VI. Response to the Dissent

In August 2013, for the first time in over 10 years, a full complement of five confirmed members of the National Labor Relations Board was sworn in to office. Soon afterward, the Board took up the long-delayed project of examining and revising its procedural rules for representation cases. With the issuance of this final rule, the project has been completed. At every stage, from establishing the framework for review of existing procedures, to structuring the public comment periods and the full-Board public hearing, to deliberations and voting on specific provisions and issues, to the exchange of drafts of the various parts of the final rule, the Board's work has been marked by the full and earnest engagement of each of the Board's members, and the frank and open exchange of ideas among all of the members. Combined with the extraordinary outpouring of detailed and insightful commentary from the public, during both the most recent comment period and the 2011 period, in written comments and at the full-Board public hearings, the Board members' painstaking efforts have resulted in a remarkably thorough and thoughtful consideration of the proposed amendments. The care with which the issues have been considered is evident throughout the final rule, from the preamble, to the dissent, to the regulatory text itself.

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effect that the regional director's rulings on election objections and challenged ballots are final and binding unless the Board grants a party special permission to appeal from the regional director's rulings. The 2011 final rule provided in § 101.30(c) that in cases arising under Subpart E of Part 101, post-hearing briefs could be filed only upon special permission of the hearing officer. 76 FR 80182. However, as discussed below in connection with § 102.66, the Board has decided that the regional director, not the hearing officer, should be the one to decide whether parties may file posthearing briefs. Accordingly, the final rule amends § 101.30(c) to so provide.

We wish that the Board could have been unanimous as to every amendment contained in the final rule. Perhaps it was inevitable, given the broad range of differing experiences and viewpoints represented on the Board that a full consensus as to every issue would not be reached. However, as to many of the features of the rule, listed below, there is no substantive disagreement among the Board members. Even more importantly, the deliberations, discussions and exchanges of ideas among Board members have proved the value of having a diversity of perspectives and backgrounds on the Board. The final rule differs from the proposed rule in many ways, both large and small, and in virtually every key aspect of the rule. Most of these departures from the original proposal, which are summarized below, were prompted by criticisms and concerns raised by our dissenting colleagues, as well as the public comments. The rule has been greatly improved as a result.

Before we address the specific differences that remain among the Board members, we offer a general observation: The most significant remaining differences among the Board members stem from a difference in approach. The approach of the majority, as explained in the preamble and below, has been to address discrete problems with targeted solutions, while maintaining the essential elements of the existing process. These solutions variously advance the goals of efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology, totally apart from, or in addition to, fulfilling the Act's mandate of expeditious resolution of questions of representation. Much of the dissent, by contrast, focuses single-mindedly on one issue: the timeline from petition to election. The possible effect of each amendment on this timeline is the main concern of the dissent, to the virtual exclusion of the problem sought

to be addressed. Indeed, the dissent proposes the creation of a mandatory timeline for the scheduling of elections. That is something that, over the nearly 80 years of the Act's existence, both Congress and the Board have declined to do. We decline to do so as well. In just the past several years, the Board has conducted elections in units smaller than 5 employees and units of nearly 50,000 employees, in a vast multitude of different industries and geographic locations. To us, the imposition of a one-size-fits-all timeline on our elections makes no sense. Instead, we think that the regional directors should continue to hold elections as soon as practicable in the circumstances of each case. Where there is no need to wait, the election should proceed; where there is a need to wait, the election should not proceed.

This view, that elections should be scheduled for the "earliest date practicable,"[507] reflects the settled view of the Board over the course of its history. The current Casehandling Manual states (at 11302.1) that "election[s] should be held as early as is practical," and the same statement is found in similar manuals dating back at least to the 1970s. And while the Act does not include that language, its very structure and relevant provisions demonstrate consistent and repeated support for that goal. Its terse and nontechnical description of procedures,[508] its broad delegation of discretion regarding the "appropriate hearing,"[509] its prohibition of any court interference with or direct court review of election procedures,[510] its purpose in authorizing the delegation of decision-

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[507] Section 102.67(b).

[508] See Section 9(c) of the Act (29 U.S.C. 159(c)).

[509] See *Id.*; *Inland Empire Council v. Millis*, 325 U.S. 697, 706-710 (1945).

[510] See Section 9(d) of the Act (29 U.S.C. 159(d)); *Boire v. Greyhound Corp.*, 376 U.S.

making authority to regional directors,[511] and its specific and unique exemption from APA adjudication procedures[512] all manifest a consistent and powerful concern with the expeditious resolution of questions concerning representation, as has been recognized in Supreme Court opinions and in the relevant legislative history.[513]

473, 476-480 (1964).

[511] See Section 3(b) of the Act (29 U.S.C. 153(b)); *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 138, 141-142 (1971).

[512] See Section 5(6) of the APA (5 U.S.C. 554(a)(6)); S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945); Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

[513] Our colleagues note, as they did in their dissent to the NPRM (79 FR at 7341 n.92) that other Board doctrines impose lengthy delays before the Board permits employees to vote on questions of representation, and they contend that the Board is irrationally reformulating its representation case processing procedures for greater expedition in the initial election context only. However, in the circumstances identified by our colleagues, employees have already had at least one opportunity to choose whether they wish to be represented, and the delay in affording them another opportunity advances the interest in industrial peace and stability. See *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011) (successor bar doctrine "clearly promotes collective bargaining" and preserves "stability"); *Lamons Gasket Co.*, 357 NLRB No. 72 (2011) voluntary recognition bar "advance[s] the statutory purposes of preventing 'industrial strife or unrest' and 'encouraging the practice and procedure of collective bargaining'"); *Brooks v. NLRB*, 348 U.S. 96, 100-101 n.8 (1954) (Section 9(c)(3) provides that after a valid election has been conducted, the Board may not hold a second election in the same unit for 1 year "in order to impress upon employees the solemnity of their choice . . . ."); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786-87 (1996) ("need for repose" and "industrial peace" underly the presumption that a union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement of 3 years or less); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987) ("develop[ing] stable bargaining relationships" will "further industrial peace," considerations which underlie presumptions of majority support "particularly * * * in the successorship situation"); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 227 (D.C. Cir. 1996) (contract-bar doctrine designed "to stabilize existing employer-union relationships"). By contrast, in an initial organizing situation the interest of industrial peace is furthered by expedition rather than repose, and thus the Board's approach is rational and accords with statutory policy. Certainly, there is no support for our colleagues' implicit suggestion that the waiting periods were designed to afford employers an opportunity to campaign against union representation, and that the Board should therefore impose a waiting period in the initial

A. Building on a Sound Foundation

The final rule does not change the essentials of the representation case process. As before, a petition starts the process; it must be supported by a sufficient showing of interest. Upon service of the petition by the regional office, employers are asked to post a notice of employee rights and to provide information in response to the petition. In the event the parties do not enter into an election agreement, there is a pre-election hearing. The hearing enables the regional director to determine whether there is a question of representation and, if so, determine the appropriate voting unit. The parties may seek Board review of the regional director's decision. Prior to the election, the employer provides the voters' contact information to the other parties and posts a notice of the election. The notice permits employees to know the unit in which the election will be conducted and when, where, and how they may vote. There is a secret-ballot election. There is a tally. Any determinative challenges or objections are litigated and resolved. The results are certified and Board review may be sought.

Contrary to our dissenting colleagues, the final rule does not disturb these fundamental elements. Rather, the final rule is a collection of discrete, targeted changes to the technical details. Each of these changes serves a distinct set of purposes, including minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation, eliminating unnecessary and duplicative litigation, simplifying representation case procedures and rendering them more transparent and uniform across regions, reducing the cost of such proceedings to the public and the agency, and

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election context as well.

modernizing the Board's processes, with a particular emphasis on the effective use of new technology. The Board has carefully examined and addressed a number of needed changes in a single rulemaking process in an effort to advance these various goals while preserving the essential steps of the representation case process.

B. Protecting Free Speech and Debate

The final rule does not change any rules regarding speech. And just as existing procedures have never been criticized for limiting speech, we do not think this final rule will create any new free speech issues. Yet the dissent argues that speech, specifically employer speech, will be limited because the final rule will not give the employer enough time to mount an election campaign. But whenever a date for an election is fixed, a limit is necessarily placed on campaign speech. Bearing this fact in mind, the relevant question is whether the procedures will provide a meaningful opportunity for employer, employee and union speech. The preamble includes a far-ranging, thoughtful, and careful consideration of this question, and concludes that the rule provides a meaningful opportunity for campaign speech before the election. Advances in communications technology have made the dissemination of information not only faster, but also more effective and efficient. Also, the scope of the campaigns is often limited, as elections frequently involve small bargaining units of no more than a couple dozen employees. There are also pre-petition opportunities to speak, which the final rule does not affect at all; the parties often know of the campaign in advance.

Regarding employer speech in particular: employers have near-complete and continuous access to employees to engage in various forms of communications, including electronic, print, and in-person—in large and small groups and individually—and may

require attention to such communications as a condition of employment.[514] Finally, the regional director will retain discretion to consider these matters in selecting an election date.

We agree with the dissent that these opportunities for free speech and debate "are part and parcel of *every* employment relationship." So much the better. Such structural opportunities for free speech and debate by employees and their employer—which are unique to the workplace environment—are especially persuasive evidence in support of our view that the final rule will not have the effect of creating "undue restrictions on protected speech" in Board elections.[515]

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[514] The Board considered similar factors when it established the *Excelsior* rule, which requires that the employer provide the names and addresses of voters to the petitioning union at least 10 days prior to the election. 156 NLRB 1236, 1239-41 (1966); see *Mod Interiors*, 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. The Board considered this an adequate time period for previously unreachable voters to be exposed to the nonemployer party arguments concerning representation. That analysis remains relevant in considering employers' opportunity to campaign.

The dissent is also mistaken in its claim that the rule does not consider employee opportunities to speak. The dissent overlooks the final rule's discussion of employee speech and debate. In any event, to the extent the preamble focuses on employer speech, such discussion is for the purpose of responding to relevant comments.

[515] The dissent cites our discussion of whether there is a "meaningful opportunity for speech" to argue that our approach is tantamount to "the government simply determin[ing that more] speech is not necessary," which the dissent finds "the most objectionable aspect of the Rule as it relates to protected speech." The dissent's argument proves too much. The selection of an election date necessarily imposes a limit on campaign speech. The dissent's own time targets would cap speech at 60 days, and in many cases would limit it to as few as 30 days. Some comments argue that this is inadequate time for speech. In response, the dissent would be forced to consider whether more than 30 to 60 days are needed for pre-election speech—the very analysis which the dissent calls "most objectionable." Indeed, any election date selected, under any set of rules, would suffer from the same supposed problems identified by the dissent.

Finally, the dissent claims that the rule is ultimately based on an "'anti-distortion' theory"—i.e., that it will disadvantage anti-union speech. The dissent notes that some comments expressed a desire to silence employers, and attempt to paint the final rule with the same brush. We do not see why it should matter that someone, somewhere has expressed inappropriate or irrelevant reasons for wanting the Board to issue a sound rule. We do not impute to the dissent the motives or reasoning of all those commenters who opposed the NPRM, and it is equally fallacious to impute the motives or reasoning of other commenters to us.

In the end, the dissent acknowledges—as it must—that the final rule expressly disclaims any such purpose. The final rule consistently and repeatedly recognizes the employer's valid right to speak and the statutory policy in favor of free debate. The final rule does not rest on any judgment or evaluation for or against any party's speech. Like the *Excelsior* rule, this rule "is not intended to* * *'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." *Mod Interiors, Inc.*, 324 NLRB 164 (1997). The Board is not trying to limit speech.

To the contrary, the final rule includes affirmative provisions to expand and encourage discourse in advance of the election. As an initial matter, it requires that an official Notice of Petition for Election be posted at the workplace so that all employees are timely notified of the initiation of the election process and advised of its procedures and their rights. In the past, posting such a notice was recommended, but not required. As a result, not all employees were equally advised about the filing of the petition and its

meaning, and there was no ready access to NLRB-provided information about their rights. The Notice of Election has also been revised to provide employees more information about the election process prior to voting. These efforts are designed to facilitate more, not less, information and debate by and among employees, as well as the parties to the proceeding.

C. The Rule Follows the Same "Hearing First, Election Thereafter" Process as Before

The pre-election hearing remains an important part of the Board's representation procedures under the final rule. The dissent's criticism of the changes to the pre-election hearing depend largely on misstatement or misunderstanding of both the prior rules and the new rules.

1. The Hearing Date

Prior caselaw imposed a minimum of 5 working days from notice of the hearing. *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002). The final rule sets a hearing date of 8 days from notice of the hearing.[516] The dissent concedes, as it must, that hearings are currently being scheduled to open in 7 to 12 days.[517] And contrary to the dissent, the final

[516] The dissenters claim that the new statement-of-position and notice requirements are so burdensome that additional time must be given in every case. As noted below, however, the form requires identifying matters that parties generally would have had to review and consider in preparing for a hearing or an election agreement under the current rules. The added burden is merely one of transcription and disclosure. The requirement to post the Notice of Petition for Election does not impose a substantial burden on employers either. Indeed, the regional director will supply the employer with the notice to be posted and with explicit instructions on how to post it.

[517] In practice, in 2013, regional directors scheduled the pre-election hearing to open in 7 to 10 days in 76% of cases. In the small minority of cases that actually went to hearing, short extensions were often granted. Still, 25% opened in 7 to 10 days, and 71% of cases that went to a hearing opened within 14 days. Only 39 total cases opened the hearing

rule gives regional directors flexibility to depart from the normal hearing time frame in appropriate cases. Indeed, the final rule provides that a regional director should, on the director's own initiative, schedule the pre-election hearing to open in more than 8 days when the petition raises unusually complex issues. The final rule also permits the director to grant postponements of up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Nothing in the final rule deprives regional directors of the discretion they currently exercise to postpone hearings when they conclude that it is highly probable that the parties will be able to enter into an election agreement.

2. The Statement of Position

Our colleagues object to the final rule's requiring nonpetitioning parties to complete written Statements of Position, but the essential new requirement is to write the position down.

The course of the hearing used to be guided by a written petition, an oral statement of other parties' positions at the hearing, and the petitioner's oral response. It will now be guided by a written petition, written statements of the other parties' positions that are filed and served the day before the hearing, and the petitioner's oral response at the hearing. Both the written statements of position and the oral response may be amended for good cause.

The dissent concedes that the information solicited by the form "routinely" has been requested from employers by regional personnel under the Board's current practice.

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after the 15th day.

The form largely asks parties to take positions on matters that must be addressed by them, one way or another, under both the old rules and the new. The only new burden is to commit the positions to paper and furnish it to the regional director and the parties before the hearing. Nonetheless, the dissent claims that (a) there is no rational basis for requiring nonpetitioning parties to complete a Statement of Position or face being precluded from litigating certain matters, and (b) the requirement imposes one-sided burdens on employers.

We find no merit to our colleagues' objections. The form allows both the Board and all the parties to understand what issues are in dispute and which employees are impacted by these issues, thus facilitating election agreements and making hearings more focused. Preclusion assures that the form is uniformly completed, and done so in good faith.[518] By precluding the parties from raising new issues later without good cause, the rule merely requires the parties to take the matter as seriously as they would an election agreement, which also precludes the raising of new issues afterward. These are plainly rational considerations. And the final rule provides for changes to the Statement of Position upon good cause shown.

As to the latter point, our colleagues are wrong in contending that the final rule's statement-of-position provisions impose one-sided burdens on employers. The representation process in an RC case is initiated by a written petition for election, filed by

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[518] Although regions routinely ask parties to voluntarily provide this information before the hearing, parties sometimes do not provide the information, let alone permit the regions to share it with the petitioners. Preclusion provides an incentive for parties to complete the form and serve it on the parties, and assures good faith in completing the form.

employees or a labor organization on their behalf. The petition requires the filer to state a position on the appropriate unit, identifying both inclusions and exclusions, and other relevant matters, including recognition and contract bar, election details, possible intervenors, the number of employees, the locations of the facilities involved, and the identities of the petition filer and the employer. All of this information is provided before the employer is required to respond in its Statement of Position. The statement-of-position form seeks essentially the same information from the employer's point of view.

Where the statement-of-position form seeks different or additional information, it is generally because the employer has exclusive access to it. For example, the questions relating to jurisdiction concern the *employer's* dealings in interstate commerce. The names and job titles of an employer's own employees are typically known only by the employer, and payroll details, including the length of the payroll period and the most recent payroll period ending date, are those established by the employer.[519]

Our colleagues also object that the petition is not constrained by the preclusion and amendment provisions that apply to the statement of position. The final rule makes no change to the well-developed caselaw governing amendments to a petition, because no

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[519] Labor organizations must complete Statements of Position in RM and RD cases when an employer or individual decertification petitioner files a petition. The Statements of Position to be completed by labor organizations in RM and RD cases are similar to the Statements of Position that employers must complete in RC cases.

Our colleagues admit that the rule is "facially neutral," but nonetheless insist that because there are more RC petitions filed than RM or RD petitions, the requirement will "usually" fall on employers. Notwithstanding the number of petitions of each type filed each year, which is entirely beyond the Board's control, the important point is that the final rule treats nonpetitioning employers the same as nonpetitioning labor organizations.

such change is necessary. Preclusion regarding the statement of position is justified by the rulemaking record and the Board's experience demonstrating that non-petitioning parties sometimes do not share the information solicited by the statement of position form prior to the hearing, or they take shifting positions on the issues at the hearing. Such conduct impedes efforts to reach election agreements or hold orderly hearings. No such problems have been identified with petitions, and so no such change is needed. Moreover, as discussed above in connection with §102.63, a party will typically have good cause to timely amend its Statement of Position to raise an issue that is presented by virtue of a petitioner amending its petition.

Second, the rules provide that if a petitioner does not respond to a position taken in the statement of position—in most cases the day after the statement of position is filed—the petitioner generally may not present evidence regarding that issue. This limitation is directly parallel to preclusion by the statement of position. See amended §102.66(d). Similarly, just as a nonpetitioning party must establish good cause if it wishes to amend its Statement of Position, so too must a petitioner establish good cause if it wishes to amend its response to the nonpetitioning party's Statement of Position. See amended §102.66(b).[520]

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[520] Our colleagues complain, however, that the petitioner is merely required to respond orally at the hearing to the positions taken the day before the hearing by the nonpetitioning party in its written position statement. But there is no unequal treatment here: the nonpetitioning parties' pre-hearing, written Statement of Position is a response to the positions taken in writing 1 week earlier by the petitioner in its petition. And just as petitioners may respond orally on the record to positions taken by the nonpetitioning parties, so too can the nonpetitioning parties orally move on the record to amend their Statements of Position.

It makes more sense to apply preclusion after a party has learned the position of the other party. As noted, non-petitioners learn the petitioner's positions on the relevant issues from the petition, and so preclusion attaches to the Statement of Position in response. Similarly, the petitioner first learns non-petitioner's position from the Statement itself, and so preclusion attaches in replying to the Statement.[521]

3. Issues *Decided* Before the Election

If the parties do not enter into an election agreement and a hearing is conducted, the regional director decides the appropriate unit, but has discretion to defer deciding discrete voter eligibility and inclusion questions. This is unchanged from prior rules, except that the rules now provide more guidance for making deferral decisions.

The dissent acknowledges that the Board has never required that all individual voter eligibility disputes be resolved before the election and that, under current practice, stipulated elections routinely defer up to 10% of the unit to the challenge process. The dissent nevertheless complains that the Board is changing the former 10% standard to 20%, and that this expansion of the practice is a bad idea. The dissent is correct that non-binding guidance issued by the NLRB General Counsel (but not contained in a Board rule) articulated a 10% standard. But Board caselaw allows eligibility and inclusion issues affecting more than 10% of the unit to be deferred. [522] And contrary to the

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[521] We also disagree with our colleagues' complaint that employers will not understand the issues to be addressed by the Statement of Position. The statement-of-position form itself will help guide parties' prehearing preparation because it identifies relevant issues that they may wish to raise. Should parties have questions, they may contact the regional office for assistance.

[522] This caselaw is discussed in the preamble section on 102.66.

assertions of our dissenting colleagues, the 20% figure is not in the final rule; the Board expressly decided not to adopt the bright-line 20% rule that was proposed in the NPRM. Rather, regional directors have discretion to defer (or not) a different percentage, based on their best judgment as to what would be most administratively efficient.[523]

The dissent engages in a lengthy discussion of legislative history about the pre-election hearing. But the conclusion it reaches—that the Act requires a pre-election hearing absent stipulation—is set forth in the plain text of the Act itself. Nothing in the final rule is inconsistent with this history.

In the 1940s, the Supreme Court decided two relevant cases interpreting Section 9. First, in *Inland Empire*, the Court held that the statute allowed for an "appropriate" hearing to come *after* the election. The Court noted that Congress specifically chose that essential word—"appropriate"—in order to give wide latitude to the Board. The Court also noted that the statute did not expressly resolve the question of when the hearing was to take place, and so the Board was free to make that choice for itself.

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[523] As the rule does not implement a mandatory 20% figure, the dissent's criticism of the deferral provision as "arbitrary" is unconvincing. To be sure, as the dissent points out, in the preamble the Board carefully analyzes its statistics and the comments on this point, and concludes in a footnote that 20% may often serve as a sensible benchmark. As shown, deferral of issues affecting such a comparatively small percentage of the electorate will very often avoid unnecessary litigation, a consideration that regional directors can and should take into account in administering cases.

But this is very different from mandating 20% as the rule in every case. The dissent's analysis is predicated on an assumption that 20% of all voters are deferred in every case. In reality the vast majority of cases will involve far fewer such disputes, either because they are resolved by stipulation or because they are never contested at the pre-election hearing.

Second, in *A.J. Tower*, the Court considered a variety of arguments against the Board's practice of litigating and resolving voter eligibility via the election-day challenged-ballot procedure. The Court upheld this procedure. Again, the Court pointed to the wide latitude given to the Board to ensure "that employees' votes may be recorded accurately, efficiently and speedily." *A.J. Tower Co.*, 329 U.S. at 331.

In 1947, Congress decided to revise representation case procedures. Congress could have deleted that essential word—"appropriate"—in order to take discretion away from the Board. It could have required the Board to follow the same APA adjudication processes that all other agencies followed. It could have eliminated the challenged-ballot procedure, and required all voter-eligibility questions to be decided before the election.

It did none of those things. Instead, Congress made one very limited, very specific change to the hearing process: the statute was amended to state that the hearing was to take place before the election.

Congress chose to retain the term "appropriate"—knowing full well the breadth of discretion that the Supreme Court understood this word to convey to the Board. Congress also preserved the Board's APA exemption. Congress did not touch the challenged-ballot procedure, and the statute continued to allow the Board to defer decisions on voter eligibility until after the election. Thus, the statute's essential view of the purpose of the hearing and the latitude given to the Board was unchanged from 1935—except for the particular fact that the hearing must now precede the election.[524]

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[524] At various times, including in 1959, at the time of the Landrum-Griffin amendments to the Act, Congress has considered undoing the 1947 change to allow hearings to come after the election, but to date it has not done so. As such, it is still the intent of the 1935 Congress, as modified by the very limited changes in 1947, which controls the analysis

The final rule is consistent with this history. It involves no qualitative changes regarding the issues to be decided before the election. Under the final rule, just as before, the regional director will determine both the appropriate unit and the payroll period for voter eligibility (or eligibility formula) before conducting the election. In addition, and without change from the current procedure, the regional director provides a written unit description to the parties and to employees before the election. The notice of election, which the employer is required to post 3 days before the election, will advise employees of the appropriate unit and the voter eligibility period – just as occurs under the current procedures. And under the final rule, regional directors may continue to utilize the challenged ballot procedure to address unresolved questions of voter eligibility and inclusion.

4. Issues *Litigated* Before the Election

If it is known in advance that a matter will not be decided in the direction of election, there is no reason to permit evidence to be introduced on the matter. This is the very definition of irrelevant and unnecessary litigation. And yet the former rules required the hearing officer to allow evidence even on voter eligibility issues that the regional director would defer deciding. Under the final rule, by contrast, if a decision on individual eligibility is going to be deferred, the regional director has discretion to direct the hearing officer to decline to take evidence on that question.

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here.

The crux is in the qualification: how can the regional director know in advance whether it would be appropriate to defer resolution of the issue? The answer given in the final rule is a procedural one.

First, the petition and statement of position will allow the regional director to know which issues parties seek to litigate and which potential voters those disputes affect. This will allow an initial assessment of the need to resolve any particular issue when judged in light of the purpose of the pre-election hearing and sound administrative practice. At the hearing, the petitioner and other parties will respond to the issues raised, further illuminating their differences and narrowing the scope of the disputed matters.

Next, the hearing officer may take an on-the-record offer of proof which provides a detailed description of the evidence that would be introduced by the party proffering it. On the basis of these proffers, the regional director will know the quantity and (to some extent) quality of evidence that would be introduced. This will further inform the decision of whether the issue should be litigated or deferred until after the election.

The dissent opines that regional directors will be unable to make reasonable decisions whether to defer voter eligibility disputes without full litigation of each. But under the final rule, if the regional director concludes that is so in a particular instance, evidence can be introduced and the issue can be decided or deferred on the basis of that evidence.

This process is consistent with that routinely used by courts, administrative law judges and hearing officers to make decisions about the order, timing and even permissibility of litigation based on only a description of the issues and evidence.

The dissent argues that such offers of proof have been infrequently utilized and are a poor substitute for oral and written evidence. Yet both the Casehandling Manual and the Hearing Officer's Guide have long encouraged offers of proof as a best practice due to their utility in promoting efficient hearings. The final rule codifies and encourages this best practice because if an offer of proof—where evidence may be characterized in its most advantageous light—cannot establish the underlying evidence's value, then there can be little doubt that party and agency resources would be wasted by taking the evidence at that particular time.[525]

Offers of proof are adequate here—as the everyday experience of trial courts attests. There is no need to clutter the record with irrelevant evidence.[526] It is the dissent's proposed model of mandatory litigation concerning issues that need not and will not be

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[525] It should also be noted that parties are also free to submit affidavits supporting their proffers.

[526] Contrary to the dissent, the rules do not treat offers of proof as "evidence" in decisions "on the merits." Offers of proof are used only to determine whether the evidence they describe is relevant, or whether the benefit of admitting it outweighs the burden.

We also disagree with Member Miscimarra's claim that the final rule conflicts with the Act by allowing off-the-record communications between hearing officers and regional directors in order for hearing officers to report—and regional directors to rule on—offers of proof. As shown in the commentary (and as more fully discussed in connection with §102.66), this aspect of the final rule codifies a best practice that has been in place for decades. The practice does not run afoul of the statute's requirement that hearing officers not make recommendations as to how the regional director should rule. Contrary to Member Miscimarra, we see no similarity between a hearing officer seeking a regional director's ruling on an offer of proof, and the practice—prohibited in 1947—of trial examiners attending executive sessions of the Board to defend the trial examiner's findings against party exceptions. See S. Rep. No. 80-105, at 10.

In any event, parties retain the right to present their arguments directly to the regional director through a request for special permission to appeal. Amended 102.65(c); see *Laurel Assoc. Inc.*, 325 NLRB at 603 & n. 13 (regional director rules on party's request for special permission to appeal a hearing officer's rejection of its offer of proof).

decided that lacks an analogue in other judicial or administrative settings. Neither the Board nor the parties should be saddled with these litigation inefficiencies.

5. Post-hearing Briefing

Our colleagues freely acknowledge that briefs are not necessary in every case. Our colleagues also do not dispute that although adjudication under the APA requires briefing, 5 U.S.C. 557(c), Congress specifically exempted Board representation cases from these provisions because of the "simplicity of the issues, the great number of cases, and the exceptional need for expedition." Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).[527] Furthermore, they do not, and cannot, contest that in several other representation case contexts, including—most notably—post-election hearings on election objections and voter challenges, the Board long ago established that discretionary briefing is the better practice. Discretionary briefing accords with the Supreme Court's decisions permitting administrative agencies the flexibility to choose between oral argument and written briefing. Compare *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976) (written submission without oral hearing), with *Goss v. Lopez*, 419 U.S.

[527] We disagree with the dissent's claim that "some measure of complexity is the norm, not the exception" with respect to representation cases. In the vast majority of cases, the parties resolve all of their issues without resort to a hearing. As for the relatively few cases that do go to hearing, the issues are typically so straightforward that most hearings last less than 1 day. And in those relatively few cases where parties request review of the regional director's decision, the Board usually denies the request in an unpublished decision.

565, 581-82 (1974) (oral hearing without written submission). The final rule allows regional directors to decide whether to allow the filing of post-hearing briefs.

The Board clearly has the authority to make the change in question and has a valid reason to do so. Our colleagues argue for a different choice because, in their view, regional directors' decisions will be better reasoned and representation cases processed more expeditiously if briefing is permitted. This is undoubtedly true in some cases, and undoubtedly false in others; we think regional directors can judge whether briefing would be helpful on a case-by-case basis, and so that is what the rule provides. The Casehandling Manual already instructs hearing officers in pre-election proceedings to "encourage the parties to argue orally on the record rather than to file briefs." Section 11242. Indeed, our colleagues' own reference to the drafting guide demonstrates that briefs are often of so little help that the drafters are instructed to begin before the briefs arrive.[528] The dissent claims that the record does not show that this change will speed the process, but in cases where briefs would be unhelpful that is reason enough to dispense with them.[529] Just as in the post-election context, the rule eliminates the one-size-fits-all approach in favor of flexibility to tailor the briefing to the case.

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[528] We note that the 1997 Report of Best Practices Committee – Representation Cases, prepared by a committee of primarily NLRB regional directors, deemed it a "best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision." It also urged hearing officers to: "ensure that the parties state on the record the issues and their position on each issue at the end of the hearing. Such statements will assist the Region in preparing the decision more quickly." p. 10. We agree with this advice of NLRB regional directors from almost 17 years ago which is only now being codified.

[529] In any event, we think it abundantly clear that the current right to a 7-day briefing period with permissive hearing officer extensions of up to 14 additional days adds some

D. Post-election Board Review

The dissent argues that post-election disputes should be subject to mandatory Board review. Yet Section 3(b) of the Act expressly permits the Board to delegate to its regional directors the power to direct elections and to certify the results, subject to a party's right to request Board review. And in *Magnesium Casting*, the Supreme Court held that the Board may engage in discretionary review of regional directors' decisions. It is rational and appropriate for the Board to continue that practice by making Board review of regional director post-election decisions discretionary.

The Board should not devote more of its resources to processes that—as our colleagues concede—have little discernible effect on case outcomes. Discretionary review is sufficient to allow the parties to bring to the Board's attention those cases which merit review.

The dissent argues that by applying discretionary review to post-election decisions, we are "improperly diminishing the Board's role" in a manner inconsistent with Section 9(b)'s admonition for the Board to determine the appropriate unit in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act[.]" Yet, the Board already exercises only discretionary review of unit appropriateness questions. This is unquestionably consistent with the Act, as the Supreme Court has already held.

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measure of unnecessary delay to case processing. In sufficiently straightforward cases, therefore, a collateral benefit of this change in the rule is that decisions will issue more promptly.

And in this context, there have been no problems of the sort predicted by the dissent: no dearth of opportunities for clarification or dissent, no breakdown in uniformity of law and policy, no development of "regional" precedent, and no increase in test-of-certification cases. The final rule merely applies precisely the same standard to post-election review. The dissent does not explain why its concerns have any greater salience in the post-election context than they have pre-election, where they have proved to be unfounded.

The dissent also argues that the stipulation rate may fall if parties cannot preserve nondiscretionary review of post-election issues under a stipulated election agreement. Their argument supposes that a party enters an agreement it would otherwise not make—thereby waiving the right to contest any and all appropriate unit issues (as well as most voter eligibility issues)—because the party is concerned about the off-chance that outcome-determinative challenges or objections that might arise later would ultimately be resolved against them by the regional director, and that, even though the issue would not be sufficient to merit *discretionary* Board review, it nonetheless would be sufficient to justify *reversing* the regional director's decision if only that party could insist on mandatory Board review. Simply stating the chain of logic here demonstrates its attenuation. In our experience, the possibility that mandatory post-election review will make a difference for a particular party in a particular case is so remote that it would matter little to a party compared to the issues being resolved in the election agreement

itself. For this reason we find it extraordinarily unlikely that election agreements are being signed by parties in order to secure post-election Board review.[530]

Under the final rule, the Board will apply the same discretionary standard to review of regional directors' post-election determinations, whether the election was directed by a regional director or agreed to by the parties. And so, again, the choice between stipulation and litigation remains unrelated to the availability of post-election review, as both lead to the same result.

E. Voter List

We are not far apart from our dissenting colleagues as to the content of the voter list, but we disagree on certain significant details. We all agree that the voter list should be expanded. Our colleagues raise no objection to the inclusion of employee work locations, shifts and job classifications; they agree not to mandate the inclusion of employees' work email and phone numbers; they agree that the agency should not further explore hosting a protected communications portal to facilitate nonemployer party-employee communication; and they would conditionally support employee's personal email address and phone numbers as valuable additions to the voter list. Unfortunately, the condition of their support for adding personal email addresses and phone numbers is to add opt-out procedures, a condition that we cannot agree to.

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[530] Most parties prefer stipulated election agreements to consent agreements for that reason, but that preference has nothing to do with the choice between stipulation and litigation.

The nub of our disagreement over the need for opt-out procedures may be our differing views of the value of employees' receipt of communications from all parties to the election, as balanced against any risk of harm to those employees. Our colleagues fault us for not taking account of "statistically proven probabilities" concerning, presumably, the likelihood of such harm. Yet, our colleagues give no weight to the nearly 50-year absence of evidence of voter lists being misused by the nonemployer parties. Given that the rulemaking record shows not a single instance of voter list misuse dating back to the 1960s, their concerns appear to be entirely speculative.

Against any such risk we must weigh the drawbacks and limits of an opt-out procedure. *Excelsior* held explicitly that even unsolicited communication from nonemployer parties remains an important part of the election process, and this would be severely abrogated by an opt-out procedure. Although our colleagues state that they favor a "wide open debate," they are unwilling to mandate the disclosure of the contact information that would ensure that employees hear from a party other than the employer. A wide open debate cannot take place unless employees are able to hear all parties' views concerning an organizing campaign, including views to which they may not be predisposed at the campaign's inception. The *Excelsior* doctrine has long sought to ensure that a two-sided debate is possible by maximizing the likelihood that all the voters will be exposed to nonemployer-party messages concerning representation. If employees are allowed to opt out of nonemployer communication altogether, or even just from the forms of communication that have become most widely used and commonplace, then this interest is severely undercut. Opening channels of communication allows a more

informed exchange of ideas and permits all employees to knowledgeably evaluate the claims and counter-claims being made by the parties.[531]

In addition, by offering an opt-out possibility to employees, the agency would be implicitly suggesting to employees that they have something to fear from the nonemployer party's possessing their contact information. Moreover, an opt-out would inappropriately inject the agency into the employees' evaluation of the source of campaign speech by implicitly devaluing nonemployer speech. Our colleagues make little attempt to explain why these fundamental inconsistencies between an opt-out policy and

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[531] The dissent argues that the final rule is somehow inconsistent with the Board's recent decision in *Purple Communications,* 361 NLRB No. 126 (2014). In *Purple Communications*, the Board addressed the right of employees under Section 7 of the National Labor Relations Act to effectively communicate with one another at work regarding self-organization and other terms and conditions of employment. The Board held that employers that have chosen to give their employees access to their email systems must ordinarily permit employee use of email for statutorily-protected communications on nonworking time. The dissent quotes a single phrase from the decision, omitting its explanatory context, which follows: "[S]ocial media, texting, and personal email accounts, however commonly they may be used for communications unrelated to the workplace, simply do not serve to facilitate communication among members of a particular workforce [, as employees may have] no practical way to obtain each others' email addresses, social media account information, or other information necessary to reach each other individually or as a discrete group (as distinct from the general public) by social media, texting, or personal email." The differences between the final rule and *Purple Communications* are obvious. The rule addresses campaign communications between the union (or other non-employer parties) and employees, while *Purple Communications* addresses only employee communications among themselves, not necessarily during an election campaign. And it is precisely the problem identified in the quotation from *Purple Communications* that the rule seeks to solve by requiring inclusion of personal email addresses and phone numbers. Indeed, it is the dissent which is inconsistent on this point, suggesting on the one hand that this material is so extremely private an opt-out is necessary, and on the other that this information is so widely available that there is no need to provide it in the first place.

the purposes underlying *Excelsior* should not control the analysis.[532] We think that a free and fair exchange of ideas is much more likely to take place if nonemployer parties have access to modern methods of communication, and are not restricted to door-to-door solicitation and the U.S. mail, as under the *Excelsior* policy dating back to the 1960s.

Our colleagues point to several other concerns discussed in the final rule regarding opt-out procedures generally (delay, increased litigation, and further unavoidable invasions of employee privacy), and assert that those concerns would be irrelevant to their specific opt-out proposal. We disagree. First, our colleagues' proposal can only be said to avoid delay by adhering to the 7-day status quo for production of the voter list—a timeframe that the final rule shows to be unnecessary based on technological developments since the 1960s--and accordingly reduces to 2 business days. Second, their proposal creates the same risks of litigation about employer coercion discussed in the preamble above. Third, and perhaps most notably, the proposal still forces unwilling employees to reveal something about their preferences—undermining the fundamental purpose of the secret ballot in Board elections. Anyone who sees the list—necessarily

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[532] Indeed, the dissent's presumed disagreement with these conclusions is only implicitly addressed through their view that an opt-out requirement would not disrupt the balance struck in *Excelsior* because an opt-out would be unnecessary for employee home addresses—information that is arguably more private, and whose disclosure is potentially more intrusive, than phone numbers or email addresses. In contrast, we are skeptical that an opt-out could rationally be applied to only employee phone and email without also reaching home addresses, and thus clearly disturbing the balance struck in *Excelsior*.

including a petitioning union to whom it may be addressed—will know which employees opted out.[533]

As to the dissent's position that the time allowed for producing the voter list should remain the same 7 days first announced in the 1960s, when parties most often relied on paper records for assembly and U.S. mail for delivery, we think that the final rule merely recognizes that times have changed, and that the typical employer will easily be able to comply with a 2-business-day timeframe for production of the list using electronic records and email delivery. Of course, an employer may begin the task earlier. Indeed the final rule's statement-of-position requirement will provide employers at least 7 days to produce an initial list of employee names and work locations, shifts, and job classifications; contact information may be compiled at this time in anticipation of the second list. We also note that the rule provides an exception to the usual deadline for extraordinary circumstances, which should mitigate the dissent's concern.

F. Blocking Charges

We disagree with the dissent's concluding assessment that the final rule's changes to the blocking charge policy are not valuable. Our colleagues concede that the final rule's requirement of simultaneous offers of proof and prompt witness availability to speed regional directors' investigation of blocking charges' merits are an improvement over the status quo. In this regard, they share the opinion of comments from both labor

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[533] We note our colleagues' agreement that the unsubscribe option that they also advocate—when employed on its own—would do nothing to allay privacy concerns having to do with the disclosure of contact information in the first place. The uncertain benefit attendant to an unsubscribe option cannot counterbalance the costs, not the least of which is an inconsistency with the *Excelsior* doctrine similar to the one from which the opt-out proposal suffers.

organizations and employer associations, as noted in the discussion of § 103.20 above. Our colleagues' real complaint appears to be that the final rule does not go as far as they would like. In our view, our colleagues' suggested changes—even if only for a "3-year trial period"—would abandon key aspects of a longstanding policy which serves a very important function in protecting employee free choice.

The basic blocking-charge policy that we endorse today has been applied by the Board to protect employee free choice from the early days of the Act to the present. See *U.S. Coal & Coke*, 3 NLRB 398 (1937); *Southern Bakeries*, 26-RD-081637 (March 31, 2014). As the Fifth Circuit explained in 1974:

> If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the 'blocking charge' rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Bishop v. NLRB, 502 F.2d 1024, 1029 (1974). We see no reason to forebear codifying a policy applied so consistently and for such a rational purpose. Neither the commenters nor the dissent have identified any change in circumstances that would justify changing the policy, let alone identified any compelling reason to abandon a policy continuously applied since 1937.

The dissenters object that codification would make future changes "more difficult" by requiring new notice-and-comment rulemaking. In our view, if codification means that any future change in the policy would involve notice and comment rulemaking, so much the better. We think it makes good sense, before changing a policy

of this vintage, to fully air the matter in public and establish good reason for the change. We do not believe that obtaining the comments of the public is a difficulty to be avoided.

In criticizing the final rule's refusal to cut back on the blocking charge's application, the dissent accuses us of paying more attention to the delay caused by permitting litigation of individual eligibility or inclusion issues than to the delay caused by the blocking charge policy. If all we were concerned about was reducing delay between the filing of a petition and the holding of an election, the dissent would have a fair point. But to repeat once again, not only is delay *not* our only concern, but it is not even a primary concern for many of the amendments; indeed, for certain changes, it is not a consideration at all. Unfair labor practice charges that warrant blocking an election involve conduct that is inconsistent with a free and fair election: it advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference. There is no inconsistency between the final rule's preservation of that basic policy and the other changes made by the final rule. Both actions are taken consistent with the Act's purposes, seeking an appropriate balance of efficiency, expedition and fairness in resolving questions of representation.[534]

G. Changes from the NPRM

[534] The dissent finds it "paradoxical" that a union filing a blocking charge may affect the timing of an election by filing a request to proceed. The true paradox, in our view, would be the converse: allowing an employer to delay an election over the objections of a union and thereby doubly benefit from its unlawful conduct. In any event, the dissent ignores the fact that an employer, too, may affect the timing of an election through settlement of unfair labor practice allegations.

The final rule embodies numerous and significant modifications to virtually every key aspect of the NPRM, as well as to the limited amendments adopted by the Board in December 2011. These modifications include, for example:

- Notice of Petition for Election: The final rule rejects the NPRM proposal that an employer's failure to "immediately post" an initial notice about the petition would constitute per se objectionable conduct and provides that the Notice of Petition for Election will make clear that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit or whether an election will be conducted.
- Statement of Position: The final rule rejects the NPRM's requirement that if an employer disagrees that the petitioned-for unit is appropriate, it must describe in its position statement the most similar unit that it concedes is appropriate; clarifies that an employer does not have to supply any employee contact information to the regional director (or nonemployer parties) as part of its Statement of Position; requires that parties will always have no less than 7 days notice of the due date for completion of the Statement of Position form; provides that the Statement of Position ordinarily will be due at noon on the business day before the hearing; and establishes standards for granting requests to postpone the due date for the Statement of Position.
- Scheduling the pre-election hearing: Pre-election hearings ordinarily will be set to open 8 days, not 7 days, from service of the notice of hearing by the

Regional Director; standards are established for granting requests to postpone the pre-election hearing.

- Conduct of the pre-election hearing: The final rule rejects the NPRM's mandatory 20% rule, whereby hearing officers generally would have barred litigation of individual eligibility or inclusion issues involving less than 20% of the unit; rejects the proposed summary judgment standard and mandatory offer-of-proof procedure, whereby hearing officers would only receive evidence if the parties' offers of proof raised genuine disputes as to material facts; and clarifies that the regional director, not the hearing officer, will decide in each case the issues to be litigated, whether petitions may be amended, whether parties may intervene, and whether hearings will continue day to day.
- Post-hearing briefs: The final rule rejects the proposal to vest hearing officers with the authority to determine whether parties may file post-hearing briefs, and instead vests that authority with the regional director.
- Decision and direction of election: The final rule rejects the portion of the proposed mandatory 20% rule whereby regional directors generally would have deferred deciding individual eligibility or inclusion issues involving less than 20% of the unit; rejects the proposal that would have permitted regional directors to direct elections without simultaneously providing a statement of reasons; and provides, unlike the NPRM, that the direction of election need not specify the election details if the regional director concludes it is appropriate to consult with the parties yet again regarding those details,

notwithstanding that the parties' positions will have already been solicited at the hearing.

- Review of a direction of election prior to the election: The final rule rejects the proposal to eliminate the pre-election request-for-review procedure, and instead allows parties to choose whether to file their requests for review either before the election or after the election; creates explicit procedures for requesting stays of the election and impoundment and/or segregation of ballots; and rejects the proposal that the Board grant requests for special permission to appeal from regional director rulings only in extraordinary circumstances where it appears that the issue would otherwise evade review.
- Notice of Election: The final rule rejects the proposal to reduce the period for posting the notice of election from 3 working days to 2, and likewise rejects the proposal that the regional director transmit election notices directly to employees, if practicable, such as by work email or phone.
- Voter list: The final rule clarifies that employers are not required to provide the work email addresses or work phone numbers of its employees as part of a voter list to either the nonemployer parties or the regional director; explains that employers have 2 business days, rather than 2 calendar days, to provide the voter list, unless a longer time is specified in the direction of election or is agreed to by all parties; and clarifies restriction language regarding use of the voter list.
- Offers of proof in support of election objections: Unlike the NPRM, the final rule provides that regional directors may extend the time for filing offers of

proof in support of election objections upon request of a party showing good cause.

- Post-election hearing: The final rule provides an additional 1-week period between the tally of ballots and the opening of post-election hearing.

H. Features of the Final Rule as to Which There Is No Substantive Disagreement

- Petition filing: permitting electronic filing of petitions;
- Showing of Interest: requiring the petitioner to simultaneously file its showing of interest with its petition;
- Notice of Petition for Election:
    - requiring the employer to post a more informative notice upon the filing of a petition;
    - triggering the posting requirement by the regional director's service of the notice of hearing;
    - requiring the employer to also electronically distribute the Notice of the Petition for Election if it customarily communicates with its employees electronically;
- Conduct of the pre-election hearing:
    - rejecting the proposed summary judgment standard and mandatory offer-of-proof procedure, whereby hearing officers would only receive evidence if the parties' offers of proof raised genuine disputes as to material facts;

  - making offers-of-proof at the pre-election hearing part of the record in §102.68 (while omitting any reference in §102.68 to the record in post-election proceedings);

- Transfer Procedure: eliminating the transfer procedure;
- Requests for Review:
  - eliminating the requirement that parties file a request for review of a decision and direction of election prior to election or be deemed to have waived the right to contest the decision thereafter;
  - providing that requests for review shall not stay regional director actions unless specifically ordered by the Board;
  - providing a procedure for requesting stays of elections and impoundment and/or segregation of ballots;
- Scheduling of Election: eliminating the 25-day waiting period after issuance of the direction of election in contested cases;
- Decision and Direction of Election: rejecting the proposal to permit regional directors to direct elections without simultaneously providing a statement of reasons;
- Transmittal of Decision and Direction of Election: permitting regional directors to transmit the decision and direction of the election and the election notice together and by email, fax or overnight mail;
- Notice of Election:

  - requiring the employer to electronically distribute the Notice of Election if the employer customarily communicates with employees in the unit electronically;
  - rejecting the proposal to reduce the period to post paper copies of the notice from 3 to 2 working days;
  - rejecting the proposal that regional directors transmit election notices directly to employees if practicable, such as by work email or phone;

- Voter List:
  - requiring the employer to include not just employee names and home addresses, but also employee work locations, shifts, and job classifications on the voter list;
  - requiring the employer to produce the voter list in an electronic format approved by the General Counsel unless the employer certifies it does not possess the capacity to do so;
  - rejecting a proposal for the agency to host sealed-off communication portals;
- Election Objections:
  - requiring parties to simultaneously file with their election objections a supporting offer-of-proof
  - providing that regional directors have discretion to grant more time for the filing of offers of proof upon request of a party showing good cause;

- Post-election Hearings: providing that the post-election hearing open 21 days, not 14 days, from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date;
- Service: permitting the Board to serve papers on parties electronically;
- Streamlining the Rules and Regulations:
    - eliminating subpart C of Part 101; and
    - rejecting the proposal to eliminate subparts D & E of Part 101.

VII. Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III

Members Philip A. Miscimarra and Harry I. Johnson III, dissenting.

We dissent from this Final Rule, and we have great regret that the Board has not chosen one of the available paths that would have permitted an assessment and resolution of these issues with unanimous support among all Board members and broad-based support among practitioners, scholars and advocates for employees, unions and employers. Much of the problem, but certainly not the main problem, involves the immense scope and highly technical nature of the Final Rule.

The Final Rule has become the Mount Everest of regulations: massive in scale and unforgiving in its effect. Very few people will have the endurance to read the Final Rule in its entirety. Recognizing that few will survive the climb, we offer the following selective observations at the outset:

- *Rule's Primary Purpose and Effect: Union Elections As Quickly As Possible*. The Final Rule adopts almost all of what was set forth in the February 2014 Proposed