

STATEMENT OF THE HONORABLE BRADLEY BYRNE TO THE US SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS (MARCH 29, 2023)

My name is Bradley Byrne. I have practiced law for 43 years. A large part of my practice has been in the area of labor and employment law. I have represented clients in numerous representation elections conducted by regional offices of the National Labor Relations Board. I also served in the US House of Representatives for seven years during which time I sat on the Committee for Education and the Workforce and chaired the Subcommittee on Workforce Protections.

Let me say at the outset that I don't represent Starbucks and have no position on whether Starbucks has violated any law or regulation. Nor do I have a position on the outcome of the elections involving Starbucks stores around the US. I leave that up to the wisdom of the workers in those stores.

I'm here today to express concerns that I have about misconduct by NLRB agents in at least one of the Starbucks elections, and my further concern that there may be a pattern and practice here. Again, I have no objection to a union organizing Starbucks stores, but the process in at least one such election may indicate something threatening the integrity of representation elections in general.

Let me give you a brief explanation of the process normally followed in representation elections. A union will communicate with workers at a particular employer's location and try to convince them to sign cards indicating that the worker signing the card wants to be represented by the union as to the terms and conditions of his or her employment. Once they have a number of signed cards the union will then file a petition with the appropriate NLRB Regional office seeking recognition. An NLRB agent with that region will contact the employer, who may or may not know that the union has been trying to organize its employees, and if the employer requests an election to determine the true decision of the workers in the unit designated, a process begins which will end in a secret vote by each employee in the unit.

The NLRB agent will attempt to get the union and the employer to agree as to the details of the election - exactly who is in the unit, when and where the election will be held, etc. Once that stipulated agreement is reached, its provisions govern the conduct of the election, unless the parties reach a subsequent agreement to amend it.

The National Labor Relations Act's purpose is not to favor employers or unions in the conduct of these elections. Its purpose is to assure that the employees in the unit have a full and free opportunity to decide for themselves whether or not they want to be represented by the union,

free of coercion. Therefore, once the petition is filed, the NLRB agent and region involved must assure “laboratory conditions” during the campaign period.

Again, the decision is up to the employees in the unit and no one else.

As the US Supreme Court recognized in the 1981 decision of *First National Maintenance Corp. v. NLRB*, the NLRB agents involved in an election must carry out their duties supervising an election in a neutral manner, favoring neither party and protecting the integrity of the process.

This neutrality is central to the obligation to maintain laboratory conditions, and to the assurance of integrity in the election process.

The employer and the union can communicate their reasons against and for the vote but there are significant limitations on those communications which are overseen and enforced by the NLRB agents involved, again in a neutral and impartial manner.

When the day of election comes the NLRB agent conducts the election and each employee in the unit who chooses to vote does so by a secret ballot to assure there is no coercion. At the end of the voting period the NLRB agent counts the ballots in the presence of employer and union representatives and then declares the vote. It takes a majority of votes in the affirmative for the union to be certified as the representative of all the employees in the unit as to the terms and conditions of their employment.

One important note is that during the pandemic representation elections were conducted by mail which adds another set of details to work through to assure the integrity and accuracy of the vote.

In my experience, NLRB agents overseeing elections have been professional and completely neutral, and have followed the applicable law and process. My clients haven’t always received the results they desired but it wasn’t because of NLRB misconduct.

I presently represent a NLRB agent who has courageously come forward as a whistle blower regarding a specific representation election as to a Starbucks store. She is a consummate professional who doesn’t care about the outcome of an election and therefore has no position as to whether Starbucks employees should or should not vote to be represented by the union. But she has knowledge of specific instances where NLRB personnel violated their neutrality obligations during this particular representation election and has brought that information to the Inspector General for the NLRB.

I am not here today to testify for her. I can point you to the transcript and exhibits of a hearing held regarding neutrality violations in a Starbucks election and the findings of the Hearing Officer in that election, wherein he noted instances of violation of the duty of neutrality. Reading that transcript and those findings causes me to have great concern about the integrity of the representation election process. My concern is as a lawyer and as a former Congressman charged with oversight responsibilities over the NLRB.

I respectfully ask this Committee to conduct an active investigation into this matter. Is the behavior in this one election a unique instance, a rogue “one off”, or is there a pattern and practice of doing so in other representation elections? And, if there is a pattern and practice, is it being led or encouraged by those higher up?

I am also concerned by the overt efforts by the NLRB’s General Counsel to do away with elections altogether. This would mean that employers would be forced to recognize unions merely based on cards even when the employer has reason to believe that the cards don’t reflect the views of the majority of employees in the unit. Unions lose many elections even when they present cards indicating a majority want union representation. Representation elections insure the purposes of the National Labor

Relations Act are followed and that employees make their choice freely and without coercion.

Representation elections have been conducted when employers have requested them for decades now, since the passage of the Taft Hartley Act, and ensconced in NLRB case law since the 1974 decision in Linden Lumber Division, Summers & Co. V NLRB. It has been recognized by the US Supreme Court in the 1969 decision of NLRB v Gisselle Packing Co. The General Counsel’s hostility to representation elections flies in the face of this well settled law.

These NLRB agents supervising elections operate under the General Counsel’s ultimate control. Given the present General Counsel’s hostility to elections in general, I hope this Committee will use its oversight powers to assure that longstanding law and Board precedent is indeed being followed.

I appreciate this opportunity to be heard and look forward to your questions.