AIADA
American International Automobile Dealers Association

POSITION PAPER

OVER REGULATION AT THE NLRB

BACKGROUND

The National Labor Relations Board (NLRB) is a federal agency charged with enforcing and interpreting the National Labor Relations Act (NLRA); the NLRB is led by a 5 Member Board and a General Counsel. The NLRA, which was enacted in 1935, established the right of employees to join or refrain from joining a union and governs relations between most private businesses and unions.

In recent years, Board Members appointed to the NLRB have accepted a number of cases and made statements and decisions that work to enact key portions of the misnamed Employee Free Choice Act.The Board has issued countless rules and decisions that have contradicted decades of well-established precedent and upended labor relations in what appears to be an all out effort to increase the number of dues-paying union members without regard to the negative impact the agency's actions will have on employees, employers, and the economy. Those who headed up the Board during the Clinton and Bush administrations have called the NLRB's actions over last few years unprecedented. (See remarks of former Clinton NLRB Chair William Gould and of former George W. Bush NLRB Chair Peter Schaumber).

Five actions have been particularly destructive for employees, employers, and the economy. They include: limit employees' access to information about the disadvantages of unionization; allow unions to access workers' personal information and violate businesses' property rights; disenfranchise employees who oppose unionization by allowing union organizers to gerrymander bargaining units into "micro-unions;" attack opportunities for small business franchisees, vendors, and subcontractors, because these businesses do not provide the same economies of scale for union organizing as larger business; and, threaten the right employees have to a secret ballot election, exposing them to potential harassment. AIADA works with other businesses and associations to fight against these attacks on workers and businesses through litigation, legislation, and the regulatory process.

POSITION

During these times of economic uncertainty, regulatory over-reach by government entities puts an unnecessary burden on American businesses threatening their fiscal vitality and job growth. AIADA supports a level playing field that allows employers and employees of auto dealerships the ability to make decisions about unionization with full knowledge of both sides and appropriate time for consideration. AIADA supports legislative efforts to counter the actions of the NLRB; it joins hundreds of other businesses in support of Congressional action intended to nullify recent NLRB rulings.

MORE ABOUT THE ISSUE

- **Ambush Elections:** In February of 2014, the NLRB issued a proposed rulemaking imposing "ambush" elections on employers and employees. The rule drastically changes the process for union representation elections in which employees vote whether or not they want to be represented by a union. The proposal is intended to increase union organizing and dues revenue streams at the expense of employees, who will not have the opportunity to hear both sides before voting on union representation, and employers, who are effectively denied free speech and due process rights. An employer's right of free speech and opportunity to express his or her views on the subject of unionization is severely undermined by the regulation. Fortunately, the Workforce Democracy and Fairness Act (S. 933 and H.R. 1768) and the Employee Privacy Protection Act (H.R. 1767) would prevent the NLRB from establishing this rule.

- **Micro Unions:** Organized labor is pushing the NLRB to make sweeping policy changes aimed at increasing union membership rolls. One of the Board's most controversial actions is its decision in *Specialty Healthcare*, which allows for the formation of "micro-unions." In this decision, the Board announced a new standard for determining composition of bargaining units, allowing organized labor to gerrymander units and disenfranchise employees that oppose unionization. This new standard makes it easier for unions to divide the workplace into multiple siloed bargaining units. These "micro-unions," or fractured units, would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible staffing as employees could not perform work assigned to another unit. Employees will also suffer from reduced job opportunities, such as promotions and transfers. The *Specialty Healthcare* decision is already negatively impacting employers and employees alike. Fortunately, Congress is working to roll back the changes and introduced the Representation Fairness Restoration Act (S. 801).

- **Persuader Rule:** One of labor's current policy priorities was the finalization of the Department of Labor's (DOL) proposed "persuader" regulation. The regulation was finalized on March 23. The rule changes federal disclosure rules to make it more difficult for employers to access legal counsel and legally communicate with employees about the pros and cons of a particular union or unionization generally. Previously, employers, consultants, and attorneys had to disclose any arrangements to persuade employees about their decision on whether or not to unionize if the consultant or attorney directly communicates with employees. This was meant to ensure employees knew the employer had hired the third party to communicate with them. If the attorney or consultant did not communicate directly with the employees, however, but instead only advised the employer about how to legally communicate with employees, then no disclosure was required.
  DOL's rule narrows the scope of this "advice" exemption so that virtually all interaction between employers and labor lawyers or consultants will be subject to the disclosure requirements. In doing this, the Board is limiting employer access to counsel, making it harder for employers to find competent counsel to represent them, and providing more opportunities for unions to catch unsuspecting employers mistakenly running afoul of complicated labor laws. The changes also make it harder for employers to train supervisors on how to communicate with employees about labor issues without violating the law. All of these repercussions make it less likely employers will exercise their federally protected free speech rights to discuss the pros and cons of unionization with employees, which was the clear design of the change. H. J. Res. 87 would roll back the rule and prohibit DOL from implementing anything substantially similar.

- **Private Ballots:** In 2005, the so-called "Employee Free Choice Act, or EFCA, was introduced, which would have replaced secret ballot elections as the method for determining whether or not employees want union representation with "card check." This means employees would not vote secretly for or against unionization but would instead be required to sign union authorization cards in front of coworkers and union organizers, exposing them to intimidation and harassment if they do not support unionization.
  EFCA's defeat did not stop the Board from actively pursuing its effects. In August 2011, the Board issued its decision in *Lamons Gasket*, in which the NLRB abolished the employee's right to demand an election within 45 days of their employer agreeing to recognize a union based solely on card check. Without this right, employees could be barred from challenging a union recognized through card check for up to a year, and far longer if the employer and union sign a contract.
  Secret ballot elections have been a key right of workers and an integral part of labor relations since the earliest days of the NLRA. Every employee should have the right to a secret ballot.

- **Joint Employer:** The NLRB has expanded the definition of a "joint employer," used to determine when a business should be considered responsible for the labor practices of another. The changes threaten to disrupt decades of established law and undermine the relationships between a brand company and local franchise business owners; contractors and subcontractors; and businesses and their suppliers and vendors – all of which have created millions of jobs and allowed hundreds of thousands of individuals to achieve the American dream of owning their own small business.
  The previous joint employer standard had been in place since 1984. Under this prior standard, the Board considered an entity to be a joint employer if it exercised *direct and immediate control*over another business's employees, including having the ability to hire, fire, discipline, supervise or direct an individual. Two entities are joint employers only when they share that direct control over the terms and conditions of employment for the same employees.
  On August 27, 2015, however, the Board issued its decision in *Browning Ferris Industries* expanding the standard to include *indirect* or even *unexercised potential control* over the terms and conditions of employment. Joint employers both have a duty to bargain with any union representing the jointly employed workers and share liability for violations of the NLRA as it pertains to these workers or any union representing them. As noted by the Board's two dissenting members, this new rule will "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."
  Congress is pursuing legislation to curtail this overreach by the Board. The Protecting Local Business Opportunity Act (S. 2015 and H.R. 3459), if passed, would reverse the *Browning Ferris* decision and reinstate the previously held joint employer standard, providing much needed protection to employers, employees, and the economy.