *Ruttman Construction*, 191 NLRB 701 (1971); *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub

nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (DC Cir. 1973). Conversion to a 9(a) relationship and agreement would occur if the union could show that it had achieved the support of a majority of bargaining-unit employees during a contract term. However, as the Board later recognized, “[t]he achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process”; rather, “the presence of an enforced union-security clause, actual union membership of a majority of unit employees, as well as referrals from an exclusive hiring hall” were sufficient proof to trigger conversion. *John Deklewa & Sons*, 282 NLRB 1375, 1378 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

In *John Deklewa & Sons*, the Board repudiated the conversion doctrine as inconsistent with statutory policy and congressional intent expressed through Section 8(f)’s second proviso. Id. at 1382. According to the Board in *Deklewa*, conversion of an 8(f) agreement into a 9(a) agreement raises “an absolute bar to employees’ efforts to reject or to change their collective-bargaining representative,” contrary to the second proviso of Section 8(f). Id. In addition, the Board adopted a presumption that construction-industry contracts are governed by Section 8(f), so that “the party asserting the existence of a 9(a) relationship” bears the burden of proving it. Id. at 1385 fn. 41. Noting, however, that “nothing in [its] opinion [was] meant to suggest that unions have less favored status with respect to construction[-]industry employers,” the Board also affirmed that a union could achieve 9(a) status through “voluntary recognition accorded . . . by the employer of a stable workforce where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority.” Id. at 1387 fn. 53.

Thereafter, the Board repeatedly stated that in order to prove a 9(a) relationship, a union would have to show its “express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of employees in an appropriate unit.” *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979–980 (1988) (quoting *American Thoro-Clean*, 283 NLRB 1107, 1108–1109 (1987)). And in *J & R Tile*, the Board held that, to establish voluntary recognition, there must be “positive evidence” that “the union

unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such." 291 NLRB 1034, 1036 (1988).

Subsequently, however, the Board held in *Staunton Fuel & Material* that a construction-industry union could prove 9(a) status based on contract language alone, without any other "positive evidence" of a contemporaneous showing of majority support. 335 NLRB 717, 719–720 (2001). Citing two decisions from the United States Court of Appeals for the Tenth Circuit,<sup>8</sup> the Board explained that contract language would be independently sufficient to prove a 9(a) relationship "where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." 335 NLRB at 720. Finding that its contract-based approach "properly balance[d] Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry," the Board stated that its test would allow "[c]onstruction unions and employers . . . to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so." Id. at 719.

However, the United States Court of Appeals for the District of Columbia Circuit has sharply disagreed with the Board's holding in *Staunton Fuel*. In *Nova Plumbing, Inc. v. NLRB*, the D.C. Circuit stated that "[t]he proposition that contract language standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in [*International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (*Garment Workers*)], for it completely fails to account for employee rights under sections 7 and 8(f)." 330 F.3d 531, 536–537 (DC Cir. 2003), granting review and denying enforcement of *Nova Plumbing, Inc.*, 336 NLRB 633 (2001). According to the court, under *Garment Workers* "[a]n agreement between an employer and union is void and unenforceable . . . if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative." Id. at 537. The court further stated that, "[w]hile

section 8(f) creates a limited exception to this rule for pre-hire agreements in the construction industry, the statute explicitly preserves employee rights to petition for decertification or for a change in bargaining representative under such contracts." Id. "By focusing exclusively on employer and union intent," the court stated, the Board's test allowed employers and unions to "collud[e] at the expense of employees and rival unions," betraying the Board's "fundamental obligation to protect employee section 7 rights." Id.

The court returned to this theme in *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (DC Cir. 2018).<sup>9</sup> There, the court—focusing closely on the centrality of employee free choice in determining when a Section 9(a) relationship has been established—stated that "[t]he *raison d'être* of the . . . Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives." Id. at 1038 (emphasis in original). The court observed that Section 8(f) "is meant not to cede all employee choice to the employer or union, but to provide employees in the inconstant and fluid construction and building industries some opportunity for collective representation . . . [I]t is not meant to force the employees' choices any further than the statutory scheme allows." Id. at 1038–1039. Accordingly, the court held that "the Board must faithfully police the presumption of Section 8(f) status and the strict burden of proof to overcome it" by "demand[ing] clear evidence that the employees—not the union and not the employer—have independently chosen to transition away from a Section 8(f) pre-hire arrangement by affirmatively choosing a union as their Section 9(a) representative." Id. at 1039. Applying this evidentiary standard, the court rejected the Board's reliance solely on contract language in finding a 9(a) relationship, stating that such reliance "would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids." Id. at 1040.

In the interest of restoring protection of employee free choice in the construction industry, the NPRM proposed to overrule *Staunton Fuel*, to adopt the D.C. Circuit's position that contract language alone cannot create a 9(a) bargaining relationship in that

industry, and to therefore require positive evidence of majority union employee support before a collective-bargaining agreement or voluntary recognition between employers and unions would bar a petition to an election. For support, the NPRM stated that (1) as the D.C. Circuit recognized, *Staunton Fuel* permits an employer and union to "paper over" the presumption that construction-industry relationships are governed by Section 8(f); (2) under *Staunton Fuel*, the contract bar would prevent employees and rival unions from filing a Board election petition to challenge the union's representative status for the duration of the contract up to 3 years, even though there was never any extrinsic proof that a majority of employees supported the union; (3) the "conversion" permitted under *Staunton Fuel* is similar to the flawed "conversion doctrine" that the *Deklewa* Board repudiated; and (4) the D.C. Circuit raised a legitimate concern that *Staunton Fuel* conflicts with statutory majoritarian principles and represents an impermissible restriction on employee free choice, particularly in light of the protections intended by Section 8(f)'s second proviso.

## II. Summary of Changes to the Proposed Rule

In response to the comments received, the final rule changes the proposed rule with respect to all three policy areas discussed.

### A. Blocking-Charge Policy

For the reasons discussed in further detail in Section III.E. below, the final rule does not retain the proposed rule's vote-and-impound procedure in all cases. Rather, it requires impoundment only for cases where the unfair labor practice charge, filed by the party that is requesting to block the election process, alleges (1) violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition; or (2) that an employer has dominated a union in violation of Section 8(a)(2) and seeks to disestablish a bargaining relationship. For those categories of charges, the final rule—unlike the proposed rule—provides that the ballots shall be impounded for up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed, or if a complaint has not issued, prior to the conclusion of the election. If a complaint issues with respect to the charge at any time prior to expiration of that 60-day post-election period, then the ballots shall continue to be

<sup>8</sup> *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000); *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147 (10th Cir. 2000).

<sup>9</sup> Granting review and denying enforcement of *Colorado Fire Sprinkler, Inc.*, 364 NLRB No. 55 (2016).

impounded until there is a final determination regarding the charge and its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time prior to expiration of that 60-day period, or if the 60-day period ends without a complaint issuing, then the ballots shall be promptly opened and counted. The final rule further provides that the 60-day period will not be extended, even if more than one unfair labor practice charge is filed serially.

For all other types of unfair labor practice charges, the final rule—unlike the proposed rule—provides that the ballots will be promptly opened and counted at the conclusion of the election, rather than temporarily impounded.

Finally, for all types of charges upon which a blocking-charge request is based, the final rule clarifies that the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.<sup>10</sup> The final rule also makes some minor, non-substantive changes to the title of the proposed rule.

In short, under the final rule, the filing of a blocking-charge request will not delay the conduct of an election but may delay the vote count or certification of results. The regional director shall continue to process the petition and conduct the election.

#### B. Voluntary-Recognition Bar

For the reasons discussed in Section III.F. below, upon consideration of all of the comments received, we have decided to adopt the proposed rule in substantial part. However, in response to certain comments, we have modified the rule to clarify that it shall apply only to an employer's voluntary recognition on or after the effective date of the rule, and to the first collective-bargaining agreement reached after such voluntary recognition. Additionally, the final rule clarifies that the employer "and/or" (rather than "and") the labor organization must notify the Regional Office that recognition has been granted. The final rule also specifies where the notice should be posted ("in

conspicuous places, including all places where notices to employees are customarily posted"); eliminates the proposed rule's specific reference to the right to file "a decertification or rival-union petition" and instead refers generally to "a petition"; adds a requirement that an employer distribute the notice to unit employees electronically if the employer customarily communicates with its employees by such means; and sets forth the wording of the notice. The final rule also makes some minor, non-substantive changes to the title and other wording of the proposed rule.

#### C. Proof of Majority-Based Recognition in the Construction Industry

For clarity purposes, we have removed the amendment regarding proof of majority-based voluntary recognition in the construction industry from § 103.21 of the proposed rule and have placed it in its own section, Final Rule (Rule) § 103.22. In addition, for the reasons discussed in Section III.G. below, we have decided upon consideration of comments received to adopt the proposed rule with one modification: This portion of the final rule shall apply only to voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule. The final rule also makes some minor, non-substantive changes to the wording of the proposed rule.<sup>11</sup>

### III. Summary of Comments and Responses to Comments

The Board received more than 80 comments from interested organizations, labor unions, members of Congress, academics, and other individuals. We have carefully reviewed and considered these comments, as discussed below.

#### A. Propriety of Rulemaking

One commenter contends that we have failed to adequately justify departing from the Board's longstanding practice of proceeding by adjudication.<sup>12</sup> However, Congress has delegated general rulemaking authority to the Board. Specifically, Section 6 of the NLRA, 29 U.S.C. 156, provides that

the Board "shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act (APA)], such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." Although the Board historically has made most substantive policy determinations through case adjudication, it has, with Supreme Court approval, engaged in substantive rulemaking. *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry). In this regard, the Supreme Court has expressly stated that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

Further, Section 6 authorizes the final rule as necessary to carry out Sections 1, 7, 8, and 9 of the Act, 29 U.S.C. 151, 157, 158, and 159, respectively, discussed in relevant part in Section I.A. above. The Board's election policies implicate each of these provisions of the Act, and Section 6 grants the Board the authority to promulgate rules that carry out those provisions.

As discussed in Section I.B.2. above, in the NPRM the Board expressed its preliminary belief that rulemaking in this area of the law is desirable for several reasons. After carefully considering more than 80 comments, we continue to believe that rulemaking, rather than adjudication, is the better method to revise and clarify the matters of broad application at issue in this rule.

First, the Board has repeatedly engaged in rulemaking to amend its representation-case procedures over the years as part of a continuing effort to improve the process and to eliminate unnecessary delays. It has only rarely utilized the APA's notice-and-comment rulemaking procedures when doing so. Most often, the Board has simply implemented procedural changes in a final rule without prior notice or request for public comment. It did so most recently in December 2019. See *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019) (2019 Election Rule). However, a few years earlier, the Board engaged in a notice-and-comment rulemaking process that resulted in a final rule making widespread revisions in prior representation-case procedures. See 79 FR 74307 (December 15, 2014).<sup>13</sup>

<sup>13</sup> See also comment of AFL-CIO in support of the Board's 2015 Election Rule. 79 FR at 74314 ("[T]he American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) states that '[t]he NLRB has specific and express statutory authority

<sup>10</sup> As noted previously, nothing in the final rule alters the existing requirements that only a party to the representation proceeding may file the request to block the election process; only unfair labor practice charges filed by that party may be the subject of a request to block; that party must file a written offer of proof as well as the names of witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony; and that party must promptly make available to the regional director the witnesses identified in the offer of proof.

<sup>11</sup> In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made. For this reason, the amendments are severable.

<sup>12</sup> Comment of AFL-CIO.

Further, as here, some of the procedures addressed in that rulemaking process were originally established in adjudication.

Second, the Board has been well served by public comment on the issues presented in response to the NPRM in this proceeding. The Board received numerous helpful comments from a wide variety of sources, many with considerable legal expertise and/or a great deal of relevant experience. Having considered these comments, we have refined the final rule in several ways, outlined above in Sections II.A. through II.C. and discussed more fully below in Sections III.E. through III.G. It is likely that we would not have received as much input had we addressed these issues through adjudication rather than rulemaking. Rulemaking has given interested persons a way to provide input through the convenient comment process, and participation was not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici.

Third, as discussed in the NPRM, rulemaking has allowed us to address these issues without depending on the participation and argument of parties in a specific case, and without allowing the developments of a pending case to “moot” the issues. One commenter challenges this notion, arguing that the Board can avoid mootness by refusing to allow parties to withdraw cases or concede issues in adjudication.<sup>14</sup> That commenter also contends that the existence of live controversies involving particular parties demonstrates that an issue is important to labor-management relations and merits Board resolution via adjudication.<sup>15</sup>

As discussed in greater detail in the NPRM, developments in specific cases have mooted some of the very issues covered by this rulemaking. See 84 FR at 39937 (citing *Loshaw Thermal Technology, LLC*, Case 05–CA–158650). As the commenter suggests, the Board has the discretion to refuse to allow parties to withdraw cases or to concede issues in a particular case. However, the existence of live controversies in adjudication of an issue does not mean that we lack the discretion to choose rulemaking as the means to address that issue. In addition, as discussed in the NPRM, this particular rulemaking has allowed us to address, in a single proceeding, three related election-bar issues that have not arisen—and likely

would not arise—in the adjudication of a single case.

Fourth, as discussed in the NPRM, establishing the new standards in the Board’s Rules and Regulations will enable employers, unions, and employees to plan their affairs with greater certainty that significant changes to these areas of the law will not be made, and retroactively applied, in adjudication of a case to which they are not parties and about which they may be unaware. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777 (1969) (Douglas, J., dissenting) (“The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.”). Specifically, rulemaking enables the Board to provide the regulated community greater certainty beforehand, as the Supreme Court has instructed that we should do. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

The same commenter also claims that the Board’s recent increased use of rulemaking rather than waiting for actual controversies to arise threatens to open the floodgates of policy oscillation. The claim is purely speculative, and runs counter to the general perception that rulemaking should diminish policy oscillation because it is harder to change policy through rulemaking than through adjudication.<sup>16</sup> The commenter also contends that the Board fails to explain why rulemaking is appropriate here when the Board is not using it in numerous other areas, and that many of the stated reasons for proceeding through rulemaking in this context would apply in other contexts as well.<sup>17</sup> However, even if rulemaking is appropriate in other areas, that does not require us to use rulemaking in all areas where it would be appropriate, let alone all at once. Cf. *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991) (“[A]n agency need not solve every problem before it in the same proceeding.”); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (“Agencies surely may, in appropriate circumstances, address problems incrementally.”). And, as stated above, “the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” *NLRB v. Bell Aerospace Co.*, 416 U.S. at 294. Thus, this comment does not

demonstrate that rulemaking is inappropriate here.

In sum, we continue to believe that use of the rulemaking process here is an appropriate exercise of the Board’s discretion and will be beneficial in ways that adjudication cannot be.

### B. Board Members’ Alleged Closed-Mindedness and Motives

Some commenters allege that the current Board Members have not shown an open mind and willingness to revise the wording proposed in the NPRM in light of public input because each Member previously has expressed a desire to revise the policies under consideration.<sup>18</sup> For the reasons that follow, we reject these contentions. We assure the public that each participating

<sup>18</sup> Comment of AFL–CIO (citing *Pinnacle Foods Group, LLC*, Case 14–RD–226626, 2019 WL 656304, at \*1 fn. 1 (Feb. 4, 2019) (Chairman Ring and Member Kaplan); *United Food & Commercial Workers, Local No. 951*, Case 07–RD–228723, 2019 WL 1879483, at \*1 fn.1 (April 25, 2019) (Chairman Ring and Member Emanuel); *Heavy Materials, LLC.*, Case 12–RM–231582, 2019 WL 2353690, at \*1 fn.1 (May 30, 2019) (Members Kaplan and Emanuel); *C.F. Paterson Foods, LLC*, Case 22–RD–210352, 2018 WL 509465, at \*1 fn.1 (Jan. 19, 2018) (Members Kaplan and Emanuel); *Leggett & Platt, Inc.*, Case 09–RD–200329, 2018 WL 509463, at \*1 fn.1 (Jan. 19, 2018) (Member Kaplan); *CalPortland Arizona Materials Division*, Case 28–RD–206696, 2018 WL 571496, at \*1 fn.1 (Jan. 24, 2018) (Members Kaplan and Emanuel); *Covanta Essex Co.*, Case 22–RD–199469, 2018 WL 654848, at \*1 fn.1 (Jan. 30, 2018) (Members Kaplan and Emanuel); *Wismettac Asian Foods, Inc.*, Case 21–RC–204759, 2018 WL 774103, at \*1 n.1 (Feb. 6, 2018) (Member Kaplan); *Apple Bus Co.*, Case 19–RD–216636, 2018 WL 3703490, at \*1 fn.1 (May 9, 2018) (Members Kaplan and Emanuel); *Kloekner Metals Corp.*, Case 15–RD–217981, 2018 WL 2287088, at \*1 fn.1 (May 17, 2018) (Members Kaplan and Emanuel); *Bemis N.A.*, Case 18–RD–209021, 2018 WL 2440794, at \*1 fn.1 (May 29, 2018) (Member Emanuel); *Janus Youth Programs, Inc.*, Case 19–RM–216426, 2018 WL 2461411, at \*1 fn.1 (May 31, 2018); *Arh Mary Breckinridge Health Services, Inc.*, Case 09–RD–217672, 2018 WL 3238969, at \*1 fn.1 (June 29, 2018) (Chairman Ring and Member Kaplan); *American Medical Response*, Case 10–RC–208221, 2018 WL 3456223, at \*1 fn.1 (July 17, 2018) (Chairman Ring and Member Emanuel); *Apple Bus Co.*, Case 19–RD–216636, 2018 WL 3703490, at \*1 fn.1 (Aug. 2, 2018) (Chairman Ring and Member Kaplan); *Columbia Sussex*, Case 19–RD–223516, 2018 WL 4382911, at \*1 fn.1 (Sept. 12, 2018) (Chairman Ring and Member Kaplan); *Westrock Services, Inc.*, Case 10–RD–195447, 2017 WL 4925475, at \*1 fn.1 (Oct. 27, 2017) (Members Kaplan and Emanuel); *ADT Security Services*, Case 18–RD–206831, 2017 WL 6554381, at \*1 fn.1 (Dec. 20, 2017) (Members Kaplan and Emanuel). See also Comment of United Food and Commercial Workers International Union, AFL–CIO (UFCW) (citing *L&L Fabrication*, Case 16–RD–232491, 2019 WL 1800677, at \*1 fn. 1 (April 22, 2019) (Chairman Ring and Member Emanuel); *Embassy Suites by Hilton, Seattle Downtown Pioneer Square*, Case 19–RD–223236, 2019 WL 656277, at \*1 fn. 1 (Jan. 15, 2019) (Chairman Ring and Member Kaplan); *Heavy Materials, LLC*, supra; *Pinnacle Foods Group, LLC*, supra; *Loshaw Thermal Technology, LLC*, Case 05–CA–158650, 2018 WL 4357198 (soliciting briefs addressing proposed changes to the Sec. 8(f)–to–9(a) conversion doctrine)).

to engage in rule-making to regulate its election process.”).

<sup>14</sup> Comment of AFL–CIO (citing, e.g., *800 River Road Operating Co. d/b/a Care One at New Milford*, 368 NLRB No. 60 (2019)).

<sup>15</sup> Comment of AFL–CIO.

<sup>16</sup> See, e.g., Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985).

<sup>17</sup> Comment of AFL–CIO.

Board Member has approached this rulemaking with an open mind.

“[A]n individual should be disqualified from rulemaking only when there has been a clear and convincing showing” that the official “has an unalterably closed mind on matters critical to the disposition of the proceeding.” *Air Transp. Ass’n of America, Inc. v. NMB*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991)). Moreover, “[a]n administrative official is presumed to be objective and ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’” *Steelworkers v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Further, “[w]hether the official is engaged in adjudication or rulemaking,” the fact that he or she “has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption.” *Id.* That presumption also is not overcome “when the official’s alleged predisposition derives from [his or] her participation in earlier proceedings on the same issue.” *Id.* at 1209. Expanding on the latter point, the D.C. Circuit has explained that “[t]o disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that ‘experience acquired from their work . . . would be a handicap instead of an advantage.’” *Id.* (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)). More recently, the D.C. Circuit has similarly emphasized that it would “eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future actions.” *Air Transp. Ass’n of America, Inc.*, 663 F.3d at 488 (quoting *C & W Fish Co.*, 931 F.2d at 1565).

Accordingly, the fact that the Board Members previously have expressed views on the subjects of this rulemaking is insufficient to demonstrate that they have engaged in this rulemaking with unalterably closed minds. See *Air Transp. Ass’n of America, Inc.*, 663 F.3d at 487–488; *Steelworkers*, 647 F.2d at 1208–1209. Indeed, after considering all of the submitted comments, we have revised the proposed rule in various respects. This in itself demonstrates that the Members did not engage in this endeavor with unalterably closed minds.

One commenter contends that although the Board’s stated goal is to protect employees’ rights, in many recent cases the Board has sought to

destabilize bargaining relationships and to allow employers to undermine unions, often under the guise of protecting employee choice.<sup>19</sup> We do not agree that either this rule or the cited, recent cases demonstrate an intention to destabilize bargaining relationships or to allow employers to undermine unions. Nor do we believe that either this rule or the cited cases are likely to have those effects. Accordingly, we disagree with this comment.

Other commenters contend that here and in other areas, the Board is using rulemaking simply to reverse precedent that it does not like.<sup>20</sup> However, like case adjudication, rulemaking involves reasoned decision-making, conducted within the constraints of the APA and subject to judicial review. As demonstrated here and below, we have carefully considered all comments with an open mind, and we believe that the final rule we have formulated represents our reasoned determination regarding the appropriate standards for furthering the various policies discussed herein, including—and especially—protecting employee free choice.

#### C. Alleged Procedural Errors

One commenter claims that the Board committed procedural errors in two ways. First, the commenter claims that the Board majority did not provide the dissenting Member adequate time to prepare her dissent, citing her statement that she had not been given sufficient time to review all of the relevant data in the appendices to the NPRM.<sup>21</sup> Second, the commenter claims that the Board did not provide interested parties adequate time to prepare their comments on the proposed rule.<sup>22</sup> Specifically, the commenter notes that the Board denied its third motion for an additional 30 days to file comments, despite the fact that the commenter still had six Freedom of Information Act (FOIA) requests pending before the Board.<sup>23</sup> According to the commenter, the documents that it has sought are essential to evaluate both the empirical

<sup>19</sup> Comment of UFCW (citing *Mike-Sell’s Potato Chip Co.*, 368 NLRB No. 145 (2019); *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139 (2019); *MV Transportation, Inc.*, 368 NLRB No. 66 (2019); *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019); *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116 (2019); *Raytheon Network Centric Systems, Inc.*, 365 NLRB No. 161 (2017)).

<sup>20</sup> Comments of AFL–CIO; UFCW.

<sup>21</sup> Comment of AFL–CIO (citing 84 FR at 39947 fn. 74). See also Comment of Senator Patty Murray.

<sup>22</sup> Comment of AFL–CIO.

<sup>23</sup> Comment of AFL–CIO. As the commenter acknowledges, the Board provided responsive documents to its other FOIA requests before the extended comment period closed.

foundation of the proposed rule and the integrity of the rulemaking process.<sup>24</sup>

As an initial matter, we reject the unsubstantiated claim of the dissenting Member that she lacked adequate time to prepare her dissent.<sup>25</sup> Moreover, the Board has previously stated that it “does not believe that it is required, either by law or agency practice, to delay the adoption and publication of a final rule in order to accommodate a dissenting Member. Nothing in the APA compels that course of action, nor does the National Labor Relations Act demand it. Neither do the Board’s rules, statements of procedure, internal operating procedures, or traditional practices, which do not address the internal process of rulemaking, compel such action.” Representation—Case Procedure, 76 FR 80138, 80146 (Dec. 22, 2011) (footnotes omitted). There is no reason that this observation should not apply with equal force to issuance of an NPRM. In any event, however, we assure the public that Member McFerran was provided sufficient time to prepare her dissent.

Further, the evidence that Member McFerran stated she lacked sufficient time to address was the supplemental Board data cited in reference to a prior non-Board study and expressions of concern by two respected academics about the adverse impact of the blocking-charge policy. See 84 FR at 39933, 39947. Some of the same data is at issue in the cited items sought in the commenter’s FOIA request.<sup>26</sup> As discussed in Section III.E. below, even accepting that some of the data that the NPRM cited is flawed, we continue to believe that the record supports finding a systemic problem of unacceptable election delays resulting from the

<sup>24</sup> Comment of AFL–CIO.

<sup>25</sup> Accord *Air Trans. Ass’n of America, Inc. v. NMB*, 663 F.3d at 487–488 (court denied challenge to National Mediation Board’s rule based on majority’s action providing dissenter only 24 hours to consider and prepare dissent, which she did).

<sup>26</sup> The commenter’s Request #2 seeks “[a]ny document that contains or evidences any analysis of the impact of the adoption of 29 CFR 103.20 on the number of blocking charges, the time needed to process blocking charges, the delay caused by blocking charges, or any other case processing outcomes.” AFL–CIO’s Aug. 29, 2019 FOIA Request at 2. The commenter’s Request #5 seeks “[a]ny document containing or evidencing any explanation of any decision to aggregate multiple blocking periods (even when they ran or are running concurrently) in producing the table in Appendix A [sic] to the NPRM.” *Id.* And the commenter’s Request #13 seeks “[a]ny documents containing or evidencing a comparison of the disposition of unfair labor practice charges filed by unions accompanied by or followed by requests to block an election and the disposition of unfair labor practice charges filed by unions not accompanied or followed by such a request.” *Id.* at 3.



blocking-charge policy.<sup>27</sup> We also note that Member McFerran was able to prepare a comprehensive “preliminary” review of blocking-charge information for Fiscal Years 2016 and 2017 independent of the data relied on by the majority or provided to the public in the past. 84 FR at 39943–39944. Likewise, during the comment period, Professor John-Paul Ferguson prepared an extensive review of data provided to the AFL–CIO that was appended to its comment. Yet another review critical of the Board majority’s analysis in the NPRM was prepared by Bloomberg Law and cited by commenters in opposition to the proposed blocking-charge rule.<sup>28</sup> Consequently, there is no basis for finding that the dissenting Board Member was prejudiced by the alleged lack of time to review the data originally cited or that, with respect to its FOIA requests 2, 5, or 13, the commenter was prejudiced by the denial of its request for an extension of time.<sup>29</sup>

The commenter also requested “[a]ny analysis of the effect or impact of *Dana Corp.*, 351 NLRB 434 (2007), other than those contained in the opinions in *Lamons Gasket*, 357 NLRB 739 (2011).” AFL–CIO’s Aug. 29, 2019 FOIA Request at 3 (Request #19). However, in issuing the final-rule amendment regarding the voluntary-recognition bar, we do not rely on any data, or analysis of data, other than that discussed in *Dana* and in *Lamons Gasket*, which we have fully considered. In these circumstances, we find no basis for concluding that the commenter was prejudiced by the denial of its request for an extension of time with regard to this FOIA request.

Further, the commenter requested “[a]ny documents containing or evidencing any statement by any Board member concerning the validity, wisdom or soundness of the Board’s blocking[-]charge policy; *Lamons Gasket Co.*, 357 NLRB 739 (2011); *Dana Corp.*, 351 NLRB 434 (2007); or conversion of 8(f) to 9(a) relationships.” AFL–CIO’s Aug. 29, 2019 FOIA Request at 4 (Request #22). According to the commenter, the requested documents

<sup>27</sup> As the AFL–CIO concedes: “Blocking elections delays elections. That is undeniably true and requires no ‘statistical evidence’ to demonstrate.” Comment of AFL–CIO at 5.

<sup>28</sup> See Alex Ebert and Hassan A. Kanu, Federal Labor Board Used Flawed Data to Back Union Election Rule, Bloomberg Law (Dec. 5, 2019), <https://news.bloomberglaw.com/daily-labor-report/federal-labor-board-used-flawed-data-to-back-union-election-rule-1>.

<sup>29</sup> We emphasize that our response to this comment only addresses the argument that the failure to provide remaining requested documents was prejudicial to the commenter’s ability to evaluate the rulemaking process. We express no opinion concerning whether any of the requested information is disclosable under FOIA.

are relevant to the Board Members’ alleged “predisposition and bias” and their ability “to fairly evaluate comments as required by the APA.”<sup>30</sup> As discussed in Section III.B. above, however, the mere fact that Board Members previously have expressed opinions regarding these matters does not provide a basis for concluding that they have approached these issues with closed minds. That would be the case under applicable precedent even if we were issuing a final rule identical to the proposed rule, but it is even more clearly the case given that we have modified the proposed rule in response to comments. Therefore, there is no basis for finding that the commenter was prejudiced by not receiving this requested information before the end of the comment period.

Finally, one of the commenter’s FOIA requests was for “[a]ny document containing or evidencing any limitations of the time allowed Member McFerran to prepare her dissent to the NPRM, any limitations on the access allowed Member McFerran to case processing information or data she deemed necessary to prepare her dissent, or any limitations on access to NLRB or General Counsel staff she deemed necessary to prepare her dissent.” AFL–CIO’s Aug. 29, 2019 FOIA Request at 3 (Request #21). As discussed above, however, we reject any suggestion that Member McFerran had inadequate time to prepare her dissent. We likewise reject the unfounded suggestion that there was any limitation on her ability to access necessary resources to prepare that dissent.

Inasmuch as there is neither statutory authority nor binding Board practice requiring that a dissenting member has the right to any amount of time to prepare a dissent, the material question here is simply whether the commenters have had sufficient time to provide their comments. Preliminarily, the APA provides no minimum comment period, and many agencies, including the Board in past rulemaking proceedings, have afforded comment periods of only 30 days. Agencies have discretion to provide still shorter periods and are simply “encouraged to provide an appropriate explanation for doing so.” Admin. Conference of the U.S., Recommendation 2011–2, Rulemaking Comments, 76 FR 48791 (Aug. 9, 2011).

As noted previously, the NPRM, which issued on August 12, 2019, set an initial comment period of 60 days, with 14 additional days allotted for reply comments. Although the APA does not require a reply period, the Board

provided it to give itself the best opportunity to gain all information necessary to make an informed decision. Then, the Board extended the comment and reply periods twice, for 90 additional days. In sum, the Board has accepted comments on 3 proposed amendments to its representation-case procedures for a total of 164 days.<sup>31</sup> We believe that the more than 80 comments submitted and the depth of analysis that many of them provide, including the comment and reply from the AFL–CIO, are a testament to the adequacy of the comment period. As such, we do not believe that this commenter was prejudiced by the fact that, at the closing of the extended comment period, the Board had not yet provided all documents responsive to its broad FOIA request.

Accordingly, we reject the commenter’s claims regarding alleged procedural errors.

#### *D. Matters Outside the Scope of This Rulemaking*

Several commenters propose that we take various other actions,<sup>32</sup> but because those actions are outside the scope of this rulemaking, we decline to take them.<sup>33</sup>

#### *E. Final-Rule Amendment Regarding Blocking-Charge Policy*

The Board received numerous comments on the amendment concerning the blocking-charge policy. We have carefully reviewed and considered these comments, as discussed below.

##### 1. Comments in Favor of, and Comments Opposed to, Changing the Blocking-Charge Policy by Eliminating the Practice of Delaying Elections

As stated above, the NPRM proposed that the current blocking-charge policy be revised to provide that a request to block would no longer delay the processing of an otherwise valid

<sup>31</sup> We note that in a prior rulemaking of far greater scope, involving 25 proposed amendments to a wide range of representation-case procedures, the Board found that acceptance of comments on these proposals for a total of 141 days, and 4 days of public hearings, was adequate. See 79 FR at 74311.

<sup>32</sup> See Comments of Center on National Labor Policy, Inc. (CNLP) (suggesting raising the Board’s jurisdictional standards); Anonymous (suggesting that the Board address the unfair labor practice investigation process); National Federation of Independent Business (NFIB) (suggesting proposing particular legislation to Congress); Coalition for a Democratic Workplace (CDW) (suggesting rulemaking to rescind and revise the Board’s 2015 Election Rule).

<sup>33</sup> However, with regard to the recommendation to rescind and revise the Board’s 2015 Election Rule, we note that we already have revised that Rule in certain respects. See 2019 Election Rule, 84 FR 69524.

<sup>30</sup> Comment of AFL–CIO.



petition and the timely conduct of an election. Under the proposed rule, if the blocking charge is still pending upon conclusion of the election, ballots would be impounded and not counted until there is a final determination regarding the charge and its effect, if any, on the election petition or fairness of the election.

Not surprisingly, the commenters on the blocking-charge policy tend to fall into two sharply divided groups. Commenters in the first group support the proposed modification and urge the Board to require regions to process representation petitions despite a request to block based on a pending unfair labor practice charge. One commenter cites the mandate in Section 9(c) of the Act that, “[i]f the Board finds . . . that . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”<sup>34</sup> According to this commenter, the blocking-charge policy is an administrative fiction that the Board has used to evade its statutory responsibility.<sup>35</sup> A second commenter suggests that the blocking-charge policy is contrary to Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), because it permits unions to serve as employees’ representative where a majority of the employees do not support union representation.<sup>36</sup> And another commenter notes that, under the Act, the Board may not defer representation proceedings to the General Counsel, which is allegedly what occurs when the processing of elections depends on whether the General Counsel issues a complaint.<sup>37</sup>

Several commenters cite the adverse impact on employees when they are forced to wait indefinitely to vote in a representation election.<sup>38</sup> In this regard, commenters assert that delaying the election punishes employees for the misconduct alleged in an unfair labor practice charge, even if they had no role in that alleged misconduct.<sup>39</sup> Commenters also contend that an indefinite delay in an election affects employees’ vote when the election is finally held. For instance, it causes some employees to perceive the Board and its processes as futile.<sup>40</sup> Further, the

election’s delay denies employees the opportunity to vote while the issues surrounding the petition effort for an election are fresh in their minds.<sup>41</sup> Commenters also echo the concern expressed in the NPRM about turnover in the workforce during the delay caused by a blocking charge, with the result that employees who supported the petition may not be the ones who vote on the representation issue when the election is finally held.<sup>42</sup> One commenter notes the adverse effect of blocking-charge delays on construction-industry employees working under a Section 8(f) agreement—a majority of whom may never have supported the union representative—who seek to decertify the union through a Board election.<sup>43</sup> One employee commenter notes his own frustration that, for years, he was unable to vote in an election to remove an incumbent union as his bargaining representative because the union filed unfair labor practice charges.<sup>44</sup> Meanwhile, a union local commenter expresses support for modifying the blocking-charge policy because of how important it is for employees to express their choice on union representation without delays to create a more level playing field in the organizing process.<sup>45</sup>

Some commenters argue that employers, too, are harmed when meritless unfair labor practice charges block an election. One commenter notes that, as the Board acknowledged in the NPRM, blocking charges can deprive employers of the supposed “safe harbor” in filing an RM election petition that the Board majority referenced in *Levitz Furniture Co. of the Pacific*, 333 NLRB at 726, as an alternative to the option of withdrawing recognition (which the employer selects at its peril).<sup>46</sup> Another commenter notes the adverse effect on an employer signatory to a construction-industry collective-bargaining agreement negotiated under Section 8(f) by a union without majority support. Although an election petition can be filed at any time during the contract term, a blocking charge can indefinitely postpone an election that could result in decertification of the union and voiding the contract.<sup>47</sup> One commenter also states that when meritless unfair labor charges are filed to delay an election, the Board must

needlessly waste its resources in conducting a pointless investigation, and employers are forced to expend limited funds in defending against such allegations.<sup>48</sup>

Several commenters assert the current blocking-charge policy is too often used as an attempt to rig the rules.<sup>49</sup> One commenter notes that blocking charges overwhelmingly affect decertification elections, and that those elections are delayed the longest.<sup>50</sup> Another commenter compares the current policy to an incumbent U.S. officeholder being able to decide when and under what circumstances to submit to a future election.<sup>51</sup> According to some commenters, this is because a union, aware of a lack of employee support, may simply choose to file an unfair labor practice charge to forestall an election, potentially for as long as necessary until it believes it can prevail.<sup>52</sup> In addition to receiving a temporary delay, the union may hope that, by chance, a regional director’s investigation may discover evidence of other conduct that becomes the basis for issuing a complaint that delays the election even longer.<sup>53</sup> One commenter claims that the passage of time, employee turnover, and other changed circumstances may give the union the chance of hanging on as employees, exasperated by their inability to obtain an election, decide to leave.<sup>54</sup> Additionally, one commenter contends, the union continues to represent the employees indefinitely and may use that time to pressure them into voting for it, if an election ever does occur.<sup>55</sup> According to one commenter, employee free choice eventually turns into employees having no choice at all because the union effectively gets to decide whether an election is held—and the union will always pick its own survival over the preference of unit employees.<sup>56</sup> Thus, one commenter notes, the current policy leads to an undemocratic charade that forces employees to endure a prolonged, if not futile, wait before being able to exercise their right to express their free choice as to whether to be represented.<sup>57</sup>

The group of commenters opposed to change in the current blocking-charge

<sup>34</sup> Comment of CNLP (quoting 29 U.S.C. 159(c)).

<sup>35</sup> Id.

<sup>36</sup> Comment of CDW.

<sup>37</sup> Comment of CNLP.

<sup>38</sup> Comments of Council on Labor Law Equality (COLLE); Representatives Virginia Foxx and Tim Walberg; General Counsel Peter Robb (GC Robb); CNLP; CDW; Chamber of Commerce (the Chamber).

<sup>39</sup> Comments of Associated Builders and Contractors (ABC); National Right to Work Legal Defense Foundation, Inc. (NRWLDf).

<sup>40</sup> Comments of CDW; COLLE.

<sup>41</sup> Comment of GC Robb.

<sup>42</sup> Comment of COLLE; CDW.

<sup>43</sup> Comment of CNLP.

<sup>44</sup> Comment of Donald Johnson.

<sup>45</sup> Comment of International Brotherhood of Electrical Workers Local 304 (Local 304).

<sup>46</sup> Comment of CDW.

<sup>47</sup> Comment of CNLP.

<sup>48</sup> Comment of NRWLDf.

<sup>49</sup> Comments of GC Robb; NRWLDf; the Chamber.

<sup>50</sup> Comment of CDW.

<sup>51</sup> Comment of COLLE.

<sup>52</sup> Comments of COLLE; Representatives Foxx and Walberg; NRWLDf.

<sup>53</sup> Comment of NRWLDf.

<sup>54</sup> Comment of CDW.

<sup>55</sup> Comment of the Chamber.

<sup>56</sup> Comment of NRWLDf.

<sup>57</sup> Comment of Representatives Foxx and Walberg.

policy focus on situations where an allegedly meritorious unfair labor practice charge taints a representation petition or otherwise spoils laboratory conditions for conducting an election, thereby preventing employees from making a truly free choice as to union representation. Some of those commenters argue that it would be inconsistent with Section 9(c) of the Act for a regional director to process a representation petition in those circumstances because the regional director would not have “reasonable cause to believe” that a question of representation exists—a prerequisite to an election under Section 9(c).<sup>58</sup> One commenter claims that a meritorious unfair labor practice charge alleging that an employer unlawfully instigated or supported a petition to displace an incumbent union precludes a question of representation because, in those circumstances, the employer has improperly circumvented Congress’s intent—set forth in Section 9(c)(1)—to allow employers to file only RM petitions.<sup>59</sup> That same commenter also states that a meritorious unfair labor practice charge alleging that an employer violated Section 8(a)(5) by ceasing to recognize and bargain with the incumbent union precludes a question of representation because displacing the union through an election would be inconsistent with the Board’s obligation to remediate the Section 8(a)(5) violation with a bargaining order.<sup>60</sup> Finally, the commenter states that a meritorious unfair labor practice charge against an employer that caused the union’s loss of majority support precludes a question of representation because the required showing of interest would be supported by coerced evidence.<sup>61</sup> Relatedly, another commenter states that, where certain unlawful conduct has been committed, conducting elections would be a betrayal of the Board’s statutory responsibility.<sup>62</sup>

<sup>58</sup> Comments of AFL–CIO; Workers United, SEIU; Communication Workers of America, AFL–CIO (CWA).

<sup>59</sup> Comment of Workers United.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Comment of Economic Policy Institute (EPI).

Another commenter contends that processing a representation petition where there is an unfair labor practice allegation that previously would have blocked an election would violate the First and Fourteenth Amendments to, and the Take Care Clause of, the U.S. Constitution, and that it also raises separation-of-powers concerns. See Comment of National Nurses United (NNU) (citing *Thomas v. Collins*, 323 U.S. 516 (1945)). This commenter does not explain its argument, and the cited decision does not support the commenter’s claim. Thus, we reject this claim as unsupported.

Several commenters assert various ways in which holding an election in spite of a blocking-charge request would harm employees voting in the election. In this connection, commenters contend that, after employees have been coerced to vote against the union in an initial election that has been set aside based on conduct subject to the blocking charge, the union will be forced to convince them to change their minds in a rerun election.<sup>63</sup> One commenter states generally that pollsters and statisticians who study cognitive biases have shown the long-term effect of coercive behavior.<sup>64</sup> Another commenter asserts that it is unfair to hold an election while employees do not know whether the unfair labor practice charge has merit.<sup>65</sup> Additionally, several commenters express concerns that having employees vote in elections that are set aside will engender a belief that exercising rights under the Act is futile, or that Board elections are somehow fixed.<sup>66</sup> Other commenters contend that holding an election while the unfair labor practice charge is pending creates an impression that the charge necessarily lacks merit, based on the belief that the Board would not spend the time, money, and other resources on an initial election if it believes that it might need to hold a rerun election.<sup>67</sup> Another commenter states that the Supreme Court recognized in *NLRB v. Gissel Packing Co.*, 395 U.S. at 575, that employees cannot “freely determine whether they desire a representative” where the employer has committed unfair labor practices that undermined the union’s support and impeded the holding of a free and fair election.<sup>68</sup> Some commenters complain that the proposed rule provides for holding an election even if an employer has engaged in egregious misconduct, such as threatening to shoot any employee voting for union representation.<sup>69</sup>

Commenters also assert that it would be an arbitrary waste of agency and party resources to conduct elections that

<sup>63</sup> Comments of SEIU; AFL–CIO; Kimberly Holdiman; NNU; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (UA); American Federation of Teachers, AFL–CIO (AFT); CWA; Utility Workers of America, AFL–CIO (UWUA).

<sup>64</sup> Comment of International Union of Operating Engineers (IUOE).

<sup>65</sup> Comment of Jay Youngdahl.

<sup>66</sup> Comments of SEIU; UFCW; UA; LIUNA Mid-Atlantic Regional Organizing Coalition (LIUNA MAROC).

<sup>67</sup> Comments of CWA; Senator Murray.

<sup>68</sup> Comment of International Brotherhood of Electrical Workers, AFL–CIO, CLC (IBEW).

<sup>69</sup> Comments of SEIU; IUOE; Michigan Regional Council of Engineers and Millwrights (MRCC); Senator Murray.

will have to be invalidated, such as where the employer indisputably assisted with or actually solicited petition signatures.<sup>70</sup> And other commenters argue that conducting an election will not serve any purpose because a union would not be certified or decertified any sooner. Votes will remain impounded until resolution of the pending blocking-charge allegations.<sup>71</sup>

Several commenters also assert that the proposed modification of blocking-charge policy is not supported by empirical data under the current policy that would be relevant to a determination of how many blocking charges were meritorious.<sup>72</sup> Commenters also criticize inaccuracies in statistics cited by the Board majority in the NPRM with respect to the number of cases where petitions have been blocked and the length of time they were blocked under the current policy.<sup>73</sup> Some commenters state that the Board has failed to consider statistics showing that evidentiary requirements implemented in the 2015 Election Rule have sufficiently addressed any concerns about the current blocking-charge policy.<sup>74</sup> Finally, some commenters contend that the Board’s concern about election delay resulting from the blocking-charge policy is inconsistent with the election delays that will result when the 2019 Election Rule takes effect.<sup>75</sup>

Having thoroughly considered the foregoing comments, we agree with those who contend that the current blocking-charge policy must be modified to provide for the timely processing of an otherwise valid petition, at least to the point of conducting an election. We remain of the view expressed in the NPRM that this approach “best satisfies the goal of protecting employee free choice . . . by assuring that petitions will be processed to an election in the same timely manner as in unblocked[-]petition cases.” 84 FR at 39938. Accordingly, the final-rule amendment provides that a blocking-charge request will no longer delay the conduct of an election in any case. As discussed in the following

<sup>70</sup> Comments of AFL–CIO; NNU; UFCW; UA; IBEW; AFT; Senator Murray; American Federation of State, County and Municipal Employees (AFSCME); EPI.

<sup>71</sup> Comments of AFL–CIO; Youngdahl; LIUNA MAROC.

<sup>72</sup> Comments of AFL–CIO; IUOE; LIUNA MAROC; Senator Murray; SEIU; UA; UFCW.

<sup>73</sup> Comments of AFL–CIO; AFT; IBEW; MRCC; SEIU; UA; UFCW.

<sup>74</sup> Comments of AFSCME; AFL–CIO; CWA; IBEW; Youngdahl; UFCW; Professor Alexia Kulwicz.

<sup>75</sup> Comments of AFT; EPI; SEIU, Local 32BJ (Local 32BJ); UFCW; UWUA; Professor Kulwicz.

section, however, we also agree with comments suggesting that the vote-and-impound procedure proposed in the NPRM need only apply to a limited class of charges and that in all other cases votes should be counted upon conclusion of the voting.

Initially, we disagree with the contention, advanced by several commenters opposing the proposed rule, that the Board lacks the statutory authority to direct elections in the face of some, or even all, blocking charges. Section 9(c)(1) provides that the Board “shall direct an election” if it finds that “a question of representation exists.” It makes no reference to the effect of a pending unfair labor practice charge on an otherwise valid election petition. Similarly, the Board’s current election rules, implemented in 2015, state that “[a] question of representation exists if a proper petition has been filed concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.” 29 CFR 102.64(a).<sup>76</sup> Consistent with this definition, the existence of a question concerning representation is not per se affected by the pendency of a charge alleging conduct that, if proven, would interfere with employee free choice in the election. If it were, then the Board would lack the discretion to direct an election if such charges were pending, regardless of whether a request to block has been made—a position wholly at odds with the Board’s longstanding procedures, which allow elections to take place despite the pendency of charges in certain circumstances, even Type II charges.<sup>77</sup> Indeed, longstanding Board procedures permit the processing of a petition and conduct of an election at the discretion of the charging party who files an unfair labor practice charge or at the discretion of the regional director upon consideration of whether

circumstances permit an election in spite of pending charges.<sup>78</sup>

Turning to the fundamental issue whether any of the unproven unfair labor practice charges currently described as Type I and II charges in the Board’s Casehandling Manual (Part 2) Representation Proceedings should be allowed to block the immediate processing of a petition and conduct of an election, we agree with the commenters who contend that, in some cases, meritless unfair labor practice charges are filed to prevent employees from exercising their right to vote. As some commenters note, ending the policy of blocking elections reduces the incentives for filing meritless unfair labor practice charges and the uncertainty as to whether employees would ever have the opportunity to vote.<sup>79</sup> At the very least, as one commenter noted, it would prompt unions to think twice before filing meritless unfair labor practice charges because they would not be able to unnecessarily deprive employees of their right to express their free choice.<sup>80</sup>

Further, as discussed in the NPRM, several federal appellate courts have expressed concerns about the impact of meritless unfair labor practice charges blocking elections. See *NLRB v. Hart Beverage Co.*, 445 F.2d at 420 (“[I]t appears clearly inferable to us that one of the purposes of the [u]nion in filing the unfair practices charge was to abort [r]espondent’s petition for an election, if indeed, that was not its only purpose.”); *Templeton v. Dixie Color Printing Co.*, 444 F.2d at 1069 (“The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking[-]charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative ‘of their own choosing’ to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced.”); *NLRB v. Midtown Service Co.*, 425 F.2d at 672 (“If . . . the

charges were filed by the union, adherence to the [blocking-charge] policy in the present case would permit the union, as the beneficiary of the [e]mployer’s misconduct, merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power. If, on the other hand, the charges were filed by others claiming improper conduct on the part of the [e]mployer, we believe that the risk of another election (which might be required if the union prevailed but the charges against the [e]mployer were later upheld) is preferable to a three-year delay.”); *NLRB v. Minute Maid Corp.*, 283 F.2d at 710 (“Nor is the Board relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.”); *Pacemaker Corp v. NLRB*, 260 F.2d at 882 (“The practice adopted by the Board is subject to abuse as is shown in the instant case. After due notice both parties proceeded with the representation hearing. Possibly for some reasons of strategy near the close of the hearing, the [u]nion asked for an adjournment. Thereafter it filed a second amended charge of unfair labor practice. By such strategy the [u]nion was able to and did stall and postpone indefinitely the representation hearing.”).

We believe that it would be inappropriate for the Board to continue to disregard these valid concerns that the current blocking-charge policy encourages such gamesmanship, allowing unions to dictate the timing of an election for maximum advantage in all elections presenting a test of representative status.<sup>81</sup> The Board has long been aware of the potential—and actuality—of such gamesmanship and has taken certain measures to discourage it. Section 11730 of the Board’s current Casehandling Manual for representation proceedings states that “it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition.” Further, while declining to modify the blocking-charge

<sup>76</sup> The Board’s 2019 Election Rule revisions to its existing election rules relevantly state: “A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.” 84 FR 69524, at 69593 (December 18, 2019) (to be codified at 29 CFR 102.64(a)). The minor differences between the 2015 and 2019 rules do not affect our analysis of the issues presented here.

<sup>77</sup> Type II Blocking Charges are charges that affect the petition or showing of interest, that condition or preclude a question concerning representation, or that taint an incumbent union’s subsequent loss of majority support. NLRB Casehandling Manual (Part 2) Representation Proceedings Sec. 11730.3 (Jan. 2017).

<sup>78</sup> See NLRB Casehandling Manual (Part 2) Representation Proceedings Sec. 11731.2, .5, and .6. We note that our final-rule amendment of blocking-charge policy does not alter current law requiring that allegations that the individual filing a decertification petition is a supervisor raise jurisdictional issues that must be resolved in the representation case before an election may be directed. See *Modern Hard Chrome Service Co.*, 124 NLRB 1235, 1236–1237 (1959).

<sup>79</sup> Comments of CDW; the Chamber.

<sup>80</sup> Comment of the Chamber.

<sup>81</sup> As comments make clear, the discretionary ability of a union to affect the timing of an election through a blocking charge exists not only for decertification election (RD) and deauthorization (UD) petitions filed by individual employees, but also for representation-election petitions filed by a union (RC) or employer (RM).

policy in the 2015 Election Rule, the Board did state that it was “sensitive to the allegation that at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections,”<sup>82</sup> and it sought to address that issue by including a provision in § 103.20 of the Board’s Rules and Regulations requiring that a charging party that files a blocking request must simultaneously provide an offer of proof with names of witnesses and a summary of their anticipated testimony.

We agree that this new evidentiary requirement would likely facilitate the quick elimination of obviously meritless charges and blocking requests based on them, and thereby permit processing of some petitions with minimal delay. We also accept as plausible the contention by some commenters that the requirement may be partly responsible for a decline in blocked petitions since implementation of the 2015 Election Rule.<sup>83</sup> But even assuming the decline is, to some extent, attributable to the offer-of-proof requirement, we nevertheless find that this decline alone does not justify adherence to the current blocking-charge policy. A regional director typically acts on a blocking-charge request soon after the request is made, if not on the same day, and a charge that appears facially sufficient based on an offer of proof may yet be dismissed as meritless after full investigation or may ultimately be withdrawn. Meanwhile, under the current policy, an election is delayed until that happens.

Further, our concerns and those expressed by commenters about the current policy extend to meritorious charges as well. Proponents of the current policy take a broad view of what constitutes a meritorious blocking charge. They would include any charge under investigation by the regional director that is not facially meritless and alleges conduct that could reasonably affect the election results or the validity of the election petition. Necessarily, then, they would include any charge on which a regional director decides to issue a complaint, regardless of whether a violation of the Act would ultimately be proven. Based on comments supportive of the dissent’s statistical survey in the NPRM, they would also define as meritorious any blocking charge that resulted in a settlement, without inquiry into the terms of the

settlement agreement.<sup>84</sup> In other words, they view any charge of conduct potentially affecting the validity of a petition or the outcome of an election as presumptively meritorious, for purposes of blocking an election, until it is dismissed or withdrawn. This view stands in sharp contrast to the Board’s, for which a charge is not meritorious unless admitted or so found in litigation. Thus, from the Board’s perspective, the current blocking-charge practice denies employees supporting a petition the right to have a timely election based on charges the merits of which remain to be seen, and many of which will turn out to have been meritless. Moreover, even assuming that some commenters are correct that for every meritless charge there are two “meritorious” charges that have appropriately blocked an election,<sup>85</sup> this does not justify the very real consequences that employees experience when unfair labor practice charges indefinitely delay their ability to vote.

We also acknowledge the claims in the dissent to the NPRM and by some commenters that there were errors in some of the data that the NPRM majority cited to support the proposed rule and that these errors led to exaggeration both of the number of cases delayed and the length of delay involved.<sup>86</sup> Even accepting those claims as accurate, the remaining undisputed statistics substantiate the continuing existence of a systemic delay that supports our policy choice to modify the current blocking-charge procedure that does not, and need not, depend on statistical analysis. As the AFL–CIO candidly acknowledges, “[b]locking elections delays elections. That is undeniably true and requires no ‘statistical evidence’ to demonstrate.” We agree. Furthermore, anecdotal evidence of lengthy blocking-charge delays in some cases, and judicial expressions of concern about this, remain among the several persuasive reasons supporting a change that will assure the timely conduct of elections without sacrificing protections against election interference.

For instance, in *Cablevision Systems Corp.*, 367 NLRB No. 59, employees were forced to wait years for a regional director to process a decertification

petition because of a blocking charge—so long, in fact, that the employee who filed the petition ultimately withdrew it and the employees were denied the right to vote. That case was by no means an anomaly. In *ADT Security Services*, No. 18–RD–206831, 2017 WL 6554381 (Dec. 20, 2017), the petitioner filed a decertification petition after personally gathering the required showing of interest. The union filed a blocking charge falsely alleging employer involvement. Although the union eventually withdrew its frivolous charge, it succeeded in blocking an election for several months.<sup>87</sup> Likewise, in *Arizona Public Service Co.*, No. 28–RD–194724, 2017 WL 2794208 (June 27, 2017), the petitioner filed a decertification petition with the required showing of interest. The union filed a blocking charge alleging employer involvement. The union eventually withdrew the charge and lost the subsequent election but was successful in delaying its ouster for nearly 3 months.<sup>88</sup> Additionally, in *Pinnacle Foods Group, LLC*, No. 14–RD–226626, 2019 WL 656304 (Feb. 2, 2019), the petitioner filed a decertification petition supported by the requisite showing of interest. The union filed a charge alleging employer involvement and the employer’s failure to meet its bargaining obligations. The region immediately blocked the petition without seeking any input from the employer or the petitioner. Although the region eventually issued a complaint on relatively minor violations of the Act, it dismissed the allegations of employer involvement in soliciting support for the decertification petition. Under the blocking-charge policy, the regional director declined to process the decertification petition, even though it was filed 18 months after the union’s certification and 12 months after the parties began bargaining—but only days after the decertification petition was filed, suggesting that its primary purpose was merely to forestall the decertification election.<sup>89</sup> Then, one commenter asserts, there is the case of the employees at Apple Bus Co. in Soldotna, Alaska, who were forced to wait years for a decertification election because of blocking charges until the union ultimately disclaimed interest in continuing representation.<sup>90</sup>

Cases such as these demonstrate how a blocking charge can postpone an election, even for years, seriously

<sup>82</sup> 79 FR at 74419.

<sup>83</sup> The statistical summary from Professor John-Paul Ferguson appended to the Comment of AFL–CIO shows a decline but proves no certain basis for inferring the cause of decline.

<sup>84</sup> See List of FY 2016 and FY 2017 Petitions Blocked Pursuant to Blocking Charge Policy in Dissent Appendix, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7583/member-mcferran-dissent-appendix.pdf> (last visited Mar. 23, 2020).

<sup>85</sup> Comments of Workers United; AFL–CIO; IUOE; UFCW; Senator Murray.

<sup>86</sup> Comments of Workers United; AFL–CIO; IBEW; AFT; UA; UFCW; MRCC.

<sup>87</sup> See Comment of NRWLDF.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing *Apple Bus Co.*, Case 19–RD–216636, 2019 WL 7584368 (Nov. 18, 2019)).

harming the interests of employees who wanted it. Although some commenters assert that blocking charges are not to blame for the unacceptably lengthy delay of elections in certain cases,<sup>91</sup> it is undisputed that blocking charges delay elections. In this regard, it takes time for the General Counsel to investigate a charge and, on occasion, to litigate a complaint based on the charge.<sup>92</sup> We believe that it is our obligation to prevent this needless delay of employees' exercise of their right to express their free choice regarding union representation in a timely held election.

Additionally, we believe that the concerns raised about the harm that employees would suffer by voting in an election that is later set aside are overstated and can be addressed by the prophylactic post-election procedures of certification stays and, in some cases, impounding ballots, set forth in the final rule. We also note that from the Board's earliest years, it has set aside the results of elections based on meritorious objections and has ordered second elections. See, e.g., *Paragon Rubber Co.*, 7 NLRB 965, 966 (1938). In many of those cases, the objectionable conduct was an unfair labor practice. Based on our extensive experience in handling election objections, we reject the notion that employee free choice in a second election will invariably be affected by a prior election loss set aside based on unfair labor practices. That has not been the case in many rerun elections where employees vote for union representation in a second or even third election. In fact, contrary to the suggestion of some commenters, we believe that when the Board orders a second election based on unfair labor practices committed during the critical pre-election period, that sends a positive signal to employees that the Board will protect their free choice when the results of an actual election require doing so. In addition, the Board holds rerun elections only at an appropriate time after the original election is set aside—i.e., after the effects of the unlawful or objectionable conduct have dissipated.<sup>93</sup> We also note

that nothing in the Supreme Court's *Gissel* decision suggests the inevitability of lingering effects preventing a fair rerun election, much less that an election should be delayed or preempted prior to any finding in adjudication that unfair labor practices have actually been committed. To the contrary, that decision makes clear the Court's implicit view that typically, fair elections *can* be held after an employer has undisputedly committed unfair labor practices. A rerun election remains the norm after a first election has been set aside based on such misconduct. The extraordinary alternative of imposing an affirmative bargaining order is warranted only when standard remedies stand no or only a slight chance of ameliorating the lingering effects of adjudicated serious unfair labor practices.<sup>94</sup>

One commenter notes that, if an election is held but votes are impounded, the workforce may change by the time the election results are certified.<sup>95</sup> As discussed below, our final-rule amendment retains the proposed vote-and-impound procedure for only a limited category of cases, but certification will in any event be postponed for some period of time if a blocking charge is still pending when an election concludes. In any event, the commenter's observation misses the critical point that our concern is with the harmful effects on employee free choice of election delay, rather than with any post-election delay until a certification of results or representative issues. For various reasons previously stated, blocking charges should neither prevent the timely processing of an otherwise valid petition nor preclude those employees who support it from participating in a timely-conducted election. Considering these factors, we disagree with one commenter's argument that we should maintain the status quo—and its attendant, unnecessary delay in employees' exercise of free choice—because that delay “is a small price to pay.”<sup>96</sup> We find instead that it is far too great a price for employees to pay.

As stated above, several commenters allege that our expressed concern about election delay resulting from the current blocking-charge policy is inconsistent with the 2019 Election Rule.<sup>97</sup> They claim that we cannot seriously be

vote—but it also was reversed by the court of appeals, reported at 794 F.2d 676 (2d Cir. 1984) (table). See Reply Comment of AFL-CIO.

<sup>94</sup> See *NLRB v. Gissel Packing Co.*, supra, 395 U.S. at 610–616.

<sup>95</sup> Comment of AFSCME.

<sup>96</sup> Comment of Youngdahl.

<sup>97</sup> Comments of SEIU; EPI; Local 32BJ.

concerned about preventing unnecessary delays in the election process because we provided in that rulemaking for pre-election review of unit-scope and voter-eligibility issues. Implicit in this argument is an assumption that the changes made by that final rule institutionalized “unnecessary” delays. We could not disagree more. As stated in response to the dissent to that rule, the amendments made there were based on the belief that “the expedited processes implemented in 2014 at every step of the election process . . . unnecessarily sacrificed prior elements of Board election procedure that better assured a final electoral result that is fundamentally fairer and still provides for the conduct of an election within a reasonable period of time from the filing of a petition.” 84 FR at 69577. In contrast, the changes that the final rule here makes in the blocking-charge policy *do* address unnecessary delay in the conduct of an election without sacrificing safeguards against unfair labor practice charges that *might* affect the election results. Further, in at least some cases, the delay involved in blocking an election has been months or years, far exceeding the additional days or weeks added to the election processing timeframe by the 2019 Election Rule.

Some commenters assert that eliminating the policy of blocking elections based on pending charges may force the Board to expend additional resources in holding second elections that would not be necessary if initial elections are delayed. We do not consider this to be a waste by any means, and any consequential costs are worth the benefits secured. Preliminarily, it is clearly not the case that unfair labor practices alleged in a charge, even if meritorious, will invariably result in a vote against union representation. If the union prevails despite those unfair labor practices, there will be no second election. In any event, one of the principal duties of the Board is to resolve questions of representation by holding elections, and that duty is not discharged where the Board does not process a representation petition, especially where there is no legitimate basis for delaying an election.<sup>98</sup> As the General Counsel has stated, “any burden on the Regions in conducting elections where the ballots may never be counted is outweighed by the critical benefit of ensuring employee free choice.”<sup>99</sup>

<sup>98</sup> Comment of CDW.

<sup>99</sup> Comment of GC Robb.

<sup>91</sup> Comments of AFL-CIO; UA.

<sup>92</sup> Comment of CDW.

<sup>93</sup> One commenter's claim that a federal district court in *Amirault v. Shaughnessy*, No. H-84-113, 1984 WL 49161, at \*4 (D. Conn. Feb. 8, 1984), issued a temporary restraining order to halt a union-affiliation election under the Labor Management Reporting and Disclosure Act (LMRDA) because of what it speculated would be the harmful effect of that election on any subsequent election has no bearing on the issue here. That case not only is inapposite based on its facts—which involved the effect of union-affiliation opponents being denied the opportunity under the LMRDA to present their views before the holding of a special convention

For the foregoing reasons (and those discussed in the NPRM), we continue to believe that revising the blocking-charge policy to end the practice of delaying an election represents a more appropriately balanced approach to the issue of how to treat election petitions when relevant unfair labor practice charges are pending. It ensures that employees are able to express their preference for or against union representation in a timely held Board election, while maintaining effective means for addressing election interference. This is an outcome that we believe we can, and should, guarantee for every employee covered under the Act, while at the same time imposing minimal burden on the parties to an election and, just as importantly, the employees who vote in those elections.

## 2. Comments Regarding Other Alternatives

Several commenters contend that there are adequate existing alternatives that make it unnecessary to abolish the blocking-charge policy.

Some commenters observe that regional directors already have discretion to decide to process a petition despite a pending unfair labor practice charge.<sup>100</sup> One commenter states that variation in the exercise of such discretion is to be expected as a consequence of what the commenter characterizes as a law-enforcement context of a prosecutorial determination of merit in the blocking charge.<sup>101</sup> Commenters suggest that, as an alternative to proceeding to an election but impounding the ballots (or delaying the certification), the Board could grant greater discretion to regional directors.<sup>102</sup>

However, one commenter contends that currently, some regional directors reflexively block elections in cases where unfair labor practice charges are filed, even when the underlying offer of proof is weak and the charges are patently frivolous, minor, and/or false.<sup>103</sup> And one commenter asserts that regional directors act arbitrarily in determining which types of charges should block an election by, for instance, largely ignoring the election-related effects of unfair labor practices committed by unions.<sup>104</sup> Further, one commenter notes the substantial inconsistency that already exists across regions, and argues that the opportunity to vote in a timely-conducted election

should not depend on employees' geographic locations.<sup>105</sup>

As reflected in these comments, and as discussed in the NPRM, concerns have been raised about regional directors not applying the current blocking-charge policy consistently, thereby creating uncertainty and confusion about when, if ever, parties can expect an election to occur. See Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879 at 1896–1897 (“Regional directors have wide discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive unmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.”).

We do not believe that granting broader discretion to regional directors is a preferable alternative to eliminating altogether the policy of blocking an election based on an unfair labor practice charge. As one commenter notes, the Board is entrusted with setting national labor policy, and it would better fulfill that duty by creating a uniform election schedule, notwithstanding any pending unfair labor practice charges, than by giving regional directors even more discretion to decide whether employees should have a timely opportunity to vote in an election.<sup>106</sup> As another commenter states, the more that employees are left in the dark as to when—much less whether—they will be able to vote, the further deprived they are of laboratory conditions.<sup>107</sup>

It is because of this need for uniformity that we also decline to create an exception, as proposed by one of the commenters, to continue to allow an election to be blocked when it is the petitioner who files the unfair labor practice charge.<sup>108</sup> Doing so would preserve the opportunity for a petitioner to manipulate the timing of the election for maximum advantage. If a petition is filed presenting a question of representation, we believe the election should proceed regardless of who files the petition, although certification may

be delayed while the unfair labor practice charge is resolved.

Other commenters suggest that the expedited evidentiary requirement for blocking charge requests adopted in the 2015 Election Rule is a sufficient alternative to the proposed change. In this connection, some commenters claim that the Board has not fully studied the effects of that Rule, or that we should maintain the status quo for an indefinite length of time because of that Rule.<sup>109</sup> We reject those claims. As one commenter suggests, at least some meritless unfair labor practice charges are still being filed, notwithstanding the 2015 Election Rule's requirement of a submission of a perfunctory offer of proof.<sup>110</sup> In any event, as previously discussed, the offer-of-proof requirement is likely to result in prompt dismissal or withdrawal of only the most obviously meritless charges. Beyond that, as also discussed, we find that the better policy protective of employee free choice is to eliminate blocking elections based on any pending unfair labor practice charges, even those that may ultimately be found to have merit. However, the final rule preserves the evidentiary requirements created by the 2015 Election Rule.

Finally, to the extent that the Board's recent decision in *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019), addresses our concern about the post-contract presumption of union majority support in the face of contrary evidence, as one commenter suggests,<sup>111</sup> that decision is not a sufficient alternative to ending the blocking-charge policy. Even under *Johnson Controls*, anticipatory withdrawals based upon evidence of employee disaffection could still be as ineffective as the RM-petition “safe harbor” because a union could still file a charge blocking employees from getting to vote in an election, while the employer may feel compelled to retain the employees' existing terms and conditions of employment out of concern that it may otherwise be engaging in objectionable conduct.

## 3. Modifications to the Proposed Rule and Arguments Regarding Settlements

Some commenters argue that a vote-and-impound procedure for all unfair labor practice charges, as proposed in the NPRM, would not provide the expected salutary effect that would come from a charging party—fully aware of the results of the election—knowing that it was acting either with

<sup>100</sup> Comments of SEIU; Professor Kulwiec.

<sup>101</sup> Comment of IUOE.

<sup>102</sup> See, e.g., Comments of IUOE; CWA.

<sup>103</sup> Comment of NRWLDLDF.

<sup>104</sup> *Id.*

<sup>105</sup> Comment of CDW.

<sup>106</sup> Comment of the Chamber.

<sup>107</sup> Comment of COLLE.

<sup>108</sup> Comment of AFL-CIO.

<sup>109</sup> Comments of SEIU; Professor Kulwiec; AFL-CIO; CWA; AFSCME; IBEW.

<sup>110</sup> Comment of CDW.

<sup>111</sup> Comment of UFCW.

the support of or in the teeth of employees' wishes.<sup>112</sup> In particular, as one commenter notes, impoundment of ballots does not fully ameliorate the problems with the current blocking-charge policy because impoundment fails to decrease a union's incentive to delay its decertification by filing meritless blocking charges; makes it more difficult for parties to settle blocking charges, as they would not know the results of the election during their settlement discussions; and further frustrates and confuses employees waiting, possibly for an extended post-election period, to learn the results of the election.<sup>113</sup>

After considering those arguments, we agree with commenters who state that it would be preferable for ballots to be counted immediately after the conclusion of the election, but holding the certification of the election results in abeyance pending the resolution of the unfair labor practice charge.<sup>114</sup> Accordingly, the final rule makes that change with regard to most categories of unfair labor practice charges.

At the same time, however, some types of unfair labor practice charges speak to the very legitimacy of the election process in such a way that warrants different treatment—specifically, those that allege violations of Section 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, and those that allege that an employer has dominated a union in violation of Section 8(a)(2) and that seek to disestablish a bargaining relationship. We believe that in cases involving those types of charges, it is more appropriate to impound the ballots than to promptly count them. Nevertheless, in order to avoid a situation where employees are unaware of the election results indefinitely, we believe it is appropriate to set an outer limit on how long ballots will be impounded. Accordingly, the final rule provides that the impoundment will last for only up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed prior to the conclusion of the election, in order to give the General Counsel time to make a merit determination regarding the unfair labor practice charge.<sup>115</sup> We believe that this

60-day period will reasonably provide sufficient time for the General Counsel to investigate the charge and assess its merits without substantially affecting employees' interests in knowing the electoral outcome.<sup>116</sup> Additionally, the final rule specifies that, if a complaint issues with respect to the charge during the 60-day period, then the ballots shall continue to be impounded until there is a final determination regarding the charge and its effects, if any, on the election petition. If the charge is found to have merit in a final Board determination, we will set aside the election and either order a second election or issue an affirmative bargaining order, depending on the nature of the violation or violations found to have been committed. If the charge is withdrawn or dismissed at any time during the 60-day impoundment period, or if the 60-day period ends without a complaint issuing, then the ballots shall be promptly opened and counted. The final rule also specifies that, if unfair labor practice charges are filed serially, the 60-day period will not be extended.

In our view, these two different procedures—a vote-and-count procedure for most categories of charges, and a vote-and-impound procedure for some limited categories of charges—best accommodate the various concerns that the commenters have raised while protecting the rights that we are obligated to safeguard. For that reason, we reject the assertion of some commenters that we have not attempted to balance, or even quantify, the burden and the benefit in adopting these revised procedures.<sup>117</sup>

Finally, we note that we received some comments regarding the proposed rule's effects on settlements.<sup>118</sup> However, the NPRM expressly stated

determine the timing of a representation election and disclosure of the results of that election during the investigation of an unfair labor practice charge, but the General Counsel has independent authority under Sec. 3(d) of the Act to investigate the charge, without any limitation on the length of that investigation. See Comments of AFL-CIO; CWA.

<sup>116</sup> We note that the NLRB's 2019 Performance and Accountability Report states that in fiscal year 2019, the Agency's regional offices processed unfair labor practice charges from filing to disposition in a median of 74 days. NLRB, FY 2019 Performance and Accountability Report 7, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr-par-2019-design-508.pdf> (last visited Mar. 23, 2020). Moreover, we would expect that investigations of charges triggering the vote-and-impound procedure could be given priority and conducted expeditiously. These considerations further support our conclusion that a 60-day limit on the duration of ballot impoundment represents a reasonable limitation on employees' interest in learning the outcome of the vote.

<sup>117</sup> Comments of AFL-CIO; UFCW.

<sup>118</sup> Comments of SEIU; AFL-CIO; Local 32BJ.

that the Board does not intend this rulemaking to address other election-bar policies, including the settlement bar. 84 FR at 39931 fn. 3. Thus, the rule, by its terms, applies to requests to block an election with an unfair labor practice charge, and it does not apply where a party seeks to interpose a settlement agreement as a bar to an election. Further, the types of settlements, and the circumstances in which they can be reached, are myriad. For all of these reasons, this rule does not address the effect of settlements or disturb the Board's case law addressing the effects of various types of settlements. Any possible changes in the law on those issues are left for other proceedings. Cf. *Mobil Oil Expl. & Producing Se. Inc.*, 498 U.S. at 231 (“[A]n agency need not solve every problem before it in the same proceeding.”); *Advocates for Highway & Auto Safety*, 429 F.3d at 1147 (“Agencies surely may, in appropriate circumstances, address problems incrementally.”). We note that, under existing procedures that this rule does not disturb, a party that files a request for review of a decision and direction of election prior to the election may request extraordinary relief in the form of, among other things, impoundment of some or all of the ballots. See 29 CFR 102.67(j). Thus, there is an existing mechanism that allows a request to keep the ballots impounded in appropriate circumstances.

#### F. Final-Rule Amendment Regarding Voluntary-Recognition Election Bar

The Board also received numerous comments on the proposed amendment concerning the current immediate voluntary-recognition bar. We have carefully reviewed and considered these comments, as discussed below.

#### 1. Comments About Voluntary Recognition Relative to Board Elections

Two commenters state that voluntary recognition is “favored,” quoting *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).<sup>119</sup> In addition, one commenter asserts that the Act does not create separate bargaining obligations or “different systems of private ordering” for unions based on whether they achieved their status through voluntary recognition or certification.<sup>120</sup> Further, several commenters note that voluntary recognition predated the Act, and that the Act created the election process only as a means of resolving questions of

<sup>119</sup> Comments of Local 32BJ; AFSCME.

<sup>120</sup> Comment of UFCW.

<sup>112</sup> Comments of ABC; NRWLDF.

<sup>113</sup> Comment of NRWLDF.

<sup>114</sup> Comment of the Chamber.

<sup>115</sup> To the extent that some commenters suggest that we could impose an outer limit on the duration of the General Counsel's unfair labor practice investigation, we reject those suggestions as beyond our authority. The Board retains the authority to



representation when the parties could not resolve them privately.<sup>121</sup>

It is well established that voluntary recognition and voluntary-recognition agreements are lawful. *NLRB v. Gissel Packing Co.*, 395 U.S. at 595–600; *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. at 72 fn. 8. However, as several commenters note,<sup>122</sup> it also is well established that Board elections are the Act's preferred method for resolving questions of representation.

As an initial matter, the Act itself implicitly supports this principle. As some commenters note, unlike the election bar, the voluntary-recognition bar is not in the Act; it is a Board-created doctrine.<sup>123</sup> Further, the 1947 Taft-Hartley amendments to Section 9 of the Act limited Board certification of exclusive collective-bargaining representatives—and the benefits that result from certification<sup>124</sup>—to unions that prevail in a Board election. While the Act's text does not state an explicit preference for Board elections, the election-year bar and the greater statutory protections accorded to a Board-certified bargaining representative implicitly reflect congressional intent to encourage the use of Board elections as the preferred means for resolving questions concerning representation.

Additionally, both the Board and the courts have long recognized that secret-ballot elections are better than voluntary recognition at protecting employees' Section 7 freedom to choose, or not choose, a bargaining representative. See, e.g., *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. at 602; *Transp. Mgmt. Servs. v. NLRB*, 275 F.3d 112, 114 (D.C. Cir. 2002); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973); *Levitz Furniture Co. of the Pacific*, 333 NLRB at 727; *Underground Service Alert*, 315 NLRB 958, 960 (1994). As the United States Supreme Court has stated, “secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.” *NLRB v. Gissel*

*Packing Co.*, 395 U.S. at 602. Although voluntary recognition is a valid method of obtaining recognition, authorization cards used in a card-check recognition process are “admittedly inferior to the election process.” *Id.* at 603.

As several commenters note, the Board takes prophylactic measures to ensure a free and fair ballot in elections that it conducts (e.g., requiring posting election notices at least 3 days beforehand).<sup>125</sup> Further, as some commenters note, because the Board does not supervise voluntary recognitions, it generally cannot know whether an employer-recognized union has the uncoerced support of a majority of employees.<sup>126</sup> Unlike votes cast in private during Board-conducted secret-ballot elections, card signings are public actions, susceptible to group pressure exerted at the moment of choice. Even if such pressure is not *unlawfully* coercive, it warrants consideration in determining the reliability of an employee's choice. As several commenters note, employees may sign cards because they are susceptible to peer pressure or do not want to appear nonconformist or antagonistic.<sup>127</sup> See, e.g., *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) (“Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).”). Of course, as several commenters also note, signatures on authorization cards may be the result not merely of peer pressure, but of threats, intimidation, coercion, harassment, or other conduct that falls far short of the “laboratory conditions” the Board seeks to ensure during elections.<sup>128</sup> Absent an electoral option, the only way for an employee to address this conduct would be to file an unfair labor practice charge, with the prospect of an extended investigation and litigation period to follow, during which the challenged bargaining relationship would continue.

Further, as some commenters note, employees often sign cards due to misunderstandings, misrepresentations, or lack of information about the

consequences of unionization.<sup>129</sup> Moreover, as one commenter notes, a card check often is accompanied by formal or informal employer neutrality, which may effectively deprive employees of any exposure to information or argument that might cause them to decline representation.<sup>130</sup>

Some commenters claim that there is no evidence to support these contentions.<sup>131</sup> Relatedly, one commenter claims that workers do not obtain more accurate information during Board election campaigns than they do during voluntary-recognition efforts.<sup>132</sup> However, the “uninhibited, robust, and wide-open debate” characteristic of a Board-conducted election better fulfills the national labor policy that Congress has established. See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008) (NLRA preempted state law restricting use of state funds to assist, promote, or deter union organizing).

Another advantage of a Board election is that it presents a clear picture of employee voter preference at a single moment. As some commenters note,<sup>133</sup> elections provide a “snapshot in time” while card signings may take place over a period of time, during which employee sentiment can change. See, e.g., *Johnson Controls, Inc.*, 368 NLRB No. 20 (six employees signed union authorization cards shortly after signing decertification petition); *Alliant Food Service*, 335 NLRB 695 (2001) (16 employees who signed cards for 1 union subsequently signed cards for another union).

According to one commenter, the fact that an election takes place at a single moment disenfranchises employees who are absent on the day of an election.<sup>134</sup> But, as the General Counsel notes, some employees may be completely unaware of an organizing effort prior to a voluntary recognition because a union needs signatures from only a majority of the unit.<sup>135</sup> It is not unreasonable to conclude that if a union knows or suspects which employees may be inclined to support it, the union may target those employees to sign cards while avoiding employees perceived to be less sympathetic to the union's efforts. In contrast, all unit employees receive advance notice of the opportunity to vote in a Board-conducted representation election. In

<sup>121</sup> Comments of IUOE; AFL-CIO; EPI; IBEW; St. Louis-Kansas City Carpenters Regional Council.

<sup>122</sup> Comments of GC Robb; CDW; Representatives Foxx and Walberg; NRWLDF; CNLP.

<sup>123</sup> Comments of NRWLDF; COLLE; CDW.

<sup>124</sup> Those benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition; protection against recognition picketing by rival unions under Sec. 8(b)(4)(C); the right to engage in certain secondary and recognition activity under Sec. 8(b)(4)(B) and 7(A); and, in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under Sec. 8(b)(4)(D).

<sup>125</sup> E.g., Comment of COLLE.

<sup>126</sup> E.g., Comments of NRWLDF; CDW.

<sup>127</sup> Comments of COLLE; CDW; GC Robb; the Chamber.

<sup>128</sup> Comments of NRWLDF; GC Robb; Representatives Foxx and Walberg; the Chamber. See also Reply Comment of CNLP.

<sup>129</sup> Comments of NRWLDF; the Chamber.

<sup>130</sup> Comment of CDW.

<sup>131</sup> Comments of IUOE; Local 32BJ.

<sup>132</sup> Comment of Local 32BJ.

<sup>133</sup> Comments of CDW; GC Robb.

<sup>134</sup> Comment of Local 32BJ.

<sup>135</sup> Comment of GC Robb.

agreement with the General Counsel, we believe that employees who would otherwise be left in the dark regarding a voluntary-recognition drive should have the opportunity to campaign and vote against representation or in favor of a different union<sup>136</sup>—even if that means that employees who are absent on the day of the election (for which they receive advance notice) are unable to vote.<sup>137</sup>

Some commenters contend that laboratory conditions are sometimes destroyed during election campaigns<sup>138</sup> and that pressure from employers or other employees can occur during such campaigns.<sup>139</sup> We agree. However, the Board's election process provides for post-election review of unlawful and other objectionable conduct, and such review may result in the invalidation of the election results and the conduct of a rerun election. There are no guarantees of comparable safeguards in the voluntary-recognition process. This is a meaningful distinction that supports previous court and Board decisions that Board-conducted elections are preferable to voluntary recognition.

One commenter states that the proposed changes to the blocking-charge policy are inconsistent with the rationale stated here—*i.e.*, that conditions attendant to Board elections make such elections preferable to voluntary recognition.<sup>140</sup> We disagree. As previously stated, our revision of the blocking-charge policy is intended to protect the right of employees to a timely election. The *outcome* of that election may still be invalidated by the ultimate resolution of the merits of the blocking charge and its effects on employee free choice, but the timely conduct of the election is entirely consistent with the concept that a secret-ballot Board election is the preferred method for determining whether a union has majority support. Further, nothing in our final-rule

amendments precludes the filing of a blocking charge with respect to an election petition filed after voluntary recognition. The same “laboratory conditions” standard will apply to the conduct of that election, and the same consequences will ensue if the blocking charge is ultimately found to have merit.

Relatedly, some commenters argue that *Johnson Controls*, *supra*, undercuts the rationale that a Board election is the preferred means of determining majority support, insofar as “the non-electoral showing of lack of majority support there is no more reliable than the non-electoral showing of majority support addressed in” the rule here.<sup>141</sup> We disagree. In *Johnson Controls*, the Board held that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. 368 NLRB No. 20, slip op. at 2. However, the Board also held that, in those circumstances, the union may attempt to reestablish that status by filing a Board election petition within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition. *Id.* Consequently, *Johnson Controls* established a process parallel to the one we adopt here in the final-rule amendment. That is, after a bargaining relationship has been established or repudiated on the basis of a non-Board showing of majority-employee support for this action, employees will still have an immediate limited opportunity for a referendum on that action in a Board-supervised private-ballot election. For that matter, our final amendment of the voluntary-recognition bar provides greater protection to a continuing bargaining relationship than *Johnson Controls* does for majority-based withdrawal of recognition. If no petition is filed within the post-recognition period permitted under the rule, the recognition and contract-bar rules will take effect, potentially postponing any electoral challenge for years. In contrast, even if no petition is filed during the *Johnson Controls* open period following anticipatory repudiation, a petition can be filed at any time after expiration of the parties' final contract.

One commenter contends that the purported preference for Board elections conflicts with the Board's December 14, 2017 Request for Information (RFI) on the 2015 Election Rule, 82 FR 58783, inasmuch as the RFI was allegedly an attempt to weaken the 2015 Election Rule, which made it possible for

employees to vote in a “timelier manner.”<sup>142</sup> We disagree with this comment. Nothing in the RFI, which had no effect on the validity of procedures established by the 2015 Election Rule, or in the amendments to those procedures set forth in the Board's 2019 Election Rule, which were founded on independent reasons stated therein, undercut the statutory, judicial, and agency preference for Board elections.

Additionally, some commenters contend that the rule discriminates against voluntary recognition, contrary to various provisions of Section 1 of the Act (“encouraging practices fundamental to the friendly adjustment of industrial disputes”; protecting “exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection”; preventing “industrial strife or unrest”; and “encouraging the practice and procedure of collective bargaining”).<sup>143</sup> One commenter also asserts that the rule is contrary to Section 8(a)(5) and Section 9(a) of the Act insofar as it “would place bargaining relationships formed by voluntary recognition at a disadvantage from their inception.”<sup>144</sup>

On the contrary, the final-rule amendment here does not discriminate against or in any way restrict the lawful voluntary establishment of majority-supported bargaining relationships, nor does it limit the immediate statutory rights and responsibilities that ensue upon commencement of those relationships. The amendment simply provides for a limited post-recognition opportunity for employees to exercise their statutory right of free choice through the preferred means of a Board election as to whether that relationship should continue without the possibility of further challenge for a substantial period of time. In this regard, several commenters correctly note that, currently, the immediate voluntary-recognition bar and the contract bar, together, can block employees' right to an election for 4 years (assuming a 3-year contract)—or even longer if the parties do not begin bargaining right away, as the voluntary-recognition bar period begins not at recognition, but when the parties start bargaining.<sup>145</sup> Given this fact, we believe that the immediate post-recognition imposition

<sup>136</sup> *Id.*

<sup>137</sup> Moreover, as noted in NLRB Casehandling Manual (Part 2) Representation Proceedings Sec. 11302 (Jan. 2017), election-scheduling details “are ordinarily based upon the parties' voluntary meeting of the minds (with the regional director's approval), as reflected in an election agreement.” In the event the regional director has to determine this matter, the manual provides that “[w]here there is a choice, the regional director should avoid scheduling the election on dates on which all or part of the facility will be closed, on which past experience indicates that the rate of absenteeism will be high, or on days that many persons will be away from the facility on company business or on vacation.” In either event, the procedures aim to minimize as much as possible the disenfranchisement of employees because they are absent on election day.

<sup>138</sup> Reply Comment of IBEW.

<sup>139</sup> Comments of Local 32BJ; UA.

<sup>140</sup> Comment of SEIU.

<sup>141</sup> Comments of SEIU; NNU.

<sup>142</sup> Comment of EPL.

<sup>143</sup> Comments of AFL-CIO; EPI; UFCW.

<sup>144</sup> Comment of UFCW.

<sup>145</sup> Comments of NRWLD; CDW; GC Robb.

of an election bar does not sufficiently protect affected employees' statutory right to exercise their choice on collective-bargaining representation through the preferred method of a Board-conducted election. This consideration provides considerable support for the proposed rule.

Further, several commenters contend that voluntary recognition is arguably more democratic than a Board election because it requires a majority of all eligible employees, not just a majority of those who vote in an election.<sup>146</sup> We do not dispute that voluntary recognition must always be based on an absolute majority of bargaining-unit employees, while the result of a Board election will be based on the choice of a majority of unit employees who actually vote. We disagree, however, that this makes voluntary recognition more democratic than a Board election. The conditions under which a choice is expressed, and the safeguards surrounding it, are as much a part of the democratic process as the number of those who register a choice. A secret-ballot election, overseen by a neutral federal agency with the power to prevent or remedy any objectionable conduct affecting the election, provides a far greater assurance of a truly democratic outcome than does the voluntary-recognition process.

## 2. Comments Alleging That the Rule is Arbitrary

Some commenters assert that requiring notices only in the context of voluntary recognition is arbitrary: Notices are not required when an employer withdraws recognition from a certified union, or when a one-year election bar expires; non-union employers are not required to post notices to employees about how to obtain Board recognition of a union; and in no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights.<sup>147</sup>

It may or may not be true that notices should be required in some of these other contexts. But the rule is not arbitrary merely because it does not address those other contexts. Cf. *Mobil Oil Expl. & Producing Se. Inc.*, 498 U.S. at 231 (“[A]n agency need not solve every problem before it in the same proceeding.”); *Advocates for Highway & Auto Safety*, 429 F.3d at 1147 (“Agencies surely may, in appropriate circumstances, address problems

incrementally.”). And we decline to decide, in the context of this rulemaking, that postings should be required in contexts outside the scope of this rule. Accordingly, we reject these comments.

Relatedly, one commenter states that there is no window period for reconsideration and an election petition when an employer lawfully withdraws recognition based on a showing of actual loss of majority support, or after a union loses an election and wants a re-vote just in case employees have changed their minds.<sup>148</sup> We disagree. As stated above, when an employer lawfully withdraws recognition based on a petition or cards showing an actual lack of majority support, employees do have an opportunity for reconsideration and an election: They can immediately file an election petition if they can garner the supporting 30 percent showing of interest for one. And after a union loses an election, the Act itself bars another election for 1 year precisely because employees have already voted in a Board election. This does not mean that the Board should decline to allow employees, in a voluntary-recognition situation where employees have not voted in a Board election, to have a limited period of time to petition for an election where they can express their views by secret ballot.

## 3. Comments Regarding Post-*Dana* Experience

Several commenters assert that data from the post-*Dana* period do not support the proposed rule because they show that workers requested an election in only a small percentage of cases, and workers voted against the incumbent union in only a fraction of those cases.<sup>149</sup> As discussed in *Lamons Gasket*, as of May 13, 2011, the Board had received 1,333 requests for *Dana* notices. 357 NLRB at 742. In those cases, 102 election petitions were subsequently filed, and 62 elections were held. Id. In 17 of those elections, the employees voted against continued representation by the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union and 1 instance in which the petition was withdrawn after objections were filed. Id. Thus, only 7.65 percent of *Dana* notice requests resulted in election petitions, only 4.65 percent of *Dana* notices resulted in actual elections, and employees decertified the voluntarily

recognized union in only 1.2 percent of the total cases in which *Dana* notices were requested.

On the other hand, in the elections that were held under *Dana*, employees voted against continued representation by the voluntarily recognized union approximately 25 percent of the time. Id. at 751 (Member Hayes, dissenting). According to one commenter, this reversal rate shows that voluntary recognition is not a reliable indicator of majority-employee support.<sup>150</sup>

In our view, the fact that only a small percentage of all *Dana* notices resulted in ending continued representation by the voluntarily recognized union does not mean that the post-recognition open period procedure was unnecessary and should not be restored. The fact that in about 1 out of every 4 *Dana* elections a majority of employees voted to reject continued representation by a voluntarily recognized union is far from meaningless. Neither is the fact that *Dana* elections were held in only a small percentage of cases where the required notice of voluntary recognition and the right to petition for an election was given. In our view, *Dana* served its intended purpose of assuring employee free choice in all of those cases at the outset of a bargaining relationship based on voluntary recognition, rather than 1 to 4 years or more later. Some commenters speculate that we could expect to see the same percentage of reversed outcomes after Board-conducted elections if the statutory election bar did not exist to temporarily bar second elections,<sup>151</sup> or that the reversal rate could represent something like “buyer’s remorse” rather than the unreliability of authorization cards.<sup>152</sup> Even were there evidence to support such speculation, we nonetheless believe that giving employees an opportunity to exercise free choice in a Board-supervised election without having to wait years to do so is still solidly based on and justified by the policy grounds already stated.

Further, as for the 1231 cases in which *Dana* notices were requested but no petitions were filed, we know nothing about the reasons for that outcome. Specifically, we know nothing about the reliability of the proof of majority support that underlay recognition in each of these cases, nor do we know why no petition was filed. What we do know is that the employers and unions who voluntarily entered into bargaining relationships during *Dana*’s effective period complied with the

<sup>146</sup> Comments of AFT; SEIU; UFCW; St. Louis-Kansas City Carpenters Regional Council; Professor Kulwicz.

<sup>147</sup> Comments of UA; IBEW; AFSCME; SEIU; AFL-CIO; NNU.

<sup>148</sup> Comment of AFSCME.

<sup>149</sup> Comments of Workers United; IUOE; AFL-CIO; NNU; EPI; UFCW; UA; IBEW; Local 32BJ; AFSCME; St. Louis-Kansas City Carpenters Regional Council.

<sup>150</sup> Comment of NRWLDF.

<sup>151</sup> Comments of Local 32BJ; AFL-CIO.

<sup>152</sup> Comment of Local 32BJ.

notice requirement in impressive numbers and, as a consequence, we can be confident that affected employees were adequately informed of their opportunity to file for an election. In sum, *Dana* imposed no apparent material hardship and provided the intended benefits of notice and opportunity to exercise important statutory rights.

One commenter asserts that between Fiscal Year 2012 and Fiscal Year 2019, unlawful-recognition charges made up only about 1.6 percent of total unfair labor practice charges, and the commenter claims that the percentage should have been higher if the Board's animating concerns were founded.<sup>153</sup> Relatedly, another commenter asserts that post-*Lamons Gasket*, only a small percentage of unlawful-recognition charges resulted in a Board order, and that, if the overruling of *Dana* had truly undermined free choice, there should have been an increase in such charges.<sup>154</sup> However, the breakdown of unfair labor practice charges and the reasons for not issuing a Board order can reflect any number of factors, and they do not necessarily indicate that a majority of employees actually support voluntary recognition. These comments are founded on the mistaken premise that the *Dana* procedure and its proposed reinstatement in this rulemaking are primarily intended to address unlawful voluntary recognition. To the contrary, the provision for notice and limited opportunity to petition for a Board election are intended to protect the preferred electoral mechanism from immediate and prolonged foreclosure by any voluntary recognition, lawful or otherwise. Ensuring employee free choice is a central purpose of the Act, and that purpose is furthered by the *Dana* procedure regardless of whether employees ultimately choose to continue their existing representation.

#### 4. Comments Predicting That the Rule Will Have Negative Effects

Some commenters claim that the rule will discourage voluntary recognition.<sup>155</sup> However, employers and unions agree to voluntary recognition for any number of reasons, economic and otherwise, that the rule will not affect. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832–841 (2005) (setting forth various reasons for neutrality and card-check

agreements). Further, there is no evidence that, under *Dana*, voluntary recognition was less frequent. In fact, as discussed above, only 7.65 percent of *Dana* notice requests resulted in election petitions—and approximately three-quarters of those resulted in a continuation of the bargaining relationship, with the additional benefits of Board certification. As one commenter notes,<sup>156</sup> this includes a protected 1-year period for negotiation of a collective-bargaining agreement,<sup>157</sup> as opposed to the reasonable period of time for bargaining after voluntary recognition, a period that could be as little as 6 months.

Other commenters argue that the rule will discourage or delay collective bargaining. In this regard, one commenter asserts that the rule “invites” employees to file election petitions and that this will delay collective bargaining and representation.<sup>158</sup> Other commenters assert that parties, especially smaller entities, will be less likely to waste limited resources engaging in bargaining that could be for naught.<sup>159</sup> Further, according to several commenters, because a collective-bargaining agreement reached within 45 days would not bar a petition, parties will be more likely to delay bargaining, or at least “serious” bargaining—thereby undermining the policies behind both the voluntary-recognition bar (enabling parties to begin bargaining without interruption) and the contract bar (achieving a reasonable balance between industrial stability and employee choice of representative).<sup>160</sup> Moreover, several commenters argue that the delay in full representation will frustrate the exercise of Section 7 rights and send employees a message of futility or cause them to be disillusioned with the union's representation, particularly given that the delay would occur when employees have not yet realized the benefits of collective bargaining.<sup>161</sup>

As an initial matter, the final rule does not affect established precedent holding that an employer's obligation to bargain with the union attaches immediately upon voluntary recognition. During the 45-day notice-posting period, the union can begin representing employees, processing

their grievances, and bargaining on their behalf for a first contract. Even if a decertification or rival union petition is filed during the 45-day window period, that will not require or permit the employer to withdraw from bargaining or to refrain from executing a contract with the incumbent union. See *Dresser Industries, Inc.*, 264 NLRB 1088, 1089 (1982); *RCA del Caribe, Inc.*, 262 NLRB 963, 965 (1982). If the union is decertified after a contract has been signed, the contract would lose effect. *Wayne County Neighborhood Legal Services*, 333 NLRB 146, 148 fn.10 (2001); *RCA del Caribe*, 262 NLRB at 966; *Consolidated Fiberglass Products*, 242 NLRB 10 (1979). On the other hand, as noted above, if the union prevails in a post-recognition election, it will have the benefit of an extended one-year period for contract negotiations, during which, absent unusual circumstances, its majority status cannot be challenged.

We also do not agree that the rule “invites” employees to file petitions for elections. The rule does not encourage, much less guarantee, the filing of a petition. An employer and a union are both free during the window period to express their views about the perceived benefits of a collective-bargaining relationship. If an employer believes that voluntary recognition is advantageous, it would not necessarily decline to recognize a union simply because there is some risk that a petition will be filed. Similarly, if a union has obtained a solid card majority and has been voluntarily recognized on that basis, it should not be deterred from promptly engaging in meaningful bargaining simply because of the risk of losing that majority in an election. For that matter, in many voluntary-recognition situations, recognition and the execution of a first collective-bargaining agreement occur simultaneously. Although some commenters cite anecdotal evidence that *Dana* procedures occasionally delayed bargaining,<sup>162</sup> there is no evidence in the record for this rulemaking that *Dana* had any meaningful impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements were reached after voluntary recognition.

Some commenters claim that the existence of a pending election petition will cause unions to spend more time campaigning or working on election-related matters rather than doing substantive work on behalf of employees.<sup>163</sup> This may be true in some

<sup>156</sup> Comment of COLLE.

<sup>157</sup> See *Brooks v. NLRB*, 348 U.S. 96 (1954).

<sup>158</sup> Comment of IBEW.

<sup>159</sup> Comments of IBEW; SEIU.

<sup>160</sup> Comments of AFSCME; Local 32BJ; UWUA; Senator Murray; IUOE; AFL-CIO; UFCW.

<sup>161</sup> Comments of IBEW; Local 32BJ; SEIU;

Professor Kulwicz; AFL-CIO; NNU; UFCW; CWA; AFSCME; St. Louis-Kansas City Carpenters Regional Council.

<sup>153</sup> Comment of UFCW.

<sup>154</sup> Comment of SEIU.

<sup>155</sup> Comments of LIUNA MAROC; Local 304; SEIU.

<sup>162</sup> Comments of AFL-CIO; Local 32BJ.

<sup>163</sup> Comments of Local 32BJ; CWA.

situations. However, we believe that this is a reasonable trade-off for protecting employees' ability to express their views in a secret-ballot election. Moreover, we fail to see the bargaining disadvantage to a recognized union that can solidify, and perhaps expand, its base of support during the post-recognition open period.

One commenter notes that the rule does not contain any mechanism that requires employers to post the notice, raising the possibility that an employer will willfully fail to post the notice and that an agreement reached could later be upheld.<sup>164</sup> According to this commenter, this may cause employers, in negotiations, to leverage their compliance with the notice-posting requirement against the union in an attempt to extract more generous substantive contract terms.<sup>165</sup> While this scenario is possible, we have no basis to believe that it will occur, or if it does, that it would not be subject to a unfair labor practice allegation.

One commenter contends that the rule would interfere in collective bargaining in another way. Specifically, this commenter claims, management often asks unions to agree not to discuss the details of ongoing negotiations or share drafts of either party's proposals with workers who are not involved in negotiations.<sup>166</sup> According to this commenter, unions will therefore often face a dilemma if decertification efforts gain support based upon rumors about the negotiating process—specifically, should they allow the rumors to go unchallenged, or respond to them and risk compromising the negotiations?<sup>167</sup> Whatever the likelihood that this would occur, we do not see why a lawfully recognized union would be bound to comply with any nondisclosure request that would interfere with its obligations to represent the unit employees during a post-recognition election campaign.

Several commenters argue that the rule will undercut industrial stability. For example, some commenters assert that the rule will disrupt longstanding and/or stable collective-bargaining relationships by encouraging election campaigns, which can involve heated rhetoric.<sup>168</sup> Another commenter states that the rule will require unions to jump through procedural hoops before they can achieve industrial stability, “without basically any concomitant benefit to employees.”<sup>169</sup> First, the final rule here does not apply to longstanding

collective-bargaining relationships. At most, in the absence of compliance with notice requirements after initial voluntary recognition, it applies to a post-recognition period extending no longer than the first collective-bargaining agreement. Second, we think it is unlikely that parties who have voluntarily entered into a mutually advantageous collective-bargaining relationship will engage in heated rhetoric in an ensuing election campaign, but if that does happen it is part of the free exchange of views that the Act protects. Third, data from the post-*Dana* period indicates that recognized unions will not often have to jump through the procedural “hoop” of an election, and those that do will far more often emerge with a reaffirmation of their majority support and the greater protection of a Board certification. The benefit to employees, as frequently stated here, is the assurance of their statutory right of free choice by providing them the limited opportunity to test a recognized union's majority support through the preferred means of a Board election.

One commenter asserts that, when a company acquires another business, voluntary-recognition agreements help employers and workers by not creating extra concerns during this period of transition; in essence, these agreements help ensure workplace stability at a critical time.<sup>170</sup> But, as discussed above, we do not believe that the rule will materially discourage voluntary-recognition agreements. The final rule also does not disturb existing legal principles governing the obligations of a successor employer.

In addition, one commenter contends that the rule will invite local managers to reverse a national decision to grant voluntary recognition by unlawfully assisting a *Dana* petition, and further contends that this did happen once.<sup>171</sup> There is no basis in the record for finding that this would occur on more than rare occasions, let alone for believing that it would escape detection through the Board's unfair labor practice processes if and when it does occur. It is always the case that bad actors may seek to subvert the Board's representation procedures through unlawful or otherwise objectionable conduct. Remedies exist to address such misconduct, and the bad acts of a few are no reason not to make those procedures more widely available.

One commenter claims that the concomitant change to the immediate contract-bar rule will disturb parties'

settled understandings of their rights and invalidate the private bargaining process that the Act is intended to promote.<sup>172</sup> We believe that the modification is a necessary part of the voluntary-recognition-bar modification, with both modifications striking a more appropriate balance between labor-relations stability and employee free choice. Further, the contract-bar modification should incentivize parties to post a notice in order to avoid having the results of their negotiations subsequently invalidated.

#### 5. Comments Regarding Availability of Other Alternatives

Several commenters argue that there are other alternatives and that their availability undercuts the need for the proposed rule, or that other alternatives are superior to the proposed rule. In particular, some commenters assert that employees may file unfair labor practice charges if they believe that voluntary recognition is not based on majority support or is based on coerced support, while non-petitioner employees may not file election-related challenges and objections to Board elections.<sup>173</sup> Further, several commenters note that employees have 6 months to file unfair labor practice charges, while parties have only 7 days to file objections after an election.<sup>174</sup> We do not believe that the availability of unfair labor practice proceedings to challenge the validity of voluntary recognition undercuts the rule. As one commenter notes, unfair labor practice proceedings generally take longer than representation proceedings,<sup>175</sup> and the General Counsel has unlimited discretion to decline to issue a complaint—and can settle the matter with the parties, without Board or court review—thus making it possible that the Board would never adjudicate employees' claims.<sup>176</sup> In any event, the commenters' entire premise is misguided. The Board's unfair labor practice processes are not an alternative to the final-rule amendment. The former, as relevant here, provide a means to challenge the legal validity of a voluntary recognition. As previously indicated, the purpose of the final-rule amendment is *not* to provide a means to challenge the legal validity of voluntary recognition. It is to provide a limited window of time for a referendum on that recognition through the preferred

<sup>172</sup> Comment of UFCW.

<sup>173</sup> Comments of AFL-CIO; IBEW; Local 32BJ; SEIU; IUOE; St. Louis-Kansas City Carpenters Regional Council.

<sup>174</sup> Comments of AFL-CIO; Local 32BJ; St. Louis-Kansas City Carpenters Regional Council.

<sup>175</sup> Comment of CNLP.

<sup>176</sup> *Id.*

<sup>164</sup> Comment of Senator Murray.

<sup>165</sup> *Id.*

<sup>166</sup> Comment of Local 32BJ.

<sup>167</sup> *Id.*

<sup>168</sup> Comments of IBEW; AFSCME.

<sup>169</sup> Comment of Plumbers and Pipe Fitters.

<sup>170</sup> Comment of CWA.

<sup>171</sup> Comment of Local 32BJ.

means and with the numerous advantages of a Board-supervised private-ballot election. Thus, the existing availability of the unfair labor practice process is not a substitute for the rule.

Further, one commenter asserts that the rule is overbroad because it encompasses voluntary recognition based on non-Board secret-ballot elections.<sup>177</sup> According to that commenter, private agencies such as the American Arbitration Association can ensure the integrity of elections, and private election agreements often provide for post-election procedures that parallel the Board's.<sup>178</sup> Another commenter contends that for successful voluntary recognitions, employers and unions have agreed to a process and a set of rules, and have met the voluntary-recognition requirements in a format that a third party or neutral can confirm and verify—and that it would be federal-government overreach for the Board to interfere with these arrangements.<sup>179</sup>

However, another commenter contends that arbitrators merely count cards against a list of employees and do not know how the cards were obtained.<sup>180</sup> In any event, regardless of what agreements employers and unions reach on these types of matters, we believe that there is significant value in allowing employees an opportunity to petition for a Board-conducted election. If they do not choose that option or do not garner sufficient support for an election petition, then nothing in this rule would interfere with the parties' alternative arrangements. Alternatively, if their petition does achieve the necessary support, the resulting Board election is at worst merely duplicative of the parties' private arrangements, and it offers a prevailing union all the advantages of Board certification.

Another commenter notes that employees have the option to petition for an election during an open period between contracts.<sup>181</sup> However, as discussed previously, the recognition bar and the contract bar, together, can last up to 4 years—longer, if there is a gap between recognition and bargaining. In our view, that is an unacceptable burden on employees' ability to file an election petition following voluntary recognition.

One commenter notes that cards signed as a result of deliberate misrepresentations regarding the

purpose of the card are invalid for purposes of proving the union's majority status.<sup>182</sup> But the possibility of cards being invalidated would necessarily involve unfair labor practice litigation challenging majority status. This does not constitute a sufficient alternative to a secret-ballot election.

Moreover, one commenter contends that the NPRM failed to explain why the benefits of certification are insufficient to satisfy the Board's expressed preference for elections.<sup>183</sup> This comment assumes that employees are aware of the electoral option and that their vote for union representation would confer certain additional benefits on the representative and the bargaining relationship thus established, but they nevertheless consent to the alternative establishment of a bargaining relationship based on voluntary recognition. We question whether employees are aware of the benefits of certification and have consciously elected to forego them in favor of the voluntary-recognition process. Even if this is so, it does not persuade us that this majority choice should immediately foreclose the possibility of a limited post-recognition opportunity for employees to test or confirm the recognized union's majority status by the preferred means of a Board election.

#### 6. Comments Providing General Critiques of the Proposed Rule

Some commenters assert that the proposed notice-posting policy is contrary to the Board's role as a neutral.<sup>184</sup> We disagree. The rule is merely an attempt to provide for greater protection of employee free choice in selection of a representative; it has no effect on what that choice will be. Moreover, as discussed further in Section III.F.7. below, we have modified the text of the proposed rule, to provide that the *Dana* notice will more neutrally reflect the different options that are available to employees.

Another commenter contends that the rule presumes that freely entered, arms-length contracts are innately suspect, contrary to longstanding jurisprudence.<sup>185</sup> The rule does not rest on this presumption; it merely gives employees a chance, for a limited period, to file a petition for an election to confirm whether such contracts were validly entered.

Additionally, several commenters assert that, because only 30 percent of

employees are needed to support a showing of interest, the rule gives employers and a minority of employees the chance to marshal support for ousting the union.<sup>186</sup> According to some commenters, the many (albeit ultimately unsuccessful) petitions filed under *Dana* show that even in cases where a majority of voting employees ultimately favor representation, an anti-union minority is encouraged to keep resisting the majority's will.<sup>187</sup> According to one commenter, just as the Act does not contemplate an election rerun absent objectionable conduct, it also does not contemplate a "do-over" organizing period simply because a minority of employees are unhappy.<sup>188</sup>

However, as discussed previously, under *Dana* the Board received only 102 election petitions relative to 1,333 requests for notices over a period of several years. We do not believe that this indicates that a minority of employees repeatedly resist the majority's will by filing petitions. And in any event, we believe that it is important to give all employees an opportunity—a narrow and limited opportunity—to express their free choice by petitioning for an election.

Further, some commenters contend that the rule will waste government and party resources by requiring unnecessary elections.<sup>189</sup> As an initial matter, as noted previously, the data under *Dana* show that, over a period of several years, only 62 elections were held—not a tremendously high number. In any event, we do not consider the elections "unnecessary," regardless of whether they confirm continued representation. We believe that securing employee free choice is worth the commitment of resources. And we note again that in approximately 25 percent of those elections, employees voted to oust the recognized union.

One commenter contends that the NPRM failed to comply with the APA because it did not contain the text of the contemplated notice to employees—and that, without that text, it is impossible to provide meaningful comments.<sup>190</sup> However, in the NPRM, the Board explicitly proposed "to reinstate the *Dana* notice." 84 FR at 39938. The key contents of the *Dana* notice were well established in that decision,<sup>191</sup> and

<sup>186</sup> Comments of SEIU; EPI; IUOE; UFCW; AFSCME.

<sup>187</sup> Comment of Local 32BJ.

<sup>188</sup> Comment of IUOE.

<sup>189</sup> Comments of AFSCME; NNU; UFCW; CWA.

<sup>190</sup> Comment of IBEW.

<sup>191</sup> Specifically, in *Dana*, the Board held that the notice should clearly state that (1) the employer (on a specified date) recognized the union as the employees' exclusive bargaining representative

<sup>177</sup> Comment of AFL-CIO.

<sup>178</sup> Id.

<sup>179</sup> Comment of James T. Springfield.

<sup>180</sup> Comment of NRWLDF.

<sup>181</sup> Comment of IBEW.

<sup>182</sup> Comment of Local 32BJ.

<sup>183</sup> Comment of AFL-CIO.

<sup>184</sup> Comments of IBEW; Senator Murray; NNU; St. Louis-Kansas City Carpenters Regional Council.

<sup>185</sup> Comment of Joel Dillard.

there is no basis for finding that the commenter was precluded from providing meaningful comments merely because the NPRM did not quote the *Dana* notice in its entirety.<sup>192</sup>

In addition, one commenter argues that the Board has failed to consider alternatives like shortening the length of the recognition-bar period.<sup>193</sup> However, we do not believe that this alternative would be sufficient to achieve the goals that we have discussed herein and in the NPRM. Further, it arguably would detract from the labor-relations stability that so many commenters discuss and that we seek to balance with employee free choice. Accordingly, we reject that proffered alternative.

Further, one commenter contends that the NPRM leaves open the possibility of further changes in the law with respect to other discretionary election-bar policies; this highlights both the arbitrary character of the items chosen for resolution here and the Board's failure to achieve its stated goal of ensuring predictability; and, by creating uncertainty about the status of these related doctrines, the Board undermines the bargaining process in other contexts.<sup>194</sup> However, for the reasons stated in Sections III.A. and III.F.2. above, we are not required to make changes to all related doctrines in this current rulemaking. Further, all legal doctrines are subject to change, whether

based on evidence indicating that a majority of employees in a described bargaining unit desire its representation; (2) all employees, including those who previously signed cards in support of the recognized union, have the Sec. 7 right to be represented by a union of their choice or by no union at all; (3) within 45 days from the date of the notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the NLRB for a secret-ballot election to determine whether or not the unit employees wish to be represented by the union, or 30 percent or more of the unit employees can support another union's filing of a petition to represent them; (4) any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures; and (5) if no petition is filed within the 45 days from the date of this notice, then the recognized union's status as the unit employees' exclusive majority bargaining representative will not be subject to challenge for a reasonable period of time following the expiration of the 45-day window period, to permit the union and the employer an opportunity to negotiate a collective-bargaining agreement. 351 NLRB at 443.

<sup>192</sup> We note that, as discussed further below—consistent with recommendations from two commenters—the final rule makes some modifications with respect to required elements in the new post-recognition notice that differ from the requirements for a *Dana* notice. There also is no basis for finding that commenters reasonably could not have known to submit comments regarding what the notices should, or should not, include. In fact, some commenters did exactly that, and we have responded positively to those comments, as discussed below.

<sup>193</sup> Comment of UFCW.

<sup>194</sup> *Id.*

through rulemaking or adjudication, so the mere mention of possible future changes does not create additional uncertainty that undermines the bargaining process. As the Board itself stated in defense of what it described as “targeted” amendments to representation procedures in the 2015 Election Rule: “Of course, an administrative agency, like a legislative body, is not required to address all procedural or substantive problems at the same time. It need not ‘choose between attacking every aspect of a problem or not attacking the problem at all.’ *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Rather, the Board ‘may select one phase of one field and apply a remedy there, neglecting the others.’ *FCC v. Beach Commc’ns*, 508 U.S. 307, 316 (1993) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). ‘[T]he reform may take one step at a time.’ *Id.*” 79 FR at 74318 (footnote omitted).

For the above reasons, we find that these comments do not support abandoning the proposed rule.<sup>195</sup>

#### 7. Comments Suggesting Changes to the Proposed Rule

The General Counsel recommends that we extend the notice period from 45 days to 1 year.<sup>196</sup> Another commenter supports this recommendation, stating that it would better protect employee free choice because employees, especially those in larger units or units that span multiple locations, need more time to organize to collect a decertification petition; and individual employees often need longer because they do not have ready access to paid organizers or to counsel who can guide them through the Board's election process and the legal rules for collecting petition signatures.<sup>197</sup> In contrast, a different commenter opposes such an extension, claiming that it is draconian; would threaten lawful, voluntary, nascent collective-bargaining relationships by permitting either a minority of employees or a rival union to file a petition during that period; would not promote collective bargaining and industrial peace; would run contrary to congressional intent that

<sup>195</sup> In its voluntary-recognition arguments, one commenter refers back to one of its blocking-charge arguments, specifically, that the rule would violate the First and Fourteenth Amendments to, and the Take Care Clause of, the U.S. Constitution, and that it also raises separation-of-powers concerns. See Comment of NNU (citing *Thomas v. Collins*, 323 U.S. 516). Once again, this commenter does not explain its argument, and the cited decision does not support the commenter's claim. Thus, we reject this claim as unsupported.

<sup>196</sup> Comment of GC Robb.

<sup>197</sup> Reply Comment of NRWLDF.

elections be conducted only where employers refuse to voluntarily recognize the union; and would thwart the expressed desire of a majority of workers.<sup>198</sup>

Consistent with certain commenters' comments, we believe that the 45-day notice period strikes a reasonable balance between employee free choice and other interests—such as labor-relations stability and preserving lawful, voluntary recognitions—and ensures that both employers and unions have the benefit of the recognition bar for a reasonable period of time following the close of the window period when no petition is filed.<sup>199</sup> Additionally, a 45-day period is consistent with the period established in *Johnson Controls* for union petitions following notice of anticipatory withdrawal of recognition. See 368 NLRB No. 20. Further, as one commenter states, because employers would be responsible for posting and maintaining the Board-provided notice “throughout this period,” extending the notice period to 1 year would make additional challenges to compliance more likely.<sup>200</sup> Accordingly, we decline to adopt the recommended change.

The General Counsel also recommends that, at the end of his proposed 1-year period of notice posting, the Board should have discretion to continue to dismiss petitions “based on the facts and circumstances of the case,” or to impose a recognition bar “if circumstances so warrant.”<sup>201</sup> Other commenters disagree with this recommendation.<sup>202</sup> As one commenter notes, the General Counsel provides no insight into what “circumstances [would] warrant insulating the collective-bargaining relationship for a limited period of time.”<sup>203</sup> We agree. In addition to the fact that we have rejected the proposal to extend the posting period to 1 year, we also do not believe that there is sufficient clarity as to how this proposed change would apply. Accordingly, we decline to adopt this suggested alternative.

Additionally, the General Counsel recommends that we modify the proposed amendment so that agreements entered into after the parties' first collective-bargaining agreement would enjoy bar status, regardless of whether the suggested 1-

<sup>198</sup> Reply Comment of IBEW.

<sup>199</sup> Comments of COLLE; the Chamber; CDW.

<sup>200</sup> Reply Comment of AFL-CIO.

<sup>201</sup> Comment of GC Robb.

<sup>202</sup> Reply Comment of NRWLDF; Reply Comment of AFL-CIO.

<sup>203</sup> Reply Comment of AFL-CIO.



year notice was posted.<sup>204</sup> We agree. Even if there is no election bar for the first contract executed in the absence of compliance with the notice requirements of the amendment, we do not see the need to continue an unrestricted open period for filing petitions during the term of any successor agreement. In this connection, we note that current contract-bar rules created in adjudication permit the filing of petitions during established periods prior to the end of any contract with a term of 3 years or less. See, e.g., *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 8 fn. 45 (discussing open periods for filing petitions in healthcare and nonhealthcare industries). In addition, there is no election bar after the third year of a contract with a longer effective term, nor is there any bar following contract expiration and prior to the effective date of a successor agreement. Under these circumstances, we believe that extant open-period rules provide a sufficient opportunity for employees and rival unions to file petitions and, thus, that it is unnecessary to require a notice posting and another open period upon execution of any successor collective-bargaining agreement. Accordingly, we clarify the rule to specify that a voluntary recognition entered into on or after the effective date of this rule, and “the first” collective-bargaining agreement entered into on or after the date of such voluntary recognition, will not bar the processing of an election petition if the requirements of the rule are not met.

The General Counsel also recommends that the final rule specify the content of the notice and that the text of the notice should include several items. First, the General Counsel asserts that the rule should include all of the applicable items from the *Dana* notice. Second, the General Counsel contends that the rule should include information regarding how the contract bar operates during and after the window period and, in particular, should notify employees that they may file a petition within the window period even if the employer and union have already reached a collective-bargaining agreement, and that if they do not challenge the union’s status by filing a petition and the parties subsequently reach a collective-bargaining agreement, an election cannot be held for the duration of the collective-bargaining agreement, up to 3 years. Third, the General Counsel argues that the notice should include a more balanced description of employee rights and an affirmation of the Board’s neutrality, as

the *Dana* notice has been criticized as being too one-sided in its description of employee rights, and therefore susceptible to the impression that the Board is urging employees to reconsider their selection of the new union. To give a more complete explanation of employee rights and to reinforce the Board’s neutrality, the General Counsel suggests that the notice should be updated to include the following language:

Federal law gives employees the right to form, join, or assist a union and to choose not to engage in these protected activities.

An employer may lawfully recognize a union based on evidence indicating that a majority of employees in an appropriate bargaining unit desire its representation.

Once an employer recognizes a union as the employees’ exclusive bargaining representative, the employer has an obligation to bargain with the union in good faith in an attempt to reach a collective-bargaining agreement. That obligation is not delayed or otherwise impacted by this notice.

The National Labor Relations Board is an agency of the United States Government and does not endorse any choice about whether employees should keep the current union, file a decertification petition, or support or oppose a representation petition filed by another union.<sup>205</sup>

The AFL–CIO proposes further revisions, specifically, that the following, italicized words be added to the General Counsel’s proposed revisions:

An employer may lawfully recognize a union based on evidence (*such as signed authorization cards*) indicating that a majority of employees in an appropriate unit desire its representation, *even absent an election supervised by the National Labor Relations Board.*

The National Labor Relations Board is an agency of the United States Government and does not endorse any choice about whether employees should keep the current union, *file a petition to certify the current union*, file a decertification petition, or support or oppose a representation petition filed by another union.<sup>206</sup>

We agree that the notice should contain the additions suggested by both the General Counsel and the AFL–CIO. As the General Counsel notes, such wording gives employees a more complete picture of their rights and emphasizes the Board’s neutrality in these matters. We also agree that the text of the final rule should include the wording of the notice. We have modified the text of the final rule, § 103.21 accordingly. In addition, consistent with the additions to the notice set forth above, we modify the text of the final rule, § 103.21 to require

employers to post a notice informing employees of their right to file “a petition”—not “a decertification or rival union petition.”

The General Counsel also argues that, in addition to notice-posting, the Board should require employers to distribute individual notices to employees via a second method of the employers’ choosing,<sup>207</sup> and another commenter supports this recommendation.<sup>208</sup> We believe that it is appropriate for the final rule to mirror the requirements that apply to petitions for elections. Accordingly, consistent with the 2019 Election Rule that is scheduled to take effect in Spring of 2020,<sup>209</sup> the instant final rule specifies that the employer shall post the notice “in conspicuous places, including all places where notices to employees are customarily posted,” and shall also distribute it “electronically to employees in the petitioned-for unit, if the employer customarily communicates with its employees electronically.”

#### *G. Final-Rule Amendment Regarding Proof of Majority-Based Recognition in the Construction Industry*

The Board received numerous comments on the proposal to redefine the evidence required to prove that a construction-industry employer and labor organization have established a majority-based collective-bargaining relationship under Section 9(a) of the Act. We have carefully reviewed and considered these comments, as discussed below.

#### 1. Comments Regarding Board and Court Precedent

Many commenters support the requirement that positive evidence is needed to prove that a union demanded recognition as the exclusive bargaining representative and that the employer granted it based on a demonstration of majority support. More specifically, the commenters contend that the rule will restore the protection of employee free choice that Congress intended to ensure when it enacted Section 8(f).<sup>210</sup> We agree.

The *Deklewa* Board properly struck a balance between employee free choice and stability in bargaining relationships, consistent with the congressional intent expressed in Section 8(f). As discussed in Section I.B.5. above, Section 8(f) permits construction-industry unions

<sup>207</sup> Comment of GC Robb.

<sup>208</sup> Reply Comment of NRWLDF.

<sup>209</sup> See 84 FR at 69591.

<sup>210</sup> Comments of COLLE; Associated General Contractors of America (AGC); GC Robb; NRWLDF; Miller & Long Company, Inc. (M&L); the Chamber; ABC; NFIB.

<sup>204</sup> Comment of GC Robb.

<sup>205</sup> Comment of GC Robb.

<sup>206</sup> Reply Comment of AFL–CIO.

and employers to enter collective-bargaining relationships absent employee majority support, but such relationships do not bar election petitions. The *Deklewa* Board adopted a presumption that bargaining relationships in the construction industry are governed by Section 8(f), and it made 8(f) agreements enforceable for their term. Moreover, the Board abolished the flawed conversion doctrine and held that 8(f) relationships could develop into 9(a) relationships only through Board election or voluntary recognition—and, in the latter case, only “where that recognition is based on a clear showing of majority support among the unit employees.” 282 NLRB at 1387 fn. 53.

The Board’s current *Staunton Fuel* standard, which requires only contract language to establish a 9(a) relationship, is contrary to these fundamental principles. See *King’s Fire Protection, Inc.*, 362 NLRB 1056, 1063 fn. 24 (2015) (Member Miscimarra, dissenting in part) (observing that the *Staunton Fuel* standard “is even more troubling than the conversion doctrine that the Board abandoned in *Deklewa*” because, “[u]nder [*Staunton Fuel*], mere words are sufficient to cause ‘pre-hire’ recognition to convert to Sec[ti]on 9(a) status, even where . . . there has been no showing of actual employee majority support”). By requiring positive evidence of employee majority support to establish a 9(a) relationship, the instant rule will restore the proper balance of interests—employee free choice on one hand, labor-relations stability on the other—intended by Congress and safeguarded in *Deklewa*.

In addition, many commenters note that the D.C. Circuit repeatedly has rejected the *Staunton Fuel* test, and they urge the Board to adopt the court’s position that contract language alone cannot create a 9(a) bargaining relationship.<sup>211</sup> As discussed in Section I.B.5. above, in *Nova Plumbing* and *Colorado Fire Sprinkler*, the D.C. Circuit criticized the Board’s reliance solely on contract language, finding it inconsistent with the majoritarian principles set forth by the Supreme Court in *Garment Workers*. *Colorado Fire Sprinkler*, 891 F.3d at 1038–1039; *Nova Plumbing*, 330 F.3d at 536–537. See also *M & M Backhoe Serv., Inc. v. NLRB*, 469 F.3d 1047, 1050 (D.C. Cir. 2006) (explaining that “a union seeking to convert its section 8(f) relationship to a section 9(a) relationship may either petition for a representation election or demand recognition from the employer

by providing proof of majority support,” and finding a 9(a) relationship based on signed authorization cards).

As the court explained, “while an employer and a union can get together to create a Section 8(f) pre-hire agreement, *only the employees*, through majority choice, can confer Section 9(a) status on a union.” *Colorado Fire Sprinkler*, 891 F.3d at 1040 (emphasis in original). Thus, in order “to rebut the presumption of Section 8(f) status, actual evidence that a majority of employees have thrown their support to the union must exist and, in Board proceedings, that evidence must be reflected in the administrative record.” *Id.* As some commenters note, the court’s rejection of the Board’s reliance solely on contract language is a strong reason to support the instant rule, as every Board decision can be reviewed by the D.C. Circuit. 29 U.S.C. 160(f).

On the other hand, other commenters argue that the proposed rule is not appropriate because the NPRM incorrectly interpreted *Staunton Fuel* and the D.C. Circuit’s decisions.<sup>212</sup> Specifically, they argue that the court stated that contract language and intent are relevant factors, so those factors should be determinative where countervailing evidence is weak or nonexistent. Some commenters also rely on the D.C. Circuit’s decision in *Allied Mechanical Services, Inc. v. NLRB*, 668 F.3d 758 (DC Cir. 2012).

Contrary to the commenters, the court has “held that ‘contract language’ and ‘intent’ of the union and company alone generally cannot overcome the Section 8(f) presumption” because allowing them to do so “runs roughshod over the principles of employee choice established in Supreme Court precedent.” *Colorado Fire Sprinkler*, 891 F.3d at 1039 (internal quotations omitted). Further, although the court has indicated that contract language and intent “certainly” are not determinative factors when “the record contains strong indications that the parties had only a section 8(f) relationship,” *id.*, its decisions do not compel the inverse proposition—*i.e.*, that contract language and intent *are* determinative where record evidence of 8(f) status is weak. Such a proposition disregards that under *Deklewa*, bargaining relationships in the construction industry are *presumed* to be governed by Section 8(f), and therefore no evidence is required to establish 8(f) status. In any event, the court clearly has not

foreclosed requiring positive evidence demonstrating majority support in all cases. And as we have explained, requiring such evidence would effectuate the Act’s purposes by protecting employee free choice, accomplish the congressional intent expressed in Section 8(f), and conform to the majoritarian principles set forth by the Supreme Court in *Garment Workers*. In addition, *Allied Mechanical* does not support the commenters’ position. In *Allied Mechanical*, the court found that a construction-industry union established 9(a) status by requesting recognition based on signed authorization cards and by entering a settlement agreement that contained an affirmative bargaining order predicated on its previous majority support. 668 F.3d at 768–769. Thus, the union did not solely rely on contract language to demonstrate its 9(a) status.

Moreover, we also note that, in pre-*Staunton Fuel* cases, the United States Courts of Appeals for the First and Fourth Circuits also required a contemporaneous showing of majority support to establish a 9(a) relationship. *American Automatic Sprinkler Sys., Inc. v. NLRB*, 163 F.3d 209, 221–222 (4th Cir. 1998) (“The Board’s willingness to credit the employer’s voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employee free choice that is a central aim of the Act.”), cert. denied 528 U.S. 821 (1999); *NLRB v. Goodless Elec. Co.*, 124 F.3d 322, 324, 330 (1st Cir. 1997) (“Voluntary recognition requires the union’s unequivocal demand for, and the employer’s unequivocal grant of, voluntary recognition as the employees’ collective[-]bargaining representative based on the union’s contemporaneous showing of majority[-]employee support.”). Further, the United States Court of Appeals for the Eighth Circuit relied on both contract language and additional evidence in finding that a construction-industry union established 9(a) status in *NLRB v. American Firestop Solutions, Inc.*, 673 F.3d 766, 770–771 (8th Cir. 2012).

In sum, we find that Board and court precedent fully support requiring positive evidence demonstrating majority-employee union support to establish a 9(a) relationship in the construction industry.

<sup>211</sup> Comments of COLLE; AGC; GC Robb; the Chamber; ABC; CDW.

<sup>212</sup> Comments of AFL–CIO; Road Sprinkler Fitters Local Union No. 669 (Local 669); IBEW; IUOE; North America’s Building Trades Unions (NABTU); UA.

## 2. Comments Regarding Employee Free Choice

As many commenters contend, requiring positive evidence of majority-employee union support will also better effectuate the purposes of the Act.<sup>213</sup> The current *Stanton Fuel* standard undermines employees' Section 7 rights by effectively reintroducing the conversion doctrine that the *Deklewa* Board repudiated and by subjecting employees to the contract bar precluding elections for several years, even where there has never been any extrinsic proof that a majority of the employees support the union.<sup>214</sup> As the commenters point out, the protection of employees' Section 7 free-choice rights is a central purpose of the Act, and the rule would protect those rights. Further, as another commenter notes, the rule will also provide greater stability in the construction industry by clarifying the requirements to create 9(a) relationships.<sup>215</sup>

## 3. Comments Regarding Collusion

Several commenters contend that the Board's current standard turns a blind eye to union and employer collusion in the construction industry, trampling employee free choice.<sup>216</sup> We agree. By allowing unions and employers to enter into 9(a) relationships based on contract language alone, employees' rights can be usurped with a stroke of a pen. Further, as the commenters point out, this is not mere speculation but has been demonstrated in several Board decisions in which parties falsified majority support. See, e.g., *Colorado Fire Sprinkler, Inc.*, 364 NLRB No. 55, slip op. at 5 (Member Miscimarra, dissenting) (noting that parties signed agreement recognizing 9(a) status before single employee hired); *King's Fire Protection, Inc.*, 362 NLRB at 1059 (Member Miscimarra, dissenting in part) (same); *Triple C Maintenance*, 327 NLRB 42, 42 fn. 1 (1998) (pre-*Stanton Fuel*, finding 9(a) relationship based on recognition clause even though no employees when relationship began), enf. 219 F.3d 1147 (10th Cir. 2000); *Oklahoma Installation Co.*, 325 NLRB

<sup>213</sup> Comments of Representatives Foxx and Walberg; CNLP; COLLE; AGC; NRWLDF; the Chamber; ABC; NFIB; CDW. See also Reply Comment of CNLP.

<sup>214</sup> We also note that the *Stanton Fuel* standard gives rise to a post-contract presumption of continuing majority support absent positive evidence that the union has ever enjoyed such support.

<sup>215</sup> Comment of Mechanical Contractors Association of America (MCAA).

<sup>216</sup> Comments of M&L; GC Robb; NRWLDF; the Chamber.

741, 741–742, 745 (1998) (same), enf. denied 219 F.3d 1160 (10th Cir. 2000).

Thus, *Stanton Fuel* has effectively permitted construction-industry unions and employers to collude at the expense of employees. For these reasons, we disagree with other commenters' contention that there is little evidence that the 9(a) process is being abused or that *Stanton Fuel* has negatively affected employee free choice.<sup>217</sup>

## 4. Comments Regarding Definition of Positive Evidence

Some commenters request that we define what "positive evidence" is sufficient to demonstrate majority-employee union support.<sup>218</sup> One commenter contends that the Board should permit authorization cards, dues-checkoff cards, membership applications, or any other evidentiary means to establish majority status, consistent with 9(a) recognition in other industries.<sup>219</sup> Another commenter notes that the preamble to the NPRM referred to extrinsic evidence in the form of employee signatures on authorization cards or a petition, but the text of the proposed rule did not.<sup>220</sup>

Although we find it unnecessary to modify the proposed rule's wording in this regard, we clarify that this rule is not intended to change the current standards regarding the forms of evidence that are acceptable to demonstrate majority support. In *Deklewa*, the Board stated that it did "not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority." 282 NLRB at 1387 fn. 53 (citing *Island Construction Co.*, 135 NLRB 13 (1962)). "That is," the Board continued, *Deklewa* was not "meant to suggest that unions have less favored status with respect to construction[industry] employers than they possess with respect to those outside the construction industry." Id. The instant rule is not intended to change that principle. Accordingly, the same contemporaneous showing of majority support that would suffice to establish that employees wish to be represented by a labor organization in collective bargaining with their employer under Section 9(a) in non-construction industries will also suffice to establish recognition under Section 9(a) in

<sup>217</sup> Comments of LIUNA MAROC; IUOE; UA.

<sup>218</sup> See, e.g., Comment of Local 669.

<sup>219</sup> Id.

<sup>220</sup> Comment of AGC.

construction-industry bargaining relationships. It is well established that signed authorization cards or petitions from a majority of bargaining-unit employees is adequate proof, as is the result of a private election conducted under the auspices of a neutral party pursuant to a voluntary pre-recognition or neutrality agreement. There is less certainty in Board precedent whether other extrinsic evidence, such as that mentioned by Local 669, would be sufficient to prove majority support.<sup>221</sup> Accordingly, we leave any further development of these evidentiary standards to future proceedings. Cf. *Mobil Oil Expl. & Producing Se. Inc.*, 498 U.S. at 231 ("[A]n agency need not solve every problem before it in the same proceeding."); *Advocates for Highway & Auto Safety*, 429 F.3d at 1147 ("Agencies surely may, in appropriate circumstances, address problems incrementally.").

## 5. Comments Regarding Prospective Application

Some commenters argue that the Board should apply the rule only to construction-industry bargaining relationships entered into on or after the date the rule goes into effect.<sup>222</sup> We agree, and we have modified the regulatory text to specify that the rule applies only prospectively to a voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule. Relatedly, two commenters question how the rule will affect successor agreements.<sup>223</sup> We clarify that, if the successor agreement is reached by parties that entered into a voluntary 9(a) recognition agreement before the effective date of the rule, then the rule will not apply to that agreement. Further, once parties prove a 9(a) relationship under the rule, they will not be required to reestablish their 9(a) status for successor agreements.

## 6. Comments Regarding Section 10(b) of the Act

Some commenters urge the Board to incorporate a Section 10(b) 6-month limitation for challenging a construction-industry union's majority status.<sup>224</sup> In *Casale Industries*, the Board held that it would "not entertain a claim that majority status was lacking at the

<sup>221</sup> See discussion of evidentiary factors in *Deklewa*, 282 NLRB at 1383–1384.

<sup>222</sup> Comments of IUOE; LIUNA MAROC.

<sup>223</sup> Comments of MCAA; LIUNA MAROC.

<sup>224</sup> Comments of NABTU; Local 669. See also Reply Comment of Local 669.

time of recognition” where “a construction[-]industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition.” 311 NLRB 951, 953 (1993). The D.C. and Fourth Circuits have expressed doubts regarding that aspect of *Casale*, while the Tenth and Eleventh Circuits have upheld the Board’s position. Compare *Nova Plumbing*, 330 F.3d at 539, and *American Automatic Sprinkler Systems*, 163 F.3d 209, 218 fn. 6 (4th Cir. 1998), with *Triple C Maintenance*, 219 F.3d 1147, 1156–1159 (10th Cir. 2000), and *NLRB v. Triple A Fire Protection*, 136 F.3d 727, 736–737 (11th Cir. 1998). Some former Board Members also have disagreed with that aspect of *Casale*. See *King’s Fire Protection, Inc.*, 362 NLRB at 1062 (Member Miscimarra, dissenting in part); *Saylor’s Inc.*, 338 NLRB 330, 332–333 fn. 9 (2002) (Member Cowen, dissenting); *Triple A Fire Protection*, 312 NLRB 1088, 1089 fn. 3 (1993) (Member Devaney, concurring). Cf. *Painters (Northern California Drywall Assn.)*, 326 NLRB 1074, 1074 fn. 1 (1998) (Member Brame finding it unnecessary to pass on validity of *Casale*).

For several reasons, we decline to adopt a Section 10(b) 6-month limitation on challenging a construction-industry union’s majority status by filing a petition for a Board election, and we overrule *Casale* to the extent that it is inconsistent with the instant rule. Specifically, we overrule *Casale*’s holding that the Board will not entertain a claim that majority status was lacking at the time of recognition where a construction-industry employer extends 9(a) recognition to a union and 6 months elapse without a petition.

As an initial matter, we note that Section 10(b) applies only to unfair labor practices and that this aspect of the rule addresses only representation proceedings—*i.e.*, whether an election petition is barred because a construction-industry employer and union formed a 9(a) rather than an 8(f) collective-bargaining relationship.

Further, we agree with the doubts expressed by the D.C. and Fourth Circuits, and by some former Board Members, regarding Section 10(b)’s applicability to challenges to a construction-industry union’s purported 9(a) status. *Nova Plumbing*, 330 F.3d at 539; *American Automatic Sprinkler Sys.*, 163 F.3d at 218 fn. 6; *King’s Fire Protection, Inc.*, 362 NLRB at 1062 (Member Miscimarra, dissenting in part); *Saylor’s*, 338 NLRB at 332–333 fn. 9; *Triple A Fire Protection*, 312 NLRB at 1089 fn. 3. It is not unlawful for a construction-industry employer and

union to establish an 8(f) relationship without majority-employee union support. Thus, the issue is whether the parties formed an 8(f) or a 9(a) relationship, and only if the parties formed a 9(a) relationship could there be an unfair labor practice that would trigger Section 10(b)’s 6-month limitation. See also *Brannan Sand & Gravel Co.*, 289 NLRB at 982 (predating *Casale*; nothing “precludes inquiry into the establishment of construction[-]industry bargaining relationships outside the 10(b) period” because “[g]oing back to the beginning of the parties’ relationship . . . simply seeks to determine the majority or nonmajority[-]based nature of the current relationship and does not involve a determination that any conduct was unlawful”). In other words, *Casale* begs the question by assuming the very 9(a) status that ought to be the object of inquiry.

In addition, we find that the Board’s pertinent reasoning in *Casale* was flawed. See *King’s Fire Protection, Inc.*, 362 NLRB at 1062–1063 (Member Miscimarra, dissenting in part). For decades, the Board had held that in other industries, Section 10(b) barred untimely allegations that an employer unlawfully extended 9(a) recognition to a minority union. *North Bros. Ford, Inc.*, 220 NLRB 1021, 1021–1022 (1975) (citing *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960)). In *Casale*, the Board stated that “[p]arties in the construction industry are entitled to no less protection.” 311 NLRB at 953. However, the *Casale* Board failed to recognize that employees and rival unions will likely presume that a construction-industry employer and union entered an 8(f) collective-bargaining agreement, which is virtually certain to have a term longer than 6 months. Thus, it is highly unlikely that they will file a petition challenging the union’s status within 6 months of recognition.

Finally, and most significantly, we find that *Casale*’s requirement that an election petition be filed within 6 months to challenge a purported 9(a) recognition in the construction industry improperly discounts the importance of protecting employee free choice as recognized by Congress in enacting Section 8(f) and by the Board and the Supreme Court in deciding *Deklewa and Garment Workers*, respectively. *Garment Workers*, 366 U.S. at 737–741; *King’s Fire Protection, Inc.*, 362 NLRB at 1062 (Member Miscimarra, dissenting in part); *John Deklewa & Sons*, 282 NLRB at 1378.

Therefore, we overrule *Casale* in relevant part and will evaluate a construction-industry union’s purported

9(a) recognition at any time that an election petition is filed.

#### 7. Comments Regarding Filing Unfair Labor Practice Charges

Some commenters argue that the rule is unnecessary because it is already unlawful for any labor organization to enter into a 9(a) collective-bargaining agreement with any employer absent majority support.<sup>225</sup> They correctly point out that an employer violates the Act by granting Section 9(a) recognition to a union that does not enjoy majority status, and that a union similarly violates the Act by accepting such recognition when it does not represent a majority of employees. The remedy in such situations is to order the parties to cease recognition of the union as employees’ collective-bargaining representative and to cease maintaining or giving effect to the collective-bargaining agreement.

The commenters fail to recognize that, until there is a Board decision finding merit to such unfair labor practice allegations, any election petition remains barred. Moreover, when a decision issues finding merit in such allegations, the remedy does not include an election. There is no remedy of a Board election in an unfair labor practice case finding that an employer and union entered into a Section 9(a) collective-bargaining agreement when the union did not enjoy majority support. By requiring positive evidence that a construction-industry union demanded 9(a) recognition and that the employer granted such recognition based on a contemporaneous showing of majority-employee support, the rule better protects employee free choice in a representation proceeding.<sup>226</sup>

#### 8. Comments Regarding Effects on Certain Bargaining Relationships

Some commenters argue that the rule will adversely affect older bargaining relationships in the construction industry and/or small construction-industry unions.<sup>227</sup> They argue that the longer a bargaining relationship lasts, the more difficult it will be for a union to produce positive evidence of majority support when the demand for recognition could have occurred years or even decades prior. Therefore, those bargaining relationships would become

<sup>225</sup> Comments of NABTU; Professor Kulwicz; Senator Murray; Local 669; Springfield. See also Reply Comments of NABTU; Local 669.

<sup>226</sup> We note that the rule applies to the question of whether an election petition is barred in a representation proceeding and does not directly implicate unfair labor practice rules.

<sup>227</sup> Comments of NABTU; AFL-CIO; IUOE; CWA; Professor Kulwicz; Local 304; MRCC; AFT. See also Reply Comment of Local 669.

less stable due to the passage of time. Relatedly, these commenters contend that the rule imposes an onerous new recordkeeping requirement and that small local unions would lack the resources to retain records of employee support.

As explained above, the rule will apply only prospectively to an employer's voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule. Thus, the rule will not affect or destabilize longstanding bargaining relationships in the construction industry. Further, although we acknowledge that the rule will incentivize unions to keep a record of majority-employee union support moving forward, we do not consider such a minor administrative inconvenience a sufficient reason to permit employers and unions to circumvent employees' rights.

#### 9. Comments Regarding Frequency of Section 9(a) Agreements in the Construction Industry

Some commenters argue that the rule is not appropriate because the issue of whether a construction-industry employer recognized or entered into a petition-barring agreement with a union as the 9(a) representative of its employees occurs very infrequently.<sup>228</sup> However, what matters here is the statutory right, not how often it is implicated. The Act protects employees' free choice to select their 9(a) bargaining representative. As one commenter notes, even though the rule may affect a small number of cases, that does not mean that there are not good reasons to adopt it.<sup>229</sup>

#### 10. Comments Regarding Issues in Representation Proceedings

Other commenters raise concerns regarding the Board's ability to rule on parol evidence in representation-case proceedings, which are non-adversarial and do not allow credibility determinations.<sup>230</sup> However, in cases where there are authentication issues, the Board expects that the process will be similar to that followed in an administrative investigation of a showing of interest: the Region will examine the signatures and handwriting comparators to determine whether a majority of unit employees supported

the union at the time of recognition. Thus, these concerns are unwarranted.

#### 11. Comments Regarding Contract Law

One commenter asserts that contract language alone should be sufficient to demonstrate majority status because principles of contract construction hold parties to their obligations, including contract wording stating that a union has majority support.<sup>231</sup> Relatedly, other commenters argue that the instant rule is contrary to the rules of contract law because it would require extrinsic evidence regardless of how clear the contract language is.<sup>232</sup> However, construction-industry employers and unions may enter a 9(a) relationship only where a majority of employees support the union. Thus, contract language alone is insufficient where a majority of employees never supported the union. Further, requiring positive evidence of majority support, even where contract language initially appears clear, is necessary to ensure that unions and employers do not collude, thereby protecting employee free choice consistent with the congressional intent expressed in Section 8(f) and with the majoritarian principles discussed by the Supreme Court in *Garment Workers*, 366 U.S. at 737.

#### 12. Comments Regarding Adequacy of Justification for Rule

Several commenters argue that the Board failed to adequately justify the proposed rule, asserting that the Board failed to offer evidence in support, analyze relevant data, or consider contrary arguments.<sup>233</sup> We disagree. The Board has fully justified the rule based on available evidence and relevant data, including prior Board precedent in *Deklewa* and its progeny, negative reception by the D.C. Circuit in *Nova Plumbing and Colorado Fire Sprinkler*, and the rights protected by the Act, particularly employees' right of free choice in selecting (or refraining from selecting) a 9(a) representative. Further, we have fully considered and addressed all contrary arguments, as demonstrated by our responses in this rulemaking.

#### 13. Comments Suggesting Modifications to the Rule

Some commenters suggest modifications to the rule.

First, some commenters propose that the rule should not apply to RM petitions.<sup>234</sup> However, it is well

established that an 8(f) relationship will not bar an RM petition. See *John Deklewa & Sons*, 282 NLRB at 1385 fn. 42. Thus, it is appropriate to require the party seeking to establish 9(a) status to present positive evidence of a contemporaneous showing of majority support, and we reject the commenters' proposal.

Second, some commenters contend that the issue of whether contract language alone can establish 9(a) status has implications beyond elections—*i.e.*, to unfair labor practice proceedings—and that the Board should address those contexts.<sup>235</sup> However, this request is beyond the scope of the rule, which only addresses representation proceedings. Thus, we deny the request. We will address any unfair labor practice issues as they arise in future, appropriate proceedings. Cf. *Mobil Oil Expl. & Producing Se. Inc.*, 498 U.S. at 231 (“[A]n agency need not solve every problem before it in the same proceeding.”); *Advocates for Highway & Auto Safety*, 429 F.3d at 1147 (“Agencies surely may, in appropriate circumstances, address problems incrementally.”).

Third, one commenter proposes to prohibit automatic renewal of 8(f) agreements.<sup>236</sup> But our concern here is to remove obstructions to Section 8(f)'s second proviso, and automatic renewal of 8(f) agreements does not obstruct that proviso because employees and rival unions are free to file election petitions at any time an 8(f) agreement is in effect, as the Board made clear in *Deklewa*. Accordingly, we reject this proposal.

Fourth, one commenter proposes that we require a contemporaneous showing of majority support in all industries because collective-bargaining relationships in other industries are also lawful only if the union had majority support at the time of recognition or Board election.<sup>237</sup> However, the construction industry is unique in allowing voluntary recognition of unions that are supported by a minority of employees or by no employees at all,<sup>238</sup> and this rule is intended to address issues, unique to that industry, that arise when assessing whether a relationship is properly treated as a 9(a), rather than 8(f), relationship. Thus, we reject the commenter's proposal. Relatedly, the same commenter requests that we specify that 9(a) recognition can

<sup>235</sup> Comments of AGC; Senator Murray; IUOE.

<sup>236</sup> Comment of M&L.

<sup>237</sup> Comment of CNLP.

<sup>238</sup> An employer in the construction industry may recognize a union as the 8(f) bargaining representative of employees it has yet to hire. Indeed, an 8(f) agreement is often referred to as a “pre-hire” agreement.

<sup>228</sup> Comments of Professor Kulwicz; EPI; IUOE; MRCC; LIUNA MAROC.

<sup>229</sup> Comment of NRWLDF.

<sup>230</sup> Comments of NABTU; IUOE. See also Reply Comment of NABTU.

<sup>231</sup> Comment of Professor Kulwicz.

<sup>232</sup> Comment of Senator Murray; CWA.

<sup>233</sup> Comments of AFL-CIO; NABTU; EPI; United Brotherhood of Carpenters and Joiners of America; UA. See also Reply Comment of NABTU.

<sup>234</sup> Comments of LIUNA MAROC; NABTU.

only occur if an employer employs a substantial and representative complement of employees. We note that the final rule does not disturb established precedent on this point.

Finally, we reject one commenter's argument that a 9(a) relationship should be created only through a Board election.<sup>239</sup> This argument is contrary to well-established precedent permitting voluntary recognition. It is also at odds with language in the Act itself. See Section 9(a), 29 U.S.C. 159(a) (referring to representatives "designated or selected" for the purposes of collective bargaining); Section 9(c), 29 U.S.C. 159(c) (providing for a Board-conducted election based on a petition stating, in relevant part, that the employer "declines to recognize" a labor organization as employees' 9(a) representative).

#### 14. Comments Requesting Clarifications

Some commenters seek clarifications regarding the rule.

Two commenters question whether employers must review evidence of majority-employee union support at the time of recognition.<sup>240</sup> This rule only requires the party seeking to establish 9(a) status to provide evidence demonstrating that a majority of unit employees supported the union at the time of recognition; the rule does not also require parties to show that the employer reviewed the evidence at that time.

Another commenter seeks clarification regarding whether 9(a) relationships created before the effective date of the rule will automatically revert to 8(f) relationships.<sup>241</sup> As explained, the rule will apply only prospectively to an employer's voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule. Thus, the rule will not disrupt longstanding 9(a) relationships.

Two commenters ask whether the new voluntary-recognition window period, discussed in § 103.21(a) of the final rule, will apply to 9(a) bargaining relationships in the construction industry.<sup>242</sup> Although we do not believe it is necessary to modify the wording of the final rule in this regard, the answer is yes—the window period applies, along with the other requirements of § 103.21(a).

Finally, one commenter questions how the rule will affect multi-employer bargaining units, me-too agreements, jobsite-only agreements, and voter eligibility.<sup>243</sup> These questions are fact dependent, and we believe that they are more properly addressed as they arise in future, appropriate proceedings.

#### IV. Justification for the Final Rule

For all of the reasons set forth above and in the NPRM, we believe that all of the aspects of the final rule further the Act's overarching goals of protecting employees' free, informed choice in designating or selecting their representatives, while also promoting industrial stability and collective bargaining and ensuring that unions claiming Section 9(a) representative status have the requisite majority-employee support. Accordingly, we find it appropriate to issue this final rule.

#### V. Other Statutory Requirements

##### A. The Regulatory Flexibility Act

##### Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (RFA), 5 U.S.C. 601–612, requires an agency promulgating a final rule to prepare a final regulatory flexibility analysis when the regulation will have a significant impact on a substantial number of small entities. An agency is not required to prepare a final regulatory flexibility analysis if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). In the NPRM, although the Board believed that this rule would not have a significant economic impact on a substantial number of small entities, the Board issued its Initial Regulatory Flexibility Analysis (IRFA) to provide the public the fullest opportunity to comment on the proposed rule. See 84 FR at 39953. The Board solicited comments from the public that would shed light on potential compliance costs that may result from the rule and that the Board had not identified or anticipated.

The RFA does not define either "significant economic impact" or "substantial number of small entities."<sup>244</sup> Additionally, "[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best

position to gauge the small entity impacts of its regulations."<sup>245</sup>

We anticipate that the rule will impose low costs of compliance on small entities, related to reviewing and understanding the substantive changes to the blocking-charge policy, voluntary-recognition-bar doctrine, and modified requirements for proof of majority-based voluntary recognition under Section 9(a) in the construction industry. There may also be a low cost for a small entity to prepare, post, and distribute a notice of voluntary recognition under the modified voluntary-recognition bar. In addition, there may be an unknown cost for small entities to participate in elections that might not have occurred but for the final rule and a de minimis cost for small labor unions representing employees in the building and construction trades to retain proof of their majority support.

##### 1. Statement of the Need for, and Objectives of, the Rule

Detailed descriptions of this final rule, its purpose, objectives, and the legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections. In brief, the final rule includes three provisions that are necessary to accomplish the objective of better protecting the statutory rights of employees to express their views regarding representation. First, the final rule modifies the current blocking-charge policy and implements two new procedures to process representation petitions where a party files or has filed an unfair labor practice charge—a vote-and-impound procedure or a vote-and-count procedure. Next, the final rule modifies the voluntary-recognition-bar doctrine by providing employees and rival unions with a 45-day window period in which to file an election petition after an employer voluntarily recognizes a union based on demonstrated majority support. Lastly, the final rule modifies the requirements for proof of majority-based voluntary recognition under Section 9(a) in the building and construction industry by eliminating the possibility of establishing Section 9(a) status based solely on contract language drafted by the employer and/or union. Thus, the final rule assists the Board in its fundamental obligation to protect employee free choice and Section 7 rights.

<sup>245</sup> Small Business Administration Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act 18 (Aug. 2018), <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> (last visited Mar. 23, 2020).

<sup>239</sup> Comment of NFIB.

<sup>240</sup> Comments of NABTU; UA.

<sup>241</sup> Comment of AGC.

<sup>242</sup> Comments of the Chamber; Senator Murray.

<sup>243</sup> Comment of MCAA.

<sup>244</sup> 5 U.S.C. 601.

2. Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

a. Response to Comments Concerning Estimated Compliance Costs of the Rule

Several commenters criticized the Board's quantification of costs associated with each of the three changes. Generally, the AFL-CIO asserts that the Board's definition of an economic impact is underinclusive, its analysis was limited to easily quantifiable costs, and it failed to attempt to quantify other costs by assessing Board data.

Regarding the blocking-charge policy-modification, the AFL-CIO accuses the Board of incorrectly professing an inability to quantify the cost of participating in additional elections. It asserts that the Board has awarded such costs as a remedy in unfair labor practice cases and, therefore, could quantify such costs in the IRFA. Further, it claims that the Board could have used the same method used to quantify the cost of learning about the rule to quantify the cost of holding an election, *i.e.*, specifying the personnel that would participate in an election, their wage rate, and a projection of hours spent on an election, or could have used election costs awarded in past arbitrations.

Regarding the modification to the voluntary-recognition bar, the International Brotherhood of Electrical Workers asserts that the Board failed to assess the cost of "delayed bargaining and disruption of bargaining relationships that would be caused by the proposed notice posting requirement." However, no data or further information was provided.

Both the AFL-CIO and the International Brotherhood of Electrical Workers generally fault the Board for failing to analyze certain costs associated with the change in the evidence necessary to prove a majority-based bargaining relationship in the construction industry and to thus block an election petition. According to the International Brotherhood of Electrical Workers, the Board further failed to analyze the cost of the disruption to established collective-bargaining relationships in the construction industry that would occur because of the rule.

Respectfully, those commenters do not raise direct economic impacts under the RFA. The RFA does not require a

regulatory agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy. What the statute requires is that the agency consider the direct burden that compliance with a new regulation will likely impose on small entities. See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (DC Cir. 1985) ("[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities"); accord *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 478 (7th Cir. 2009); *Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991).

This construction of the RFA, requiring agencies to consider only direct compliance costs, finds support in the text of that Act. Section 603(a) of the RFA states that if an IRFA is required, the IRFA "shall describe the impact of the proposed rule on small entities." 5 U.S.C. 603(a). Although the term "impact" is undefined, its meaning can be gleaned from Section 603(b), which recites the required elements of an IRFA. One such element is "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record." 5 U.S.C. 603(b)(4). Section 604 further corroborates the Board's conclusion, as it contains an identical list of requirements for a final regulatory flexibility analysis (if one is required). 5 U.S.C. 604(b)(4). Additional support for confining the regulatory analysis to direct compliance costs is found in an authoritative guide published by the Office of Advocacy of the United States Small Business Administration (SBA). In that guide—*A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (SBA Guide)* (Aug. 2018), <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> the SBA explains that "other compliance requirements" under section 603 include things such as capital costs for equipment, costs of modifying existing processes and procedures, lost sales and profits, changes in market competition, extra costs associated with the payment of taxes or fees, and hiring employees. SBA Guide at 37. These are all direct, compliance-based costs.

In the IRFA, we noted that the only identifiable compliance costs imposed by the proposed rule related to

reviewing and understanding the substantive changes and the minimal cost associated with the posting of a notice of voluntary recognition. 84 FR at 39956. Otherwise, there will be no "reporting, recordkeeping and other compliance requirements" for small entities. See 5 U.S.C. 603(b)(4) & 604(b)(4). The same is true of the final rule, except to the extent that the final rule requires electronic distribution of notices to employees where an employer customarily communicates with employees electronically—at most, a minimal additional cost.

Consistent with these principles, the Board rejects the view that it must analyze the indirect and speculative costs of delayed bargaining or the disruption of bargaining relationships. The D.C. Circuit has firmly rejected the notion that a regulating agency must analyze every indirect and remote economic impact. See *Mid-Tex Elec. Coop., Inc.*, 773 F.2d at 343 ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."). "[R]equir[ing] an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (citing *Mid-Tex Elec. Coop., Inc.*, 773 F.2d at 343).

Notwithstanding the indirect nature of the potential impacts raised by these comments, we also disagree with the notion that the rule will upset existing collective-bargaining relationships. We specifically note that the final rule regarding the requirement of proof to demonstrate majority-based 9(a) status in the construction industry has been clarified to reflect that it will apply only to voluntary recognitions extended on or after the effective date of this rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of this rule. Thus, established bargaining relationships will not be disrupted. Further, we believe that the rule will promote employees' statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret-ballot election. Labor-management stability will be promoted when employees' rights are respected.



Furthermore, while the Board recognized the possibility that small employers and unions may have to prepare for and participate in elections that may not have occurred but for the rule, such a cost is also speculative. Even if such a cost could be quantified, given how relatively infrequently the issues in this rule arise in Board proceedings, the cost would not affect a substantial number of small entities. As we explain below, the rule would annually impact only 744 out of approximately 6 million small entities. See Section V.A.4. The Board has neither a method to accurately determine the number of elections that may occur as a result of the rule nor a method to quantify the cost of participating in an election. In the cases cited by the AFL–CIO where the Board has awarded elections costs as an extraordinary remedy, the aggrieved party requested costs associated with an election that had already occurred, *Texas Super Foods*, 303 NLRB 209 (1991), or costs associated with “a prolonged attempt at organization, requiring extraordinary expenditures,” *J. P. Stevens & Co.*, 244 NLRB 407, 458 (1979), but neither decision stated the amount awarded.<sup>246</sup> The unknown cost of each of those elections was unique to those particular elections, as are the costs associated with all elections. The commenters do not appear to appreciate the number of variables that may come into play when attempting to quantify the cost of an election, such as the size of the petitioned-for unit, number of facilities, geographic location, or strength of opposition or favorability to union organization. Simply put, any attempt to quantify this cost would be incredibly speculative.

#### b. Response to Comments Concerning Economic Impact on Small Labor Unions

The International Brotherhood of Electrical Workers and the AFL–CIO criticize the Board’s IRFA analysis for failing to adequately acknowledge and assess the potential impact of the rule on small labor unions, particularly local labor unions. Neither commenter has identified a specific “impact” that the IRFA did not address or that is not addressed in this Section. In reviewing the comments on the IRFA, we find no other compliance costs to small labor

unions, other than the very low cost relating to reviewing and understanding the rule (and, in some cases, a de minimis cost to retain records relating to proof of majority status), and no evidence presented shows that any additional indirect cost to small labor unions would constitute a significant impact.

#### c. Response to Comments Concerning Recordkeeping Requirements

The Board’s IRFA stated that there may be a recordkeeping cost imposed on small construction-industry labor unions, relating to the retention of positive evidence that they demanded recognition as the majority-supported collective-bargaining representative of employees in the building and construction industries and that the employer granted such recognition. See 84 FR at 39956. One commenter speculates that the rule will create an onerous new recordkeeping requirement under which a union is required to maintain records indicating its majority support in perpetuity.<sup>247</sup> Another commenter further speculates that small local labor unions lack the sophisticated record-retention systems that would be necessary under the rule.<sup>248</sup> And still another commenter asserts that the rule will require unions to expend funds to retain the evidence of majority support.<sup>249</sup> No commenter has identified any such complex or sophisticated recordkeeping requirement.

The RFA defines a “recordkeeping requirement” as “a requirement imposed by an agency on persons to maintain specified records,” 5 U.S.C. 601(8), and the rule directly imposes no such requirement but we acknowledge the very high likelihood that small construction industry labor unions will choose to do so. Under this rule, however, there is no reason for a small labor organization to implement a record-retention system that is more sophisticated than their normal-course-of-business records retention. In any event, beyond familiarization costs, the Board finds that the rule imposes only a de minimis additional cost for recordkeeping, and no comment presents empirical evidence to the contrary.

#### d. Response to Comment Concerning Public Outreach

The AFL–CIO argues that the Board failed to conduct sufficient outreach to small businesses, including small local

unions, that will be impacted by the rule. Most of the issues addressed by this rule have been the subject of a robust public debate for several years. And in conjunction with the official publication of the NPRM, the Board worked to widely publicize the proposed rule. Upon issuance, the Board published the NPRM and facts sheets on its website. See NLRB, Election Protection Rule, <https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking/election-protection-rule> (last visited Mar. 23, 2020). On August 9, 2019, the Board issued a press release, which was published on its website and distributed by email to subscribers, notifying the public of the proposed rule. See NLRB Office of Public Affairs, NLRB Proposes Rulemaking to Protect Employee Free Choice (Aug. 9, 2019) <https://www.nlr.gov/news-outreach/news-story/nlr-proposes-rulemaking-protect-employee-free-choice> (last visited Mar. 23, 2020). The press release was also shared on social media through the Board’s official Twitter and Facebook accounts. The Board Members themselves have also discussed the proposed rule at various public speaking engagements, including the annual meeting of the Labor and Employment Law Section of the American Bar Association. Given the foregoing efforts and the many comments the Board received in response to the NPRM, we believe the public has been well informed, the pros and cons of the rule have been thoroughly examined, and the impact of the rule on the full range of small business entities governed by it have been brought into sharp focus by individuals, businesses, labor unions, and industry trade groups.

#### 3. Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The Chief Counsel of Advocacy of the Small Business Administration did not file any comments in response to the proposed rule.

#### 4. Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply

To evaluate the impact of the final rule, the Board first identified the universe of small entities that could be impacted by changes to the blocking-charge and voluntary-recognition-bar policies, as well as by elimination of the

<sup>246</sup> The arbitration decision cited by the AFL–CIO, *Yale-New Haven Hospital*, Arbitration Proceedings Before Margaret M. Kern (Oct. 23, 2007), includes an award of organizing expenses for the union, but there, too, the union calculated and submitted the expenses. Moreover, neither the employer nor the union are within the SBA’s small entity size standard. See fns. 250 & 254.

<sup>247</sup> Comment of LIUNA MAROC.

<sup>248</sup> Comment of Professor Kulwiec.

<sup>249</sup> Comment of AFL–CIO.

contract language basis for 8(f) to 9(a) conversion in the construction industry.

#### a. Blocking-Charge and Voluntary-Recognition-Bar Changes

The changes to the blocking-charge and voluntary-recognition-bar policies will apply to all entities covered by the National Labor Relations Act (“NLRA” or “the Act”). According to the United States Census Bureau, there were 5,954,684 businesses with employees in 2016.<sup>250</sup> Of those, 5,934,985 were small businesses with fewer than 500 employees.<sup>251</sup> Although this final rule would apply only to employers who meet the Board’s jurisdictional requirements, the Board does not have the means to calculate the number of excluded entities (nor was data received on this particular issue).<sup>252</sup> Accordingly, the Board assumes for purposes of this analysis that the rule could impact the great majority of the 5,934,985 small businesses.

These two changes will also impact all labor unions, as organizations representing or seeking to represent employees. Labor unions, as defined by the NLRA, are entities “in which

<sup>250</sup> See U.S. Department of Commerce, Bureau of Census, 2016 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry (Dec. 2018), <https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html> (from downloaded Excel Table titled “U.S., 6-digit NAICS”).

<sup>251</sup> Id. The Census Bureau does not specifically define “small business” but does break down its data into firms with fewer than 500 employees and those with 500 or more employees. Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS).

<sup>252</sup> Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private-sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*, 306 U.S. 601, 606–607 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of \$500,000 or more. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). But shopping-center and office-building retailers have a lower threshold of \$100,000 per year. *Carol Management Corp.*, 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959). The following employers are excluded from the NLRB’s jurisdiction by statute:

Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).

Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery. 29 U.S.C. 152 (3).

Employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>253</sup> The SBA’s “small business” standard for “Labor Unions and Similar Labor Organizations” is \$8 million in annual receipts.<sup>254</sup> In 2012, there were 13,740 labor unions in the U.S.<sup>255</sup> Of these labor unions, 11,245 had receipts of less than \$1,000,000; 2,022 labor unions had receipts between \$1,000,000 and \$4,999,999; and 141 had receipts between \$5,000,000 and \$7,499,999. In aggregate, 13,408 labor unions (97.6% of total) are small businesses according to SBA standards.

The blocking-charge policy change will be applied as a matter of law only under certain circumstances in a Board proceeding, namely, when a party to a representation proceeding files an unfair labor practice charge and requests a delay in the count of ballots or the certification of results after an election. Therefore, the frequency with which the prior blocking-charge policy arose is indicative of the number of small entities most directly impacted by the final rule. For example, in Fiscal Year 2018, 1,408 petitions were filed and proceeded to an election, and only 4 of those petitions were subject to a blocking charge. Thus, the current blocking-charge policy directly impacted 3.125% of petitions filed in Fiscal Year 2018, parties to which would only constitute a de minimis number of all small entities under the Board’s jurisdiction.

Similarly, the number of small entities expected to be most directly impacted by the modified voluntary recognition bar doctrine is also low. When the modified voluntary recognition bar was previously in effect, the Board tracked the number of requests for *Dana* notices, which were used to inform employees that a voluntary recognition had taken place and of their right to file a petition for an election. Those notices are similar to the notices that would be required under this final rule. From September 29, 2007, to May 13, 2011, the Board received 1,333 requests for *Dana*

<sup>253</sup> 29 U.S.C. 152(5).

<sup>254</sup> See 13 CFR 121.201.

<sup>255</sup> The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data have not been published, so the 2012 data are the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, [https://www2.census.gov/programs-surveys/susb/tables/2012/us\\_6digitnaics\\_r\\_2012.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx) (Classification #813930—Labor Unions and Similar Labor Organizations) (last visited Mar. 23, 2020).

notices, which is an average of 372 requests per year.<sup>256</sup> Assuming each request was made by a distinct employer and involved at least one distinct labor organization, approximately 744 entities of various sizes were impacted each year that the modified voluntary-recognition bar was in effect.<sup>257</sup> Thus, given our historic filing data, these numbers are very small relative to the number of small employers and unions subject to the NLRA and generally impacted by this change.

Throughout the IRFA, the Board requested comments or data that might improve its analysis, 84 FR at 39954, 39957, but no additional data was received regarding the number of small entities and unions to which this change will apply.

#### b. Elimination of Contract Language Basis for Proving Majority-Based Recognition in the Construction Industry

The Board believes that the proposed elimination of the contract-language basis for proving majority-supported voluntary recognition is relevant only to construction-industry small employers and labor unions because Section 8(f) of the Act applies solely to such entities engaged in the building and construction industries. These construction-industry employers are classified under the NAICS Sector 23 Construction.<sup>258</sup> Of the 640,951

<sup>256</sup> *Lamons Gasket*, 357 NLRB at 742.

<sup>257</sup> *Dana Corp.*, 351 NLRB at 441–442 (establishing a 45-day “window period” after voluntary recognition during which employees could file an election petition supported by a 30-percent showing of interest seeking decertification or representation by an alternative union).

<sup>258</sup> These NAICS construction-industry classifications include the following codes: 236115: New Single-Family Housing Construction (except For-Sale Builders); 236116: New Multifamily Housing Construction (except For-Sale Builders); 236117: New Housing For-Sale Builders; 236118: Residential Remodelers; 236210: Industrial Building Construction; 236220: Commercial and Institutional Building Construction; 237110: Water and Sewer Line and Related Structures Construction; 237120: Oil and Gas Pipeline and Related Structures Construction; 237130: Power and Communication Line and Related Structures Construction; 237210: Land Subdivision; 237310: Highway, Street, and Bridge Construction; 237990: Other Heavy and Civil Engineering Construction; 238110: Poured Concrete Foundation and Structure Contractors; 238120: Structural Steel and Precast Concrete Contractors; 238130: Framing Contractors; 238140: Masonry Contractors; 238150: Glass and Glazing Contractors; 238160: Roofing Contractors; 238170: Siding Contractors; 238190: Other Foundation, Structure, and Building Exterior Contractors; 238210: Electrical Contractors and Other Wiring Installation Contractors; 238220: Plumbing, Heating, and Air-Conditioning Contractors; 238290: Other Building Equipment Contractors; 238310: Drywall and Insulation Contractors; 238320: Painting and Wall Covering Contractors; 238330: Flooring Contractors; 238340:

employers included in those NAICS definitions, 633,135 are small employers that fall under the SBA “small business” standard for classifications in the NAICS Construction sector.<sup>259</sup> In the NPRM, the Board identified 3,929 small labor unions primarily operating in the building and construction trades that fall under the SBA “small business” standard for the NAICS classification “Labor Unions and Similar Labor Organizations” of annual receipts of less than \$7.5 million.<sup>260</sup> In the IRFA, the Board requested comments or data that might improve its analysis regarding the number of construction-industry labor unions affected by the proposed rule, see 84 FR at 39955, but we did not receive any additional data regarding the number of small labor unions to which the rule will apply.

It is unknown how many of those small construction-industry employers elect to enter into a 9(a) bargaining relationship with a small labor union based on language in a collective-bargaining agreement. However, again, the number of cases that involve a question of whether a relationship is governed by Section 8(f) or 9(a) is very small relative to the total number of construction-industry employers and unions. For example, only one case was filed in Fiscal Year 2017 where the Board ultimately had to determine whether a collective-bargaining agreement was governed by Section 8(f) or 9(a).<sup>261</sup> In Fiscal Year 2016, no cases required the Board to determine whether a collective-bargaining agreement was governed by 8(f) or 9(a). One case was filed in Fiscal Year 2015 that came before the Board with the 8(f) or 9(a) collective-bargaining agreement issue.<sup>262</sup>

The historic filing data thus suggests that construction-industry employers and labor unions will only be most directly impacted in a small number of

instances relative to the number of those types of small entities identified above.

#### 5. Description of the Projected Reporting, Recordkeeping, and other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The RFA requires agencies to consider the direct burden that compliance with a new regulation will likely impose on small entities.<sup>263</sup> Thus, the RFA requires the Board to determine the amount of “reporting, recordkeeping and other compliance requirements” imposed on small entities. In providing its final regulatory flexibility analysis, an agency may provide either a quantifiable or numerical description of the effects of a rule or alternatives to the rule, or “more general descriptive statements if quantification is not practicable or reliable.”<sup>264</sup>

We conclude that the final rule imposes no capital costs for equipment needed to meet the regulatory requirements; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes. To become generally familiar with the new vote-and-impound or vote-and-count procedures and the modified voluntary-recognition bar, we estimate that a human-resources specialist at a small employer or labor union may take at most 90 minutes to read the rule. It is also possible that a small employer or labor union may wish to consult with an attorney, which we estimate will require 1 hour. Using the Bureau of Labor Statistics’ estimated wage and benefit costs, the Board has assessed these labor costs to be \$164.51.<sup>265</sup> The costs

<sup>263</sup> See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d at 342 (“[I]t is clear that Congress envisioned that the relevant ‘economic impact’ was the impact of compliance with the proposed rule on regulated small entities.”).

<sup>264</sup> See 5 U.S.C. 603(b)(4), 604(a)(4).

<sup>265</sup> For wage figures, see May 2018 National Occupational Employment and Wage Estimates, found at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm) (last visited Mar. 23, 2020). The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2018, average hourly

associated with the portion of the rule that eliminates the contract-language basis for establishing voluntary recognition under Section 9(a) are limited to small employers and unions in the construction industry. To become generally familiar with that change, in addition to the first two changes, we estimate that a human-resources specialist at a small employer or union in the construction industry may take at most 2 hours to read the entire rule. Consultation with an attorney may take an additional 15 minutes, or 75 minutes to consult with an attorney regarding the entire rule. Thus, the Board has assessed labor costs for small employers and unions in the construction industry to be \$211.25.

#### a. Costs Associated With Establishment of Vote and Impound or Vote-and-Count Procedures

Although we do not foresee any additional compliance costs related to eliminating the blocking-charge policy, this policy change would cause some elections to occur sooner, and in some cases would lead to elections that previously would not have occurred. Arguably, the time compression of holding an election under the Board’s typical election timeline may create additional costs for small businesses that do not have in-house legal departments or ready access to outside labor attorneys or consultants, and that consequently need to pay to obtain such assistance. Conversely, because the Board’s current blocking-charge policy appears susceptible to manipulation and abuse, the elimination of that policy may result in fewer unfair labor practice charges filed with the intent to forestall employees from exercising their right to vote. This would reduce some costs for small employers by eliminating the need to hire a labor attorney to defend against such charges. It could also create additional costs for small labor unions that have to prepare for an election that may have otherwise been postponed or that may subsequently be set aside. In the IRFA, the Board requested comments or data that might improve its analysis regarding the estimated cost for preparing and participating in elections, see 84 FR at 39956, but—other than the AFL-CIO’s comment referenced above—we received no additional data regarding the average cost for preparing for or participating in a Board election.

wages for a Human Resources Specialist (BLS #13-1071) were \$32.11. The same figure for a lawyer (BLS #23-1011) was \$69.34. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate. In the IRFA, we estimated these costs using May 2017 National Occupational Employment and Wage Estimates.

Tile and Terrazzo Contractors; 238350: Finish Carpentry Contractors; 238390: Other Building Finishing Contractors; 238910: Site Preparation Contractors; 238990: All Other Specialty Trade Contractors. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, [https://www2.census.gov/programs-surveys/susb/tables/2012/us\\_6digitnaics\\_r\\_2012.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx) (last visited Mar. 23, 2020).

<sup>259</sup> NAICS codes 236115–237130 and 237310–237990 have a small-business threshold of \$39.5 million in annual receipts; NAICS code 237210 has a threshold of \$30 million in annual receipts; and NAICS codes 238110–238990 have a threshold of \$16.5 million in annual receipts. See 13 CFR 121.201.

<sup>260</sup> See 84 FR at 39955.

<sup>261</sup> See *AFP Specialties, Inc.*, Case 07–RD–187706, 2017 WL 2212112, at \*1 fn.1 (May 18, 2017).

<sup>262</sup> See *Loshaw Thermal Technology, LLC*, Case 05–CA–158650, 2018 WL 4357198.

The Board believes that any costs from participating in quicker elections or elections that would have not otherwise occurred are limited to very few employers, comparing the limited number of Board proceedings where an unfair labor practice charge has been filed contemporaneously with an election petition with the high number of employers that are subject to the Board's jurisdiction.

**b. Costs Associated With Modification of the Voluntary-Recognition Bar**

In a case in which an employer voluntarily recognizes a union, we estimate that the employer will spend an estimated 1 hour and 45 minutes to comply with the rule. This includes: 30 minutes for the employer (or union) to notify the local regional office of the Board in writing of the grant of voluntary recognition by submitting a copy of the recognition agreement; 60 minutes to open the notice sent from the Board, insert certain information specific to the parties to the voluntary recognition, post the notice physically and electronically (depending on where and how the employer customarily posts notices to employees), and distribute it electronically (if the employer customarily communicates with employees electronically); and 15 minutes to complete the certification-of-posting form to be returned to the Region at the close of the notice-posting period. We assume that these activities will be performed by a human-resources specialist for a total cost of about \$78.66.

The Board's modified voluntary-recognition bar will cause elections to be held in a small number of cases in which the election petition previously would have been dismissed, increasing costs for both employers and unions. As stated previously, in the IRFA, the Board requested comments or data that might improve its analysis regarding the estimated cost for preparing for and participating in elections, including those after a grant of voluntary recognition, see 84 FR at 39956, but we received no additional data, other than the AFL-CIO's comment referenced above.

**c. Costs Associated With Elimination of Contract-Language Basis for Proving Majority-Based Recognition in the Construction Industry**

Under current Board law, a construction-industry employer and union can write into their collective-bargaining agreement that the union showed or offered to show evidence of majority support and, in combination with certain other contractual language,

have the bargaining relationship be governed under Section 9(a) as opposed to a presumed 8(f) bargaining relationship. As described above, the final rule eliminates the contract-language basis for establishing a 9(a) bargaining relationship and thereby barring a petition in a representation proceeding. However, the rule continues to allow two other methods to establish a 9(a) bargaining relationship: a Board-certified election and voluntary recognition based on demonstrated majority support. In the handful of cases where an election petition is filed involving one of the approximately 6 million small entities in the United States, both the construction industry employer and labor union would incur the cost of participating in an election. As noted above, we are unable to quantify the cost of preparing for or participating in a Board election. In cases where a construction-industry employer voluntarily recognizes a union based on demonstrated majority support, the union may incur an additional de minimis cost related to the retention of the evidence of majority support, *e.g.*, signed union authorization cards, for a longer period of time if it can no longer rely on contractual language. No data or comments were received relating to such costs, other than those comments described above.

**d. Overall Costs**

We do not find the estimated \$164.51 cost to small employers and unions in order to review and understand the petition-processing procedures and the modified voluntary recognition bar, or the estimated \$78.66 cost for an employer to comply with the notice requirements of the modified recognition bar, to be significant within the meaning of the RFA. We find the same with regard to the estimated cost of \$211.25 for small employers and unions in the construction industry to review and understand the elimination of the contract-language basis for establishing voluntary recognition under Section 9(a), in addition to the first two changes. In making these findings, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected. Other criteria to be considered are the following:

- Whether the rule will cause long-term insolvency, *i.e.*, regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;
- Whether the cost of the proposed regulation will (a) eliminate more

than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.

The minimal cost to read and understand the rule, \$164.51 or \$211.25, will not generate any such significant economic impacts, nor will the minimal cost, \$289.91 for employers to comply with the modified recognition-bar notice posting.

**6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each one of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities was Rejected**

Pursuant to 5 U.S.C. 604(a)(6), agencies are directed to examine "why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." In the IRFA, the Board requested comments identifying any other issues and alternatives that it had not considered. See 84 FR at 39957.

Many comments suggested that the Board withdraw the proposed rule and leave in place the current blocking-charge policy, voluntary-recognition bar, and requirement of proof to show majority-based recognition in the construction industry. We considered and rejected these alternatives for the reasons stated above. Consequently, we reject maintaining the status quo.

The AFL-CIO suggests several alternatives to the proposed modification to the blocking-charge policy, including expedited investigation of possible blocking charges, periodic review of charges that are blocking an election, instructing regional directors to make fuller use of their existing discretion to not block elections, expanding exceptions in the blocking-charge policy, or limiting the application of the new rule to charges not filed by the petitioner.<sup>266</sup> We have discussed, and rejected, these alternatives for the reasons discussed in Section III.E. above.

<sup>266</sup> CWA similarly stresses the existing discretion afforded to regional directors as to whether to process a petition and conduct an election if a charge and request to block an election has been filed.

In the NPRM, the Board considered exempting certain small entities. See 84 FR at 39957. We received no comments on this potential alternative and again reject this exemption as impractical because such a large percentage of employers and unions would be exempt under the SBA definitions, thereby substantially undermining the purpose of the final rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers. As the Supreme Court has noted, “[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.” *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 123 (1944). As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

None of the alternatives considered would adequately accomplish the primary objective of issuing this rule—protection of employee free choice—while minimizing costs on small businesses. Accordingly, we believe that promulgating this final rule is the best regulatory course of action.

#### B. Paperwork Reduction Act

In the NPRM, the Board explained that the proposed rule would not impose any information-collection requirements and accordingly, the proposed rule is not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* See 84 FR at 39957. We have not received any substantive comments relevant to the Board's analysis of its obligations under the PRA.

#### C. Congressional Review Act

The three provisions of the final rule are substantive, and the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act, Subtitle E (the Congressional Review Act or CRA), 5 U.S.C. 801–808. Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs designated this rule as a major rule. Accordingly, the rule will become effective June 1, 2020.

## VI. Final Rule

For the reasons set forth in the preamble, the National Labor Relations Board amends part 103 of title 29 of the Code of Federal Regulations as follows.

### List of Subjects in 29 CFR Part 103

Jurisdictional standards, Election procedures, Appropriate bargaining units, Joint Employers, Remedial Orders.

## PART 103—OTHER RULES

- 1. The authority citation for part 103 continues to read:

**Authority:** 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

- 2. Revise § 103.20 to read as follows:

### § 103.20 Election procedures and blocking charges.

(a) Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that the charge block the election process, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the election process, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the election process shall also promptly make available to the regional director the witnesses identified in its offer of proof.

(b) If charges are filed alleging violations other than those described in paragraph (c) of this section, the ballots will be promptly opened and counted at the conclusion of the election.

(c) If charges are filed that allege violations of section 8(a)(1) and 8(a)(2) or section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, or a charge is filed that alleges an employer has dominated a union in violation of section 8(a)(2) and seeks to disestablish a bargaining relationship, the regional director shall impound the ballots for up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed prior to the conclusion of the election. If a complaint issues with respect to the charge at any point prior to expiration of that 60-day post-election period, then the ballots shall continue to be impounded until there is a final determination regarding the charge and

its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time during that 60-day period, or if the 60-day period ends without a complaint issuing, then the ballots shall be promptly opened and counted. The 60-day period will not be extended, even if more than one unfair labor practice charge is filed serially.

(d) For all charges described in paragraphs (b) or (c) of this section, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.

- 3. Add § 103.21 to read as follows:

### § 103.21 Processing of petitions filed after voluntary recognition.

(a) An employer's voluntary recognition of a labor organization as exclusive bargaining representative of an appropriate unit of the employer's employees under section 9(a) of the Act, and the first collective-bargaining agreement executed by the parties on or after the date of such voluntary recognition, will not bar the processing of an election petition unless:

(1) The employer and/or the labor organization notifies the Regional Office that recognition has been granted;

(2) The employer posts, in conspicuous places, including all places where notices to employees are customarily posted, a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and that they have a right to file a petition during a 45-day “window period” beginning on the date the notice is posted;

(3) The employer distributes the notice described in paragraph (a)(2) of this section electronically to employees in the petitioned-for unit, if the employer customarily communicates with its employees electronically; and

(4) 45 days from the posting date pass without a properly supported petition being filed.

(5) The notice described in paragraph (a)(2) of this section shall state as follows:

Federal law gives employees the right to form, join, or assist a union and to choose not to engage in these protected activities.

An employer may lawfully recognize a union based on evidence (such as signed authorization cards) indicating that a majority of employees in an appropriate bargaining unit desire its representation, without an election supervised by the National Labor Relations Board.

Once an employer recognizes a union as the employees' exclusive bargaining representative, the employer has an obligation to bargain with the union in good

faith in an attempt to reach a collective-bargaining agreement, and that obligation is not delayed or otherwise impacted by this notice.

The National Labor Relations Board is an agency of the United States Government and does not endorse any choice about whether employees should keep the recognized union, file a petition to certify the recognized union, file a petition to decertify the recognized union, or support or oppose a representation petition filed by another union.

[Employer] on [date] recognized [Union] as the employees' exclusive bargaining representative based on evidence indicating that a majority of employees in [described bargaining unit] desire its representation.

All employees, including those who previously signed cards in support of [Union], have the right to be represented by a union of their choice or by no union at all.

Within 45 days from the date of this notice, a petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not the unit employees wish to be represented by [Union], or 30 percent or more of the unit employees can support another union's filing of a petition to represent them.

Any properly supported petition filed within the 45-day window period will be

processed according to the National Labor Relations Board's normal procedures.

A petition may be filed within the 45-day window period even if [Employer] and [Union] have already reached a collective-bargaining agreement.

If no petition is filed within the 45-day window period, the Union's status as the unit employees' exclusive bargaining representative will be insulated from challenge for a reasonable period of time, and if [Employer] and [Union] reach a collective-bargaining agreement during that insulated reasonable period, an election cannot be held for the duration of that collective-bargaining agreement, up to 3 years.

(b) This section shall be applicable to an employer's voluntary recognition on or after the effective date of this rule.

■ 4. Add § 103.22 to read as follows:

**§ 103.22 Proof of majority-based bargaining relationship between employer and labor organization in the construction industry.**

(a) A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed

pursuant to section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Collective-bargaining agreement language, standing alone, will not be sufficient to provide the showing of majority support.

(b) This section shall be applicable to an employer's voluntary recognition extended on or after the effective date of this rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of this rule.

Dated: March 24, 2020.

**Roxanne L. Rothschild,**  
*Executive Secretary.*

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