IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 11-2262 Judge James E. Boasberg

PLAINTIFFS' MOTION TO STAY AGENCY ACTION PENDING JUDICIAL REVIEW

In the present action, Plaintiffs Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace (the "CDW") respectfully request the Court to review, set aside, and remand purported agency action under the Administrative Procedures Act (the "APA"), 5 U.S.C. § 706(2)(A)-(D). The rule at issue in this case, which institutes sweeping changes to the election process for employees to determine whether to be represented for purposes of collective bargaining with their employer, 76 Fed. Reg. 80,138, 80,189 (December 22, 2011) (to be codified at 29 C.F.R. pts. 101 and 102) (the "Final Rule"), is scheduled to take effect on April 30, 2012. Plaintiffs, by and through undersigned counsel, respectively move this Court for a temporary stay of agency action to allow this Court time to decide the important issues in this case before the rule is permitted to go into effect. Defendant National Labor Relations Board (the "Board" or "NLRB") opposes Plaintiffs' motion.

ARGUMENT

This Court is authorized under the APA to stay agency action pending its review. 5 U.S.C. § 705. "The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed absent a stay; (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). "A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Id.* Thus "a particularly strong showing on one factor may compensate for a weaker showing on one or more of the other factors." *AFL-CIO v. Chao*, 297 F. Supp. 2d 155, 161 (D.D.C. 2003) (granting motion for preliminary injunction delaying implementation of new Department of Labor regulation). As described below, all of the factors are satisfied in this case.

First, Plaintiffs are likely to succeed on the merits. As set forth in Plaintiffs' prior briefs (Dkts. 22, 30, and 34), which are incorporated here by reference, the Final Rule suffers from at least three fatal flaws: The rule was issued by only two members and thus without the statutorily required quorum; the Final Rule is inconsistent with the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the "Act" or "NLRA"); and many of the two members' actions, taken in part to expedite the rulemaking process, were arbitrary and capricious. Plaintiffs are likely to succeed on the merits.

Second, the failure to stay implementation of the new election procedure will result in irreparable harm to an unquantifiable and unidentifiable group of employers covered by the NLRA, including employers who are members of the Chamber and CDW. As of April 30, 2012,

any new petition filed by a union or employee will be processed under the new election procedure sanctioned by the final rule.

The NLRB's Acting General Counsel issued a "Guidance Memorandum on Representation Case Procedure Changes" yesterday, April 26, 2012, which makes clear that elections will be held in as little as 17 days after a petition is filed under the new procedure. Therefore, if an election petition is filed on Monday, a hearing under the new procedure may be held as soon as May 7 and an election may be held as soon as May 17. Employers will suffer irreparable harm during that time if, as contemplated under the final rule, they are denied the opportunity, at the pre-election hearing, to litigate issues concerning the scope of the bargaining unit or the eligibility of certain employees to vote in the election -- issues that may ultimately affect the outcome of the election. Employers also will be irreparably harmed based on the condensed pre-election time frame restricting Section 8(c) free speech rights. Communications during the initial pre-election period are critical in shaping employee opinions and voting decisions regarding union representation, and this harm to employers by limiting communications cannot be remedied in the future. Moreover, if elections are subsequently held and employers refuse to negotiate in order to challenge the process, this could cause, among other things, irreparable harm to an employer's relationship with its employees as well as its reputation.

If the Court subsequently holds that the final rule is invalid, those elections will have to be re-run under the NLRB's current procedure. Therefore, to avoid the potential for re-running elections held under the new procedure, and to prevent the irreparable harm that employers will suffer under the new procedure, Plaintiffs move the court for an administrative stay preventing

the Board from implementing the new procedures until the Court has ruled on the cross-motions for summary judgment.

Third and fourth, the lack of harm to others and public interest clearly favor a temporary administrative stay. See *Chao*, 297 F. Supp. 2d at 165. The *Chao* court explained why a temporary stay of a new administrative regulation would be appropriate under the prospect of harm to others and public interest components as follows:

> There is no evidence whatsoever that a temporary stay of the implementation of the Final Rule will cause any significant harm to the Secretary, to union members, or to the public. It is noteworthy that the Secretary, in choosing the January 1, 2004 effective date, did not claim any particular need for extraordinary urgency. While it may well be that there is justification for the Final Rule adopted by the Secretary, there is certainly good reason to preserve the status quo as it existed before the effective date of the new regulation, especially when that status quo has been deemed acceptable by the Department of Labor for over 40 years.

297 F. Supp. 2d at 165. The same rationale applies here to support a temporary administrative stay to maintain the decades-old representation procedures until the Court has ruled on the cross-motions for summary judgment.

As for the consideration of others, the NLRB and unions will not be harmed in any way should it be required temporarily to delay implementation of the new representation procedures. The prior procedures have been in effect for decades and can continue until such time that this Court issues a final decision on the Plaintiffs' challenge. There also is nothing significant with the selected April 30, 2012 implementation date – it was selected for administrative convenience and not for any special attribute of the date.

Further, the public interest is served by having stability in the regulatory environment for employers and unions within the NLRB's jurisdiction while the Court fully considers the cross-motions for summary judgment. A temporary delay in the new representation procedures, while

the Court analyzes the important statutory issues in this case, serves the public interest without any corresponding harm to the public through the use of existing NLRB election procedures, until such time as the Court rules.

CONCLUSION

For the foregoing reasons, the Chamber and CDW respectfully request this Court to grant the Motion to Stay Agency Action Pending Judicial Review to give the Court sufficient opportunity to consider the merits of the pending cross-motions for summary judgment before the Final Rule takes effect.

Dated: April 27, 2012

Respectfully submitted,

/s/ Howard M. Radzely

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