Statement of Robert G. Sullivan

before the

Committee on Education and the Workforce
United States House of Representatives

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"Workforce Democracy and Fairness Act"

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for your invitation to testify at this hearing. I am honored to be here today.

My name is Bob Sullivan. I am here representing the Retail Industry Leaders Association (RILA). RILA is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

By way of background, I have been a management-side labor and employment lawyer for nearly twenty years. For the first ten years of my career, I practiced at two separate law firms in Providence, Rhode Island, where I represented a wide range of public and private sector employers in matters that included collective bargaining, union organizing and National Labor Relations Board (NLRB or Board) elections, and a wide range of labor matters before the NLRB, state labor boards and the courts.

From 2002 through 2009, I served as Vice President and Associate General Counsel for Labor and Employment with one of the country's largest grocery wholesalers with warehouses throughout the country, as well as affiliated companies that operated retail grocery chains in the Northeast and Southeast United States. As an in-house lawyer, I was responsible for all aspects of labor and employee relations, including the negotiation and administration of over forty union contracts and the handling of numerous organizing campaigns and union elections.

Since 2009 I have operated RG Sullivan Consulting, LLC, a firm that provides consulting and training services in the areas of labor and employee relations, litigation, legislative and regulatory matters.[1]

The Committee has asked me to testify on the Workforce Democracy and Fairness Act, which would amend the National Labor Relations Act (NLRA) to effectively overrule the NLRB's recent decision in *Specialty Healthcare*,[2] and to address issues raised in the Board's June 22 proposed rulemaking, in which the Board proposes to radically overhaul union election procedures and force elections in as little as ten days after the filing of a representation petition.[3]

I have the benefit of input from RILA's membership as well as my own experience. With the Committee's indulgence, I would like to focus on practical concerns associated with the Board's recent actions and the need for legislative action to protect the secret ballot election and the election process itself. The changes in bargaining unit determinations under *Specialty Healthcare*, if allowed to stand, and the proposed election rule change, if implemented, would impose severe administrative burdens on employers; lead to operational problems caused by fractured bargaining units; be detrimental to employee interests; and, for retailers, ultimately result in poor customer service.

- Micro Unions

Specialty Healthcare dealt with a nursing home and a union's petition to represent certified nursing assistants as a discrete group, versus a larger unit proposed by the employer that would have included other non-professional employees. The Board ruled in favor of the union's proposed unit, and cast its ruling broadly. Under the rule announced in the case, a party seeking to expand a proposed unit in any industry must now show that the employees it wants included in the unit have an "overwhelming" community of interest with the employees in the proposed unit.[4]

The most striking negative effect of *Specialty Healthcare* is the extent to which it allows for what many have termed "micro unions," or bargaining units composed

[1] My testimony here today is on behalf of RILA and reflects my own personal experience. My views should not be attributed to my pervious employers or current or prior clients.
[2] *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011).
[3] Representation—Case Procedures, 76 FR 36,812 (June 22, 2011); *see* dissent of Member Hayes, 76 FR at 36,831.
[4] *Specialty Healthcare*, 357 NLRB at 12.

of small groups of employees who formerly would have been found to have a sufficient community of interest with other employees to require that a proposed unit include the larger group (these micro-unions also have been referred to over the years as fractured units). This represents a drastic change to existing law, as recently discussed in the Board's August 27, 2010 decision in *Wheeling Island Gaming*, where the majority applied the community of interest standard—without the "overwhelming" component—and then stated that "[o]ur inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." [5] The creation of micro unions will impose costly and unnecessary administrative burdens on employers; hinder operations; deprive employees of numerous beneficial opportunities; and negatively affect customer service.

While *Specialty Healthcare* involved a nursing home, the impact of the case is much broader, including a significant negative impact on the retail industry. I'd like to discuss some of these concerns.

Under *Specialty Healthcare*, organizers can isolate small groups of employees where they have support. As the courts have acknowledged, unions will propose the group they have organized.[6] If organizers have support from employees working in just one department, for example, accessories, they can seek to represent only clerks in that department. As Member Hayes noted in his dissent in *Specialty Healthcare*, the ruling "will in most instances encourage union organizing in units as small as possible…."[7]

When retail settings are unionized, they most often have what is referred to as "wall-to-wall" bargaining units, where one unit includes essentially all union-eligible employees (that is, excluding supervisors and management). In many cases, a wall-to-wall unit is the only appropriate one given the commonality of interests within a single retail location and the frequency of staffing across departments.

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[5] *Wheeling Island Gaming*, 355 NLRB No. 127, n.2. (August 27, 2010).

[6] *Laidlaw Waste Systems, Inc. v. NLRB934 F.2d 898, 900 (7th Cir. 1991).* Despite the majority's views in *Specialty Healthcare*, the ruling improperly imposes such a high standard on a party—usually the employer—opposing a proposed unit (requiring an "overwhelming" community of interest between the proposed unit and other employees sought to be added to it) that it is virtually impossible to alter the proposed unit, thus violating section 9(c)(5) of the act, which provides that in determining unit appropriateness "the extent to which the employees have organized shall not be controlling." *Specialty Healthcare*, 357 NLRB at 9; 29 U.S.C. §159(c)(5).

[7] *Specialty Healthcare*, 357 NLRB at 19.

When all workers in a retail establishment are in the same unit, covered by the same contract, there are mechanisms for cross-training, for covering absences between departments or in nearby stores—in other words, for employees to expand their horizons, earn extra money by picking up additional shifts—and for continuity of operations and enhanced customer service. The employer and union need to administer and negotiate just one contract, minimizing confusion, administrative burden and usually limiting negotiations to once every few years.

These issues are particularly important in retail. Retailers encourage employees to learn about their business by working in different departments. They recognize the value to employees and customers alike when a customer can ask almost any store employee for help, and get effective assistance throughout the store. Employees also appreciate the variety and in the present economy many are looking for additional shifts, which are more available with free movement between departments.

Among the executive ranks of RILA's members are many who started their careers working on the floor of a store. They are gravely concerned that micro-unions would prevent employees from developing their knowledge base and advancing their careers, allowing for better employee retention and a better connection between senior management and the employees in their stores.

Retailers typically have from five to over twenty departments. With the potential for each department, or each shift, to become a separate bargaining unit, managing the store would become a nightmare. Employees themselves would lose the opportunity to cover for absent workers and to learn about other departments, making advancement into management much less likely. Employees in smaller stores tend to move around a great deal, and drawing lines between departments would impact both customers and employees even more acutely there than in larger operations.

Worse yet, while my experience includes many responsible, customer-oriented union officials and employees, separately represented departments would inevitably lead to at least some degree of "not my job" responses to customer requests. Obviously, such customer relations would be detrimental to business, which in turn would be detrimental to all employees of the business.

Many RILA members run their own distribution centers and are quite concerned that having small groups of warehouse workers organized would prevent them from moving product in and out efficiently. They use the term "just in time

product" to describe the fast pace and tight delivery windows common across retail operations. The issue is especially crucial around the holidays when retail business surges.

In a distribution center, if receiving is disrupted, product can build up on the dock before being stored in the racks. This is known as being "in default," and the effect is to back up inbound trucks, which miss their scheduled drop-offs times, triggering a succession of back-ups in the supply chain.

In stores, shelves are generally replenished overnight. When deliveries to the store are late, or when store personnel are unable to get product on the shelves in time, the impact goes straight to the customer, who may be greeted by pallets on the floor or products missing from the shelves. And I'm sure that although we have all seen Halloween decorations going up in stores, most of us probably haven't thought about what has to be done Halloween night so that customers walk into a transformed store the next day.

On both the distribution and retail sides, the answer to seamlessly keeping product on the shelves is meeting schedules and, in times of heavy volume or late deliveries, the ability to have employees pitch in on whatever needs to be done, including drawing across departments and shifting schedules. Micro unions would be an impediment to responding to changing needs, an impediment that would be felt most during the holidays.

With multiple bargaining units and multiple unions, contract negotiations themselves carry a significantly higher risk of a strike disrupting operations and hurting customers. With multiple unions and bargaining units in the same facility, it is possible to reach agreement with all but one bargaining unit, only to have the last group go on strike and shut down the entire operation.

Representation by different unions in the same setting can also have adverse effects on employee morale and job satisfaction. Two similar groups represented by different unions might not only end up with different pay scales, they would quite likely have different health and retirement plans. A union representing back room workers might have a high-end health plan and put less emphasis on retirement. A union representing greeters or cashiers might have an opposite approach. Further, contracts negotiated in different economic climates may be more or less generous than contracts negotiated at different times. The result can be employees unhappy with some aspect of their benefits who feel slighted

and resentful. The team atmosphere that most employers foster and most employees appreciate would suffer, and customers notice unhappy employees.

Finally, at a time of universal discussion about the need to grow our economy, we look for expansion by our successful businesses, and opportunities to help ones that are struggling. *Specialty Healthcare* is a clear disincentive to both. At a minimum, healthy companies will wait to see what effects develop in their existing operations before investing in expansion—given the limited avenues of appeal for the *Specialty Healthcare* ruling this could take years.[8] Struggling companies will not fare well with small groups of employees being organized, making them less likely to succeed and less attractive prospects for takeover. The end result will be fewer jobs.

- Proposed Election Rule Changes

In addition to addressing the problems created by *Specialty Healthcare*, the Workforce Democracy and Fairness Act would prevent the NLRB from drastically changing union election rules by regulation in ways that would shift the Board away from its historic position of neutrality. The June 22 Notice of Proposed Rulemaking would bring a vast number of changes to an election system that not only has worked well for decades, but already results in union wins in nearly seventy percent of elections.[9]

In the interest of brevity and my intention to focus on practical matters, as well as the fact that others are here to discuss the proposed rulemaking in more detail, I will limit my comments to the effects on employees, and to the considerable burdens placed on employers by the proposed changes to what they would be required to accomplish in just the first week after the filing of a representation petition and the unnecessary increase in litigation this change will bring.

Under current practice, when a union files a petition, the Board serves it on an employer, along with a questionnaire about the employer's commerce information (relevant to the Board's jurisdiction), a request for a list of names and classifications for the employees sought to be represented, a reference to a

[8] As a representation case rather than an unfair labor practice case, *Specialty Healthcare* is not subject to direct judicial review. Only "final orders" of the Board may be appealed directly, and the courts long ago determined that decisions in representation cases are not considered final orders. 29 U.S.C. § 159(f); *see American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940).* To appeal, the employer must refuse to bargain, go through unfair labor practice proceedings in which the employer can challenge the findings in the representation process. If the employer loses before the Board, the resulting decision is a final order and may be appealed in court. 29 U.S.C. § 159(f).

[9] Unions won 67.6% of elections in calendar year 2010. "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 May 3, 2011.

hearing which may not have an actual scheduled date, and a request for the employer to comment on the appropriateness of the proposed unit.

As even the Board's majority as acknowledged in the Notice of Proposed Rulemaking,[10] the vast majority of representation cases proceed to election under some form of agreement rather than after a hearing. This process is helped by the function of Board Agents, who are charged with the task of determining whether there is a question concerning representation, and if there is a hearing, developing a complete record using a fact-finding, non-adversarial process.[11] In my experience, Board Agents are not only expert in this process, but efficient, thorough, and of great value in helping the parties to a representation case understand the issues and reach agreement if possible rather than proceeding to hearing. While Board Agents are not advocates for employers and therefore no substitute for counsel, the Board's proposed rule changes would remove them from the process and result in far fewer elections by agreement.

Despite the fact that this stage of the process lacks hard-and-fast time limits and is left in large part to the discretion of the Board's Regional Directors, on average elections take place in barely over thirty days from the filing of a petition.[12] This time frame affords employers not only the time to comply with the Board's election procedures, it allows a reasonable period of time for communication with employees. As an election approaches, employees often have questions for the employer about everything from current benefits to what happens on election day.

The law specifically protects an employer's right to engage in non-threatening, non-coercive discussion with employees about bargaining issues.[13] The Supreme Court has acknowledged the desirable Congressional policy of "favoring uninhibited, robust, and wide-open debate" on matters relating to unionization, so long as that does not include unlawful speech or conduct.[14]

The Board's proposed rule changes would require elections in as little as ten days,[15] during which, as explained below, the employer would face a monumental task in trying to provide a greatly increased volume of information to

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[10] Representation—Case Procedures, 76 FR 36,812 (June 22, 2011).
[11] *See Mariah, Inc.* 322 NLRB 586 n.1 (1996).
[12] 76 FR at 36,831.
[13] Section 8(c) of the National Labor Relations Act provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 USC §158 (c).
[14] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).
[15] 76 FR at 36,831.

the Board, at the risk of permanent forfeiture of its right to challenge the proposed bargaining unit. With such a short time table, employers will have difficulty getting adequate legal advice, especially about how to discuss the issues with employees.

The result for employees would be two-fold: Far less ability to learn about the issues and hear the employer's perspective; and a higher likelihood that a well-meaning but unprepared employer would inadvertently violate employee rights by making improper statements.

As to the process itself, the Board's proposed rule changes would do two things that are momentous, one more obvious than the other. First and most obviously, a hearing would be scheduled for seven days after the filing of a petition, and employers would be required to provide far more comprehensive, detailed, and crucially important information within that time frame than ever before.

In seven days, an employer would need to file a Statement of Position, in which it must state whether it agrees with the proposed unit. If it does not, the employer would have to provide in extreme detail information about its position on all employees it contends should not be included, and on any it contends should be included, including not only name and classification, but also work location and shift, phone numbers, e-mail addresses and home addresses, for all employees in the unit that it believed appropriate.[16] The Statement of Position must include the employer's position in detail on "type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing."[17] An employer that fails to provide the required information in a timely fashion (i.e., within seven days) would be precluded from contesting unit appropriateness, presenting evidence, or even cross-examining witnesses.[18]

Requiring such comprehensive and detailed information, including essentially all legal and factual challenges to the proposed unit and in favor of an alternate unit, under threat of complete forfeiture of the right to challenge the proposed unit, stands in stark contrast to the current burden an employer faces, which is to provide relatively easily obtainable basic information, without the need to formulate a complete factual and legal strategy within seven days (during which most, especially small, employers will have to find and retain experienced labor counsel).

The less obvious of the proposed changes—but perhaps far more significant for small employers—is the fact that the Board wants to remove its Board Agents from the role of developing a record on the representation issue.

[16] 76 FR at 36,838.
[17] 76 FR at 36,838.
[18] 76 FR at 36,839.

The proposed rules will wreak similar havoc with small and large employers, for reasons that differ in direct proportion to their size.

Small employers in many cases may be able to access factual information about a proposed bargaining unit better than larger firms, but they will have no in-house experts to help them evaluate the facts in light of legal issues, and almost certainly no relationship with an outside labor specialist who might have some hope of figuring out the legal and factual issues and helping to prepare the required Statement of Position within seven days. With Board Agents no longer developing a record, up against professional union organizers, and virtually on their own, small employers will not stand a chance of complying with the Board's requirements, let alone communicating effectively and lawfully with a group of employees about to make perhaps the most important decision of their working lives, with little or no input from their employers, and most likely only a vague understanding of who would be in their own bargaining unit.

Large employers will face a different array of intractable challenges. They will have the advantage of either in-house labor staff, or relationships with outside labor experts, or both. But while their size and resources will help in guidance, they will hinder fact-finding. Labor experts in a large corporate environment will generally be found in a central headquarters. Often they will oversee matters in many subsidiaries and affiliates. Faced with a petition seeking to organize a group of employees, their first task will be to examine the correct employing entity, then determine the organizational structure and find the right management officials with first-hand knowledge about the proposed unit, and then consider whether there are other employees who should be included in the unit. With more capability but vastly more complicated facts, large employers would be hard pressed to meet the proposed filing deadline without missing factual and legal issues. With greater resources than small employers, and given the significant burdens imposed by the Board's changes, they would also be quite likely to litigate more representation cases.

Perhaps the most striking aspect of the Board's draconian proposal to preclude employers from raising any issue not included in the Statement of Position would be its effect on the employees themselves. It is easy to lose sight of the fact that the crucial phrase "community of interest" relates to the interests of the employees. It is their livelihoods that are at stake. With today's non-adversarial fact determination, the process moves forward toward either an agreement or a hearing based on the facts bearing on unit appropriateness. The Board's proposal shows a lack of concern for accurate facts, and intent to let arbitrary procedural issues drive outcomes. This would do a disservice to the employees whose rights the Board is charged with guarding.

- Overall Effects.

In order for our economy to function, recover, and provide more jobs, retailers need to sell, builders need to build, and manufacturers need to manufacture. The NLRB's recent actions and proposed rulemaking will have them dealing with multiple small-group organizing campaigns, litigation, and fragmented workplaces with greatly reduced flexibility. At a time when President Obama has stated that his administration is "reviewing government regulations so that we can fix any rules in place that are an unnecessary burden on businesses,"[19] the Board is doing the exact opposite. The Workforce Democracy and Fairness Act will bring reason back to the representation process, put the NLRB back on the course that the President has laid out, and let employers get back to business. More importantly, it will remove the most glaring of the Board's recent decisional and regulatory threats to economic progress, and bring back a climate where business leaders can focus on growing the economy and creating jobs.

- Conclusion.

I have only scratched the surface of the issues raised by the Board's recent decisions and proposed rulemaking. Hopefully, though, I have explained some of the more significant practical concerns with the Board's recent actions, particularly as they relate to retailers. Thank you again for inviting me to testify. I would be happy to answer any questions from Members of the Committee related to my testimony.

[19] June 29, 2011 press conference.