FOOD MARKETING INSTITUTE

August 22, 2011

Submitted Electronically

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

RE: National Labor Relations Board, Proposed Rules
Representation Case Procedures

RIN 3142-AA08,

Dear Mr. Heltzer:

Please accept the following supplemental comments of the Food Marketing Institute ("FMI") to the proposed amendments to the rules governing Representation – Case Procedures (29 C.F.R. § 101, 102, 103) published by the National Labor Relations Board ("NLRB") on June 21, 2011.

We thank you for the opportunity to submit our comments in connection with this important issue. For the reasons set forth herein, as well as those set forth by the Coalition for a Democratic Workforce ("CDW") – who's comments FMI joins and fully endorses - we respectfully request that the NLRB not implement any of the proposed rule changes.

FMI is a national trade association representing a wide variety of entities in the food marketing industry. We conduct programs in public affairs, food safety, research, education and industry relations on behalf of our 1,500 member companies – food retailers and wholesalers – in the United States and around the world. Our members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies, and provide employment and opportunity to more than 2.5 million individuals. The combined annual sales volume of our members is $680 billion, and represents approximately three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

Given the industry we serve, there are several industry-specific reasons why we oppose these proposed changes to the Representation Case regulations.

2345 Crystal Drive, Suite 800 • Arlington, VA 22202-4801 • T 202.452.8444 • F 202.429.4519 • fmi@fmi.org • www.fmi.org

1. The 20% threshold is unworkable and will serve to hinder the exercise of employee Section 7 rights.

Under the proposed rule changes, the NLRB would not resolve bargaining unit issues at the pre-election stage of a proceeding unless it impacted 20% or more of the total composition of the bargaining unit. Instead, it would defer resolution of such issues until after the election has taken place through an expanded use of the procedures for permitting individuals to cast votes using challenged ballots. We oppose the establishment by regulation of a bright line threshold for making determinations of voter eligibility at the pre-election stage of a representation case. Deferral of eligibility determinations for large groups of employees to the post-election stage of a proceeding creates confusion and invites problems. The resultant problems will generate protracted and unnecessary litigation that can easily be avoided if the disputed issues were to have been resolved before the election. The current practice, which addresses each situation on a case-by-case basis, is the most appropriate manner of ensuring that such problems are avoided.

In their retail operations, our members employ individuals in a wide variety of job classifications. In particular, there exist many different types of job classifications within the ranks of management and supervision. A single retail grocery store can employ a large number of individuals classified as manager or supervisor, and large departments in an individual store can have several layers of supervision.

There are very legitimate business reasons for having such structures in place in the retail environment. First, they offer the store an ability to maintain uniform quality of service, operation and coverage during for 24 hour/7 day a week operations. Second, it offers employees the ability to incrementally advance within a company, and makes available numerous opportunities for career development. Finally, it offers employees the opportunity to receive training in the management of personnel and operations in an incremental manner that permits them to advance at their own pace and in accordance with their own skills and abilities. This incremental management structure creates an environment in which the degree of supervisory authority certain classifications of supervisors and managers exercise can vary quite a bit.

Whether employees are supervisors or not under Section 2(11) of the Act is probably the single most contested issue in an initial representation case hearing. To superimpose the criteria of Section 2(11) upon the incremental management structure of a retail grocery store or pharmacy, particularly at the first-line supervisory level, is not an easy task. For example it is not uncommon for individuals who might consider themselves "supervisors" in title not to possess or exercise sufficient authority to warrant exclusion from a bargaining unit. Conversely, there may be others who in fact exercise one or more of the enumerated criteria under Section 2(11) but who do not believe they should be excluded.

It is important that there be a determination of supervisory status by the Board before it conducts an election, because it may necessarily involve an entire classification of first level supervisors who may be influential while at the same time not amount to 20% of the bargaining unit. Moreover, to address this issue through the challenge procedure creates additional complexity because it does not remove the supervisors from the polling place while votes are being cast. The presence of large numbers of 2(11) supervisors at polling stations while votes are being cast obviously could have an impact on the exercise of free choice by non-supervisory voter, and will generate post-election objections.

This same reasoning applies to other job classifications that are often contested in initial representation case proceeding and are also very common in our industry. These include seasonal, temporary and contingent workers. Some of our members have very seasonal businesses, and must increase the number of personnel they have on hand to staff their operations. This applies to both retail and to warehousing and distribution operations. We believe that it is best if employees know who is in a voting unit before the cast their ballots, not after the fact.

Ultimately, deferral of contested job classifications to be resolved as part of the challenge procedure creates a rule out of what has clearly existed to serve as an exception. Historically, the practice of deferring voter eligibility determinations to the challenge procedure has been reserved for the exceptional situation involving classifications containing small numbers of individuals. This practice should be limited to small numbers of contested voters, and not groups as large as 20% of the total voting unit.
With the new regulations, the NLRB proposes to make a rule out of that exception, and for the reasons set forth above, we object to it.

2. The proposed regulations would encourage certification by the NLRB of bargaining units that are coextensive with the extent of organizing.

We strongly object to the proposed regulations' apparent effort to place all burdens of proof upon the employer with respect to unit placements and determinations. Not only do the procedural steps set forth in the proposed regulations place virtually all burdens of proof on the employer, but the very narrow time frames they create also effectively inhibit an employer's ability to properly assess the circumstances it is confronting and respond appropriately. In the end, we see this as having the practical effect of being an NLRB-sanctioned framework that will permit certification of bargaining units that are coextensive with the extent of a labor union's organization. Not only is this contrary to the express provisions of the NLRA, but it disregards the notion of community of interest, long the core of what constitutes an appropriate unit for purposes of collective bargaining.

Along these lines, to give an employer a mere seven (7) days to prepare and submit a comprehensive statement of position asserting all issues related to the appropriateness of the proposed bargaining unit, is similarly unworkable. Pursuant to the proposed regulations, an

employer's failure to raise issues in the statement of position would preclude it from presenting evidence or cross-examining witnesses on the issue, even where such information first comes to light during the hearing. An employer that did not, in the short time period allowed, raise a challenge to the appropriateness of a unit in the statement of position would be bound by the petitioner's proposed unit description.

Given the variety of departments, units and divisions within many of our member's retail stores, this structure creates an environment that is unworkable, because it enables a labor union to gerrymander a bargaining unit that is coextensive with the extent of its organization. The result of such gerrymandering, in addition to being illegal, creates the potential for the establishment of a patchwork of bargaining units within one store or facility, when one might be more appropriate and more workable. This increases operating costs, and creates the potential for unnecessary and avoidable complexities within a single operation.

3. The proposed regulations would inhibit employees from receiving the benefit of all available information to make an informed decision on whether or not to join or form a labor union.

The proposal to expedite the election process, to the point of conducting an election in as few as ten (10) days from the filing of a petition, serves to disenfranchise employees by denying them the ability to have full access to information from all perspectives.

The establishment of what Board Member Hayes characterized in his dissent as a "quickie election" will disadvantage employees by truncating the time employers have to communicate with employees prior to a vote on organizing. During a union organizing effort there is a lot of information disseminated by the parties in furtherance of their positions. Before the filing of an NLRB petition, most union organizing efforts occur in an environment of secrecy. During this period, employees receive the benefit of only one perspective – that of the labor organization seeking to represent the employees. Most employees have had little if any experience with a labor union or how representation by a labor union might impact their work environment. Proponents of labor union representation do not always convey accurate or truthful information in their efforts to convince employees to join their cause. Indeed, Section 8(c) of the NLRA exists to ensure that employers have the ability to communicate their views on unionization to employees, and by significantly shortening the time that employers can get their message out to employees, the proposed regulations undermine that section of the Act.

This will have a significant impact on employers in the industry FMI represents because many operate around the clock, and depending on the nature of the operations, rely heavily on part time, seasonal, or contingent workers. To the extent they are eligible voters, these individuals have as much a right to consider all available information as those who work a regular schedule, and their employer should not be denied the ability to convey it to them. It is not practical or feasible to

assume that these individuals will have the ability to gain access to such information, and to have time to consider it as part of making a well reasoned decision, within the 10 to 21 day time frame that will be established by the proposed regulations.

Ultimately, it is inconsistent with the principles of industrial democracy, upon which the NLRA is premised, to ask an employee to decide whether he or she wishes to be represented by a labor union without first receiving the benefit of sufficient time to consider available information to enable them to make an informed decision.
There are numerous valid and legitimate reasons why an employee would prefer not to be represented by a labor union. To deny employees time to access and consider information related to those reasons, is contrary to the principles of having an informed electorate. The "quickie election" procedure established by the NLRB's proposed rulemaking, serves to deny employees the ability to obtain relevant information related to this important decision.

4. The proposed regulations would inappropriately require disclosure of private and personal information related to employees and the employer that merely serves as invasion of privacy and to further the union's organizing objectives.

The proposed regulations, if implemented as written, will require an employer, upon receipt of a petition to compile and produce to the union a significant amount of information about employees. We believe that this requirement implicates the privacy rights of employees in a manner that is inappropriate. Moreover, it effectively grants a labor union access to an employer's workplace at times when the employees are supposed to be at work.

In addition to the requirement that the employer produce information about each employee with its statement of position, the proposed regulations require the employer to provide a final voter list to the NLRB and the union, and that such list include "available telephone numbers" and "available e-mail addresses" of employees within two days after the direction of election. The proposed regulations' broad and unqualified use of the terms "numbers" and "addresses" will effectively require an employer to provide every phone number and email address in its possession for each employee. Such information would include home and work email addresses, as well as mobile phone numbers.

To mandate production of this information to a labor union exposes the employees to unwanted emails, calls and texts from the union and others to whom the information may ultimately be disclosed, as there is no limitation or restriction on how this information can or cannot be used.

The requirement that an employer produce employee work email information also effectively confers upon the labor union access to an employer's workplace during working hours. As there are no restrictions on the use of such information, there are no limitations on the manner, timing or purpose to which the petitioner will put the information it has to use. There is nothing to prevent a

labor union from engaging in disruptive activities that would interfere with the business operations of the employer or the employee's ability to perform their duties.

Indeed, many employees are issued a company email address for use in connection with company business. In some cases, employees are issued a company mobile phone. Under the broad definition of the proposed regulations, and employer would be required to produce this information. While these are without question company property, the requirement of the proposed regulations that they be produced to a labor union as part of the new procedures, for use as the labor union sees fit, amounts to a requirement of questionable legal validity.

Conclusion

For the foregoing reasons, as well as those set forth by the Coalition for a Democratic Workforce, we respectfully request that the NLRB not implement the changes to the regulations it has proposed in the Notice of Proposed Rulemaking. We believe that the current system, which addresses representation issues expeditiously and in a manner that accounts for the wide variety of employment settings, is far more conducive to the effective implementation of the NLRA which serves to strike a balance between the flow of commerce and the rights of workers to form labor unions.

We appreciate your attention on these important issues. If you have any questions please feel free to contact me at elieberman@fmi.org or (202) 220-0614.

Sincerely,

Erik R. Lieberman
Regulatory Counsel

Stefan Marculewicz
LITTLER MENDELSON P.C.
1150 17th Street, N.W., Suite 900
Washington, DC 20036
Counsel to the Food Marketing Institute