United States Senate

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

June 30, 2011

Hon. Wilma Liebman
Chairman
National Labor Relations Board
1099 14th St, NW
Washington, DC 20570-1000

Re: Request for delay of public hearing and extension of time to file comments

Dear Chairman Liebman:

We respectfully request that the National Labor Relations Board ("the Board") delay the public hearing scheduled for July 18, 2011 related to the Board's Notice of Proposed Rulemaking ("NPRM") on pre and post-election procedures under the National Labor Relations Act ("NLRA") published in the Federal Register on June 22, 2011. We also request that the Board grant a 90 day extension for the public to file comments in regards to the NPRM. Allowing more time for all stakeholders to prepare public testimony and comments for this proposed rule is essential to ensure an open and transparent rulemaking process.

The current scheduling for the sole public hearing on this rulemaking does not provide sufficient time for stakeholders to determine if they will participate and prepare testimony. The Board announced on Monday, June 27 that interested stakeholders must notify the Board by Friday, July 1 of their intent to speak at the public hearing. This time period is unreasonable and without justification. Interested stakeholders will require more time to become aware of and familiar with the proposed regulation and to prepare for the public hearing. The time-frame you have established will prevent the views of stakeholders who were not aware of this rulemaking before it was announced from being heard.

Notwithstanding the request to delay the public hearing, we also request an extension of time to file comments on the NPRM. Currently, comments are due on Aug. 22. These proposals involve highly complex issues that require stakeholders to spend time analyzing the effect these proposals have. Limiting the time in which stakeholders can submit comments for such a complicated and irregular rulemaking and then providing stakeholders with less than five days to decide whether to participate in the public hearing is simply inappropriate.

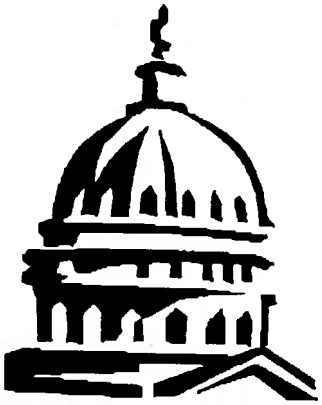
Such a condensed timeline is also unparalleled among similarly significant rulemaking proposals from other federal agencies in recent years. The Board has not justified the need for an expedited comment period. At a June 24 congressional staff briefing, an NLRB attorney stated that a 60-day comment period was appropriate because amending election procedure is a fairly routine practice of the Board. Yet, you have stated publically that the NPRM is "controversial." We believe that, due to the significant legal questions involved and the controversial nature of the proposal, stakeholders should have more than minimal time to decide whether to participate in public hearings and to prepare comments for submission. If you have any questions, please contact Frank Macchiarola, Staff Director for the Senate HELP Committee, at (202) 224-6770.

Sincerely,

Senator Michael B. Enzi
Ranking Member, Committee on Health, Education, Labor and Pensions (HELP)

Senator Orrin G. Hatch
Ranking Member, Committee on Finance

Senator Johnny Isakson
Ranking Member, HELP Subcommittee on Employment and Workplace Safety



U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, & PENSIONS

835 Hart Senate Office Building
Washington, DC 20510

Senator Michael B. Enzi
Ranking Member

Labor Policy Office
Tel. (202) 224-6770
Fax (202) 224-6510

To: Chairman Wilma Liebman

Of: National Labor Relations Board

Date: 06/30/11 Fax Number: (202) 273-4270

From: _____Kyle Hicks

_____Kai Hirabayashi

_____Mandy Gunasekara

Total Pages (including cover): 3

Re:_____

_____

_____

If have a problem receiving this transmission, call (202) 224-6770*

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th Street NW, Suite 11600
Washington, DC 20570

Telephone: 202/273-1067
Fax: 202/273-4270

www.nlrb.gov

July 1, 2011

The Honorable Michael B. Enzi
The Honorable Orrin G. Hatch
The Honorable Johnny Isakson

[Via Facsimile and Regular Mail]

Dear Senators Enzi, Hatch and Isakson:

This will acknowledge receipt of your letter, dated June 30, 2011, to Chairman Liebman relating to the Board's Notice of Proposed Rulemaking on Representation Case Procedures (NPRM), published in the Federal Register on June 22, 2011. A copy of your letter will be included in the rulemaking record and your request will be referred to the Board.

Very truly yours,

Lester A. Heltzer
Executive Secretary

cc: Frank Macchiarola
Republican Staff Director
Senate HELP Committee

********** -COMM. JOURNAL- ********** DATE JUL-01-2011 ***** TIME 18:20 ********

MODE = MEMORY TRANSMISSION START=JUL-01 18:20 END=JUL-01 18:20

FILE NO.=625

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	#	92022246510	002/002	00:00:18

-NLRB -

********** - ***** - 202 273 4270- **********

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE EXECUTIVE SECRETARY

FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Michael B. Enzi
The Honorable Orrin G. Hatch
The Honorable Johnny Isakson

Frank Macchiarola

FROM: LESTER A. HELTZER
Executive Secretary

DATE: JULY 1, 2011

FAX NUMBERS:

(202) 228-0359 (Sen. Enzi)
(202) 224-6331 (Sen. Hatch)
(202) 228-0724 (Sen. Isakson)

(202) 224-6510
Mr. Macchiarola

TOTAL NO. OF PAGES INCLUDING COVER:2

Re: Letter from NLRB Executive Secretary

OPERATOR: RCN
ALL CONFIRMATIONS:BLANK

1099 14TH STREET N.W.
WASHINGTON, D.C. 20570
TELEPHONE (202) 273-1067
FAX (202) 273-4270

WORKFORCE FAIRNESS INSTITUTE

STOP BIG LABOR BAILOUT!

TO: Lester A. Heltzer
FAX #: 202-273-4270
DATE: 7/7/11

FROM: Workforce Fairness Institute
PHONE #: 202-595-2114

Memo:

WORKFORCE FAIRNESS INSTITUTE

STOP BIG LABOR BAILOUT!

July 1, 2011

Dear Mr. Heltzer:

The Workforce Fairness Institute (WFI) is an organization committed to educating voters, employers, employees and citizens about issues affecting the workplace. We represent workers and business owners who are committed to maintaining good working relationships with each other, and are opposed to unnecessary and burdensome government regulation and improper interference in the workplace by outside special interests. We work to educate the public on issues related to workforce fairness, and to build greater public awareness of efforts that interfere with the good employer/employee relationships that most American businesses enjoy. We are not anti-union and support employees' right to make choices on the question of unionization if it is presented to them free from coercion or intimidation.

On June 21, 2011, the National Labor Relations Board issued a notice of proposed rulemaking. The rule changes decades of Board law and procedures governing the Board's election process. It is involved and complex and raises a variety of issues of concern to employees and the labor-management community. The Board invited comments to be submitted 60 days later with replies 14 days after the comments. On July 27, 2011, the Board announced a public meeting to take place on July 18 and 19, and invited interested parties to register to attend by the afternoon of July 1. If the interested party wished to appear as a witness they were to submit with their registration a brief outline of their comments.

With due respect to the Board and its desire to proceed expeditiously, meaningful input and collaboration with those who will be most affected by the proposed rule is simply not possible on such a shortened schedule in the middle of the summer. In order for the Board to develop a full record, particularly from employees of small businesses and their employers all across the country who in all likelihood have not yet heard of the proposed rule, additional time is needed.

As the Board is well aware, the proposed rule was issued without advance notice. The Board's deliberations were not noticed nor was there a public Board meeting. And the Board never solicited input from affected parties before the proposed rule was announced. It seems to us, and those we represent, that this failure to be open and transparent, coupled with a rush for comments and hearing precludes adequate public participation and will result in a process that inadequately informs the Board on a matter of great importance.

We respectfully suggest that the following schedule:

Workforce Fairness Institute | P.O Box 25518 | Alexandria, VA 22313

WORKFORCE FAIRNESS INSTITUTE

STOP BIG LABOR BAILOUT!

1. Extend the time for public comments for ninety days from August 21, 2011, to and including, November 19, 2011.
2. Provide 15 days from November 21, 2011 for the filing of responsive comments.
3. Postpone the public hearing from July 18 and 19, 2011, to a date or dates at least thirty days from the receipt of responsive comments.

It would be of particular benefit to the small business owners we represent if additional hearings were scheduled at locations across the United States convenient to persons and organizations who may wish to testify before the Board with respect to these proposed regulations.

Thank you in advance.

Sincerely,

Fred Wszolek
Workforce Fairness Institute (WFI)

###

Workforce Fairness Institute | P.O Box 25518 | Alexandria, VA 22313

Proskauer Proskauer Rose LLP 1001 Pennsylvania Avenue, NW Suite 400 South Washington, DC 20004-2533

Ronald Meisburg
Member of the Firm
d 202.416.5860
f 202.416.6899
rmeisburg@proskauer.com
www.proskauer.com

July 6, 2011

BY FAX

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

Re: RIN 3142-AA08 (Notice of Proposed Rule Making)
Request to Extend Time for Submission of Comments,
Reschedule Existing Hearing and Schedule Additional Hearings

Dear Mr. Heltzer:

Faxed herewith is a Request to Extend Time for Submission of Comments, Reschedule Existing Hearing and Schedule Additional Hearings, which is filed by their respective counsel on behalf of the parties identified in the Request. Copies of the original will be sent to you by overnight delivery. Thank you for your attention to this matter.

Very truly yours,

Ronald Meisburg

Enclosure

cc: Peter N. Kirsanow, Esq.
Charles I. Cohen, Esq.
Philip A. Miscimarra, Esq.
Harold P. Coxson, Esq.
Harold R. Weinrich, Esq.
Andrew M. Kramer, Esq.
G. Roger King, Esq.
Maurice Baskin, Esq.

NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	**RIN 3142-AA08**
	)	**(76 Fed. Reg. 15037**
NOTICE OF PROPOSED RULE MAKING	)	**and**
	)	**76 Fed. Reg. 37291)**
	)	
Representation Case Procedures	)	

REQUEST TO EXTEND TIME FOR SUBMISSION OF COMMENTS, RESCHEDULE EXISTING HEARING AND SCHEDULE ADDITIONAL HEARINGS

The parties identified below hereby request that the Board to enter an order:

1. Extending the time within which public comments will be received by the Board for ninety days, from August 21, 2011, to and including November 19, 2011, with the understanding that because the ninety-day extension period ends on a Saturday, the comment deadline will be Monday, November 21, 2011.
2. Providing 14 days from November 21, 2011, to and including December 5, 2011, for the filing of responsive comments.
3. Postponing the public hearing currently scheduled in Washington, DC, for July 18 and 19, 2011, to a date or dates at least thirty days after December 5, 2011.
4. Scheduling, on dates at least thirty days after December 5, 2011, at least four additional hearings at locations around the United States convenient to persons and organizations who may wish to testify before the Board with respect to the proposed regulations.

As grounds for granting this request, the parties state that:

(1) the significant and substantial changes that may be brought about by the proposed regulations, some of which may not be readily apparent without further consideration and study, do not allow for the filing of complete and comprehensive comments within the time currently allowed;

(2) the problem of the short current deadline is compounded by the fact that the proposed regulations must be studied and comments on them developed, drafted, revised and filed over the months of July and August, when many of the persons necessary to carefully evaluate the proposed regulations, such as managers, attorneys and other advisers, may be effectively unavailable because of travel and family plans and commitments;

(3) typically in rulemaking the public hearings are utilized as an adjunct to written comments after the written comments have been filed, with the written comments serving as the basis of a give and take between the Board and members of the public, and furthering the goal of having a full explication of the proposed rules and suggested alternatives;

(4) the utility of hearings is enhanced when they are also held outside the confines of Washington, DC, at convenient locations around the United States, which allows the opportunity for a greater variety and cross section of affected parties to speak directly to the Board and allows the Board to ask questions of the speakers;

(5) both the substance and appearance of good government – and thus, the efficacy of the proposed rules – will be enhanced if the Board does not – and does not appear to – "rush to judgment", but instead allows the reasonable time and occasions necessary all stakeholders – employers, unions, employees, and their representatives,

attorneys and advisers – to fully and fairly participate in a process which may potentially have great impact on their work, life and livelihood;

(6) the requested process is similar to that which was followed by the Board in the promulgation of the health care rules nearly thirty years ago, and the success of those rules is testament to the wisdom of utilizing the same or similar process with respect to the proposed rules under consideration in this proceeding.

The undersigned counsel represents that he has been authorized to present this request on behalf of each of the counsel who represent their respective clients named below. Each party has requested an opportunity to appear and make a presentation at the July 18-19 hearing, and the request for postponement of that hearing is made without prejudice to our respective requests to appear.

In view of the foregoing, the parties ask that this request be granted.

Respectfully submitted,

Ronald Meisburg
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, N.W.
Suite 400 South
Washington, DC 20004
(202) 416-5860
rmeisburg@proskauer.com

Counsel for the United States Chamber of Commerce

Peter N. Kirsanow
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
200 Public Square, Suite 2300
Cleveland, OH 44114
(216) 363-4481
pkirsanow@beneschlaw.com

Counsel for National Association of Manufacturers

Charles I. Cohen
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-5710
ccohen@morganlewis.com

Philip A. Miscimarra
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601-5094
(312) 324-1165
pmiscimarra@morganlewis.com

Counsel for The Coalition For a Democratic Workplace

Harold P. Coxson
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1909 K Street, NW, Suite 1000
Washington, DC 20006
(202) 887-0855
hal.coxson@ogletreedeakins.com

Counsel for Council on Labor Law Equality

Harold R. Weinrich
JACKSON LEWIS LLP
10701 Parkridge Blvd., Suite 300
Reston, VA 20191
(703) 483-8300
weinrich@jacksonlewis.com

Counsel for The Atlantic Legal Foundation

Andrew M. Kramer
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-4660
akramer@jonesday.com

Counsel for HR Policy Association

G. Roger King
JONES DAY
P.O. Box 165017
Columbus, OH 43216
(614) 281-3874
rking@jonesday.com

Counsel for Society for Human Resource Management

Maurice Baskin
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4823
mbaskin@venable.com

Counsel for Associated Builders & Contractors, Inc.

Proskauer Proskauer Rose LLP 1001 Pennsylvania Avenue, NW Suite 400 South Washington, DC 20004-2533

t 202.416.6800
f 202.416.6899

Date: July 6, 2011

Client-Matter: 99999-702

Total Pages (Including Cover): 6

From: Ronald Meisburg

Sender's Voice Number: 202.416.5860

Sender's Email: rmeisburg@proskauer.com

Sender's Room Number: 4007

Main Fax Number: 202.416.6899

Fax Transmittal

To:	Lester Heltzer	**Fax No.:**	202.273-4270
Company:	National Labor Relations Board	**Voice No.:**	

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th Street NW, Suite 11600
Washington, DC 20570

Telephone: 202/273-1067
Fax: 202/273-4270

www.nlrb.gov

July 7, 2011

Mr. Fred Wszolek
Workforce Fairness Institute
P.O. Box 25518
Alexandria, VA 22213

[Via Facsimile and Regular Mail]

Dear Mr. Wszolek:

This will confirm receipt of your July 1, 2011 faxed letter to this office relating to the Board's Notice of Proposed Rulemaking on Representation Case Procedures (NPRM), published in the Federal Register on June 22, 2011. Your letter has been referred to the Board and a copy of your letter will be included in the rulemaking record.

Very truly yours,

Lester A. Heltzer
Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In Re:

NLRB Notice of Proposed Rulemaking – Representation Case Procedures

ORDER

On June 22, 2011, the National Labor Relations Board published a Notice of Proposed Rulemaking (NPRM) (76 FR 15307), and in that notice and through a separate notice on June 27, 2011, the Board invited interested parties to attend a public meeting on July 18, 2011 to share their views on the proposed amendments to its pre- and post-election procedures, or to make other suggestions for improving representation case procedures.

The Board has received requests seeking, inter alia, to postpone the public meeting. These requests have been made by Senators Enzi, Hatch and Isakson, by the United States Chamber of Commerce (joined by other organizations) and by the Workforce Fairness Institute. Having duly considered these requests, the Board (Member Hayes, dissenting[1]) has decided to proceed with the meeting as scheduled. Sufficient public interest in participating in the meeting has been expressed to warrant extending the meeting through July 19, 2011. Moreover, interested parties that are unable to participate in the hearing or wish to extend their oral remarks may do so through the submission of written comments by August 22, 2011, pursuant to the NPRM.

By direction of the Board:

Dated, Washington, D.C., July 8, 2011

Lester A. Heltzer
Executive Secretary

1/ For the reasons stated by the requesting parties, which accord with prior procedural objections voiced by Member Hayes in his dissent to the Notice of Proposed Rulemaking, Member Hayes would postpone the hearing at least until the second week of August. In his view, there is absolutely no reason for conducting a hearing only 3 weeks after its announced scheduling and less than 4 weeks after publication of the Notice spanning 36 pages in the Federal Register.

Littler
Employment & Labor Law Solutions Worldwide

Littler Mendelson, P.C.
1150 17th Street N.W.
Suite 900
Washington, DC 20036

July 15, 2011

Ilyse Wolens Schuman
202.423.2223 direct
202.842.3400 main
202.478.2215 fax
ischuman@littler.com

VIA E-MAIL

Hon. Wilma B. Liebman
Chairman
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570

Re: New Speaker for Open Meeting About Proposed Election Rule Amendments

Dear Chairman Liebman:

On behalf of Littler Mendelson, thank you for the opportunity to provide another knowledgeable speaker to appear before the Board at the open meeting on the proposed election rule amendments scheduled for July 18 and 19, 2011. I understand that the speaker deadline has passed and appreciate your accommodation of my request for a speaker from our Firm. I understand from discussions with Robert Schiff earlier today that this will be an addition to the speaker list for the Afternoon Session (1:00 pm – 4:00 pm) on Tuesday, July 19.

This will confirm that the speaker from Littler Mendelson will be David A. Kadela, a shareholder from our Columbus, Ohio office, who will speak on behalf of the Firm. Dave's contact information is DKadela@littler.com (email) and (614) 463-4211 (business phone). Please note that Dave will not attend the Morning Session on Tuesday, July 19. I will attend the meetings on both days.

Sincerely,

Ilyse Wolens Schuman

cc: David A. Kadela, Esq.

National Labor Relations Board

Public Meeting Schedule of Speakers

July 18-19, 2011

Monday, July 18 Morning Session (9:00 am – 12 noon)

1. Arnold E. Perl, Glankler Brown PLLC o/b/o Tennessee Chamber of Commerce and Industry
2. Amy Bachelder, Sachs Waldman P.C.
3. Brian A. Caufield, Fox Rothschild LLP
4. Marshall B. Babson, Seyfarth Shaw LLP
5. Dr. Anne Marie Lofaso, West Virginia University College of Law
6. Eric C. Schweitzer, Ogletree Deakins Law Firm o/b/o COLLE (Council on Labor Law Equality)
7. Scott Pedigo/Rich Cossell, Utility Workers Union Local 304
8. Peter Kirsanow, National Association of Manufacturers
9. Professor Samuel Estreicher, New York University School of Law
10. Michael Prendergast, Holland & Knight
11. Hope J. Singer, Bush Gottlieb Singer López Kohanski Adelstein & Dickinson
12. Oliver J. Bell, Texas Labor & Employee Relations Consortium
13. Christine Lou Owens, National Employment Law Project
14. William P. Barrett/David C. Burton, Williams Mullen o/b/o Universal Leaf Tobacco
15. Ross Eisenbrey, Economic Policy Institute
16. Ronald J. Holland, Sheppard Mullin Richter & Hampton

Monday, July 18 Afternoon Session (1:00 pm – 4:00 pm)

1. Christopher G. Cozza, CWA-TU
2. Andrew M. Kramer, Jones Day o/b/o HR Policy Association
3. Thomas W. Meiklejohn, Livingston, Adler, Pulda, Meiklejohn & Kelly
4. Michael J. Hunter, Hunter, Carnahan, Shoub, Byard & Harshman
5. Ron Mikell, United Federation of Special Police and Security Officers and Federal Contract Guards of America
6. Ronald Meisburg, United States Chamber of Commerce
7. Professor Ethan Daniel Kaplan, Columbia University (Visiting) and University of Maryland at College Park
8. Robert Garbini, National Ready Mixed Concrete Association
9. Margaret A. McCann, American Federation of State, County and Municipal Employees (AFSCME)
10. Douglas A. Darch, Baker & McKenzie o/b/o Illinois Chamber of Commerce and the Wisconsin Manufacturers and Commerce
11. Joseph A. McCartin, Kalmanovitz Initiative for Labor and the Working Poor
12. F. Curt Kirschner, Jr., Jones Day o/b/o American Hospital Association and American Society of Healthcare Human Resources Association
13. Dora Chen/Veronica Tench/Shari Kurtz, Service Employees International Union
14. Charles I. Cohen, Morgan Lewis o/b/o Coalition for a Democratic Workplace

15. John Brady/David Linton, American Federation of Teachers
16. Brett McMahon, Miller & Long Construction
17. Michael D. Pearson, Retired NLRB Field Examiner

Tuesday, July 19 Morning Session (9:00 am – 12 noon)

1. Faith Clark/Phil Ornot, United Steelworkers
2. G. Roger King, Jones Day o/b/o Society for Human Resource Management
3. Paul F. Clark, Dept. of Labor Studies and Employment Relations, Penn State University
4. Elizabeth Milito/John Raudabaugh, Nixon Peabody o/b/o National Federation of Independent Business
5. Christopher N. Grant, Schuchat, Cook & Werner
6. Patrick J. O'Neill, United Food and Commercial Workers International Union
7. Maurice Baskin, Associated Builders and Contractors, Inc.
8. Gabrielle Semel, Communications Workers of America Legal Department
9. Brian Brennan, IBEW
10. Harold R. Weinrich, Jackson Lewis LLP
11. Elizabeth Bunn, AFL-CIO
12. Kimberly Freeman Brown, American Rights at Work
13. Francis T. "Tom" Coleman, Printing Industries of America
14. Sarita Gupta, National Jobs With Justice
15. C. Stephen Jones, Jr., Chandler Concrete Co., Inc.
16. Professor Dorian Warren, Columbia University

Tuesday, July 19 Afternoon Session (1:00 pm – 4:00 pm)

1. Lexer Quamie, The Leadership Conference on Civil and Human Rights
2. Steve Maritas, International Union, Security, Police and Fire Professionals of America SPFPA
3. William Messenger, National Right to Work Legal Defense Foundation
4. Joseph L. Paller Jr., Gilbert & Sackman
5. Russ Brown, Labor Relations Institute
6. Dr. Dean Baker, Center for Economic and Policy Research
7. Yona Rozen, Gillespie, Rosen & Watsky PC
8. R. Brian Bixby/Karla Kozak, TWU International
9. Jay P. Krupin, Epstein Becker Green o/b/o National Grocers Association
10. David Madland, Center for American Progress Action Fund
11. Michael E. Avakian, The Center on National Labor Policy Inc.
12. Peter J. Leff, Graphic Communications Conference of the International Brotherhood of Teamsters
13. David A. Kadela, Littler Mendelson
14. Professor Kate Bronfenbrenner, Cornell School of Industrial and Labor Relations

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:
PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES

The above-entitled matter came on for public meeting pursuant to notice at the **National Labor Relations Board, 1099 14th Street, N.W., Margaret A. Browning Hearing Room #11000, Washington DC 20570,** on **Monday, July 18, 2011,** at **9:00 a.m.**

Free State Reporting, Inc.
1378 Cape St. Claire Road
Annapolis, MD 21409
(410) 974-0947

A P P E A R A N C E S

National Labor Relations Board:

WILMA B. LIEBMAN, Chairman
CRAIG BECKER, Board Member
BRIAN E. HAYES, Board Member
MARK GASTON PEARCE, Board Member

LES HELTZER, Executive Secretary
GARY SHINNERS, Deputy Executive Secretary

Morning Session Speakers:

ARNOLD E. PERL, Glankler Brown PLLC o/b/o Tennessee Chamber of Commerce and Industry
AMY BACHELDER, Sachs Waldman P.C.
BRIAN A. CAUFIELD, Fox Rothschild LLP
MARSHALL B. BABSON, Seyfarth Shaw LLP
DR. ANNE MARIE LOFASO, West Virginia University College of Law
ERIC C. SCHWEITZER, Ogletree Deakins Law Firm o/b/o Council on Labor Law Equality (COLLE)
SCOTT PEDIGO, Utility Workers Union Local 304
PETER KIRSANOW, National Association of Manufacturers
PROF. SAMUEL ESTREICHER, New York University School of Law
MICHAEL PRENDERGAST, Holland & Knight
HOPE J. SINGER, Bush Gottlieb Singer López Kohanski Adelstein & Dickinson
OLIVER J. BELL, Texas Labor & Employee Relations Consortium
CHRISTINE LOU OWENS, National Employment Law Project
WILLIAM P. BARRETT, Williams Mullen o/b/o Universal Leaf Tobacco
DAVID C. BURTON, Williams Mullen o/b/o Universal Leaf Tobacco
ROSS EISENBREY, Economic Policy Institute
RONALD J. HOLLAND, Sheppard Mullin Richter & Hampton

A P P E A R A N C E S

Afternoon Session Speakers:

ANDREW M. KRAMER, Jones Day o/b/o HR Policy Association
THOMAS W. MEIKLEJOHN, Livingston, Adler, Pulda, Meiklejohn & Kelly
MICHAEL J. HUNTER, Hunter, Carnahan, Shoub, Byard & Harshman
RON MIKELL, United Federation of Special Police and Security Officer and Federal Contract Guards of America
RONALD MEISBURG, United States Chamber of Commerce
PROF. ETHAN DANIEL KAPLAN, Columbia University (Visiting) and University of Maryland at College Park
ROBERT GARBINI, National Ready Mixed Concrete Association
MARGARET A. McCANN, American Federation of State, County and Municipal Employees (AFSCME)
DOUGLAS A. DARCH, Baker & McKenzie o/b/o Illinois Chamber of Commerce and the Wisconsin Manufacturers and Commerce
JOSEPH A. McCARTIN, Kalmanovitz Initiative for Labor and the Working Poor
F. CURT KIRSCHNER, JR., Jones Day o/b/o American Hospital Association and American Society of Healthcare Human Resources Association
DORA CHEN, Service Employees International Union
VERONICA TENCH, Service Employees International Union
CHARLES I. COHEN, Morgan Lewis o/b/o Coalition for a Democratic Workplace
JOHN BRADY, American Federation of Teachers
DAVID LINTON, American Federation of Teachers
BRETT McMAHON, Miller & Long Construction
MICHAEL D. PEARSON, Retired NLRB Field Examiner

I N D E X

P R O C E E D I N G S

(Time Noted: 9:00 a.m.)

CHAIRMAN LIEBMAN: Good morning and welcome everybody to this open meeting of the National Labor Relations Board. We are delighted to have you with us here today.

My name is Wilma Liebman, and I am the Chairman of the National Labor Relations Board. To my right are Board Member Craig Becker and Board Member Brian Hayes, and to my left is Board Member Mark Pearce.

On June 22, 2011, the NLRB published a Notice of Proposed Rulemaking, which proposes to amend the Board's Rules and Regulations governing the filing and processing of petitions relating to the representation of employees for the purpose of collective bargaining with their employer.

The Notice of Proposed Rulemaking sets out a procedure for filing written comments on the procedure, on the proposal. Those written comments are due by August 22, 2011.

Today and tomorrow at this open meeting, the Board is providing another opportunity for interested persons to provide their views on this important matter.

At this meeting, we are going to hear from a remarkable group of speakers, diverse in experience and viewpoint, and including a balance of practitioners, workers, academics and public policy advocates. We are truly grateful for this showing of interest and for the efforts of all of the

speakers to study the proposal, to reflect on it, and to share their thoughts and suggestions with us.

We know that the proposals have generated some controversy, and we welcome this chance to have an airing of views on this important subject.

We take the meeting very seriously. We want to hear your thoughts about the proposals, how they would work, and what might work better. I assure you, we all have open minds.

All persons who will be making a presentation here today made an advance written request to speak at this meeting, and all of the time slots for the oral presentations have been filled. Accordingly, everyone here who did not request an opportunity to speak today may observe the proceedings, and we are pleased to have you with us, but you will not have the opportunity to speak. You may, of course, submit written comments using the procedure described in the June 22 Notice of Proposed Rulemaking.

Now, let me cover some housekeeping matters which I've been asked to cover.

As you can see, the room is nearly full. There has been considerable public interest in this proceeding, and we have had more requests to attend than there are seats in this hearing room. Seats in this room have been made available on a first come, first serve basis, and we've also established

three overflow rooms where interested members of the public can watch the proceedings through a videoconference.

In addition, we are streaming these proceedings live over the internet.

Those of you who are watching from the overflow rooms will be seated in this room as space becomes available according to the priority established by the time of your arrival this morning. When you checked in, you should have been given a badge and a number. Please keep those with you at all times. If you leave the room, you must take your badge and number with you. You will not be allowed to reenter this room without both the badge and the number.

Speakers do not need a number to attend the session during which they will speak, but if they wish to attend any other session, we ask you to have both a badge and a number.

If you are a speaker this morning, for some reason you didn't receive a number when you checked in, let one of our ushers know, and we'll get a number for you.

When you leave the building for the day, this is important, make sure to return your badge and your number so you can retrieve your ID.

Please note also, there are two exits from the room. The main door is to my left through which you entered and the door to my right. You may use either door to exit the room, but you may only enter through the main doors to my left.

Restrooms are located outside the hearing room to the left and to the right. We have staff in the hallway who can escort you or direct you where you need to go. We ask you not to go into other parts of the building. If you want to leave the building, we'll escort you down to the elevator.

Today's meeting will be divided into two sessions, a morning and afternoon session. In addition to a lunch break that will begin at about noon, we'll take a midmorning and a midafternoon break.

If you must leave the meeting during the proceedings, please move quietly to the nearest exit, and an usher will assist you.

Speakers are, of course, welcome to stay with us through the session, but if you wish to leave, you are welcome to do that.

Now, let me just review some final guidelines for the speakers. We are going to follow the order of speakers that is set out on the list that was given to you this morning. Each person making an oral presentation will be given five minutes to present his or her remarks. The Board Members will then have an opportunity to ask questions after which the speaker will be excused.

Each speaker should be ready to proceed in turn and should move promptly to the podium when called. We ask that you introduce yourself and indicate who you are representing,

if anyone. If you have someone else with you, you may also introduce that person. Your five minutes will start after you making the introductions.

Now, Deputy Executive Secretary Gary Shinners, who was sitting below me on the right, will be our timekeeper today. There are lights on the podium that will start after your introductions, and the green light will turn on. The yellow light will indicate that you have one minute remaining, and the red light indicates that your time has expired. We ask that you please observe the lights, particularly the red one, so that we can remain on schedule as the day proceeds.

If you have a written statement that you wish to put in the record, please give it to our Executive Secretary Les Heltzer, who was in the anteroom to my left, before you leave for the day.

My colleagues may wish, upon review of any written testimony you submit, to pose questions to you about the testimony. I have asked them to have all questions to me within seven days. You will have until the end of the comment period, August 22, to submit answers to any questions that may be posed.

Finally, please note that this meeting is limited to issues related to the proposed amendments to the Board's Rules governing our representation case procedures and other proposals for improving representation case procedures. No

other issues will be considered at this meeting.

I want to particularly alert our speakers that they should not discuss matters that are now pending before the Board as there are important rules governing ex parte contact that we don't want you to violate.

So at this point, I would ask you to all please make sure your cell phones are turned off or any other devices, and unless anyone of my colleagues has something to say at this point, I think we can now hear from our first speaker, Mr. Arnold Perl.

Mr. Perl, if you would come forward, and Ms. Amy Bachelder will be the next speaker.

Good morning, Mr. Perl.

MR. PERL: Good morning, Madam Chairman, and Members of the Board. I'm Arnold Perl of the law firm Glankler Brown, appearing on behalf of the Tennessee Chamber of Commerce and Industry. The President and CEO of the Tennessee Chamber, Ms. Deborah Woolley, is here with me today.

The Tennessee Chamber has a natural interest in the proposed election rules, given that Tennessee's union membership in the private sector is 2.2 percent, the second lowest in the United States.

I've submitted to the Board my presentation in advance for the purpose of allowing you to ask whatever questions that you have.

Now, maybe my time can start, Madam Chairman.

As the Board observed in Excelsior Underwear, which you've cited frequently in your report, the rules governing representation election are not fixed and immutable. They've been changed and refined but generally always in the direction of higher standards.

In our view, that regrettably is not the case here, and I'd like to explain why we feel that way.

The current rules for the conduct of representation elections, in our view, do not build in unnecessary delays. Almost all elections, as your report had, take place within 56 days of the filing of the representation petitions, and the median time for the holding of elections is only 38 days. In our view, this hardly resembles unnecessary delay, since the Board itself, over the years, has stressed that the opportunity for both sides, both the employer as well as the union, to reach all the employees is basic to a fair and informed election.

Now, a notable exception to that is the Board's current blocking charge policy which you asked for views on. That policy has been abused over the years by unions in our view for their own gain to manipulate the timing of representation elections. Some of you may remember when I served on the Board's last Advisory Panel in the 1990s, 1994 to 1998, with the union bar as well as the management bar.

The management bar to a person strongly urged the Board to abandon its blocking charge policy, and yet that blocking charge policy is still around today and represents the pinnacle of unfairness and unnecessary delays.

Now, the proposed rules for quickie elections will prevent or impede a free and reasoned choice by the electorate which goes against what the Board has sought to do with its high standards.

Now, a primary goal of the Board's proposed rule amendment is to conduct elections more speedily, and this quickie election model for representation elections seriously compromises, however, the Board's self-professed duty, and it is a duty, not a goal, to conduct secret ballot elections under circumstances which ensure an informed electorate.

Now, Congress entrusted to the Board the determination of rules but did so to conduct elections fairly.

Just consider the context under which these elections take place. Legally, unions can conduct currently an organizing effort in secrecy without any notice requirement to the employer. Once a union has gained maximum support, it files its petition, and the Board under the new rules would schedule an election in far less than half the time provided under the current rules, and under such circumstances, there would be an entirely inadequate time for employees to hear the other side from the employer on the disadvantages of

union representation.

The Board's quickie election model also constitutes an impermissible limitation on the time given for an employer to communicate with its employees, and as stated in our presentation, we explain why and how that violates the Congressional mandate and intent of Section 8(c).

Now, I'm going to spend just a few moments on something that the Board said it had a preliminary view on, and that's the rule, the policy, that would be in the rules, not to allow any pre-election litigation unless it amounts to affecting 20 percent of the unit.

When you look at the case that I cited and provided you an anatomy with, of all the things that happened, of ITT Lighting Fixtures, that provides a lesson learned of how protracted litigation results when critical unit issues are not resolved by the Board prior to the election. In that case, it involved the company's group leaders that amounted to at most 10 percent, not 20, but 10 percent of the unit, and the employer sought to get a determination in the pre-election hearing that the group leaders were supervisors and therefore should be excluded from the unit. The Regional Director, while he held a hearing, did not make a resolution of that issue and left it to the challenged ballot procedure.

That case went on for five years, all the way to the United States Supreme Court with the employer urging that the

group leaders open and pervasive union activity affected the fair and free choice of voters who were voting, not by challenge, but voted in the election.

Finally, the Board, at the end, found that all the group leaders were supervisors but by then, it was too late. The United States Court of Appeals for the Second Circuit had heard that case twice and vacated finally the Board's election results. So there was no winner, not the employer, not the union, not the employees.

In conclusion, Your Honor, we're gratified that you've held these hearings, stated you had an open mind, wanted to learn from the experiences of others, but in our view, there is a test. The litmus test for this proceeding must be will the quickie election model ensure an informed electorate? And we don't believe that this model passes that critical test.

This Board, and I was part of it at one time, has a distinguished history, and I hope that the proud legacy is retained, and that there's a reconsideration after you hear the views of this distinguished group, that the Chairman has spoken of, from all sectors, that you reconsider what is really best in the interest of employees, employers and unions, and especially for the distinguished history and legacy of this Agency.

CHAIRMAN LIEBMAN: Do my colleagues have any questions?

MEMBER BECKER: Mr. Perl, you spoke about the blocking charge policy, and in the Notice of Proposed Rulemaking, we invited comments on that question and posed a range of options as to how allegations of unlawful conduct prior to elections could be handled. Do you have any views on which of those options would make sense?

MR. PERL: Yes, I saw that you had nine different options, Member Becker, and when we made our recommendation on behalf of the management bar and the Advisory Panel, I think it was 1995, you have a record of that, we urged the Board to reconsider that and to basically eliminate, and that's one of the options you have in there. I think it's number 8, just eliminate the blocking charge policy. Hold the election. If there was such serious conduct that either set aside the election under the current blocking charge, the union can file objections. You can handle this in your post-election proceedings, but to go ahead and within a week -- I had a case in the State of Florida. One week before the election was held, the union filed charges, sought to block the election. The Board blocked the election with less than a week to go. All the employees had been expecting to vote in this election.

The Notice of Election had already been posted, and now it has to be explained, no, we won't hold an election. That just doesn't seem, not only does it not seem fair, it really

jeopardized I think the process in the end because people who were going to vote, that vote was taken away from them, and there's been a lot of comment. You cited in your majority report along with the dissent the very astute article written by Bert Subrin, who worked out there and was held in such high regard. His article was in The Labor Law Journal, "Blocking Charge Policy: Wisdom or Folly." It was a great article, and I read it several times when we did our work in the Advisory Panel on blocking charges.

I think this is one area where if you want to do away with unnecessary delay, the blocking charge to me is the poster child for unnecessary delay.

CHAIRMAN LIEBMAN: Thank you for being with us today. Thank you for coming here from Tennessee. We appreciate your thoughts and will take them into consideration.

MR. PERL: Chairman Liebman, thank you for having us.

CHAIRMAN LIEBMAN: Thank you. Our next witness will be Amy Bachelder, and after her will be Brian Caufield.

Good morning.

MS. BACHELDER: Good morning. I am Amy Bachelder. I'm an attorney from the law firm of Sachs Waldman in Detroit, a law firm that has represented unions in the public and private sector for many years. I'm pleased to be able to comment today about the Board's proposed rulemaking changes.

I am relatively new to the private practice of law

having spent the majority of my career working for the NLRB in the Detroit Regional Office, the biggest and busiest Regional Office in the nation. I worked there for 25 years as an attorney, a supervisor, and a Deputy Regional Attorney and was involved in every aspect of representation cases from conducting elections, to holding hearings and writing pre- and post-election decisions. I trained and supervised employees in every one of those activities also.

Arnold Perl wants me to mention that we find ourselves reunited today after about 30 years after trying a case in the Detroit Region, but I think he just wants me to stop talking.

I view the proposed changes as largely modest in incremental variations on standard good regional practice in pursuit of the Agency goal to expeditiously and efficiently process R cases. Many aspects of these cases are already in practice.

I'm going to comment on two of the proposed changes, the 20 percent rule and the statement of position at the pre-election hearing.

From my experience and observation, delay is often used as a tactic in election cases. Merely by refusing to agree to an election, a party can effectively dictate that the Region hold a pre-election hearing. Under current practice, the mere opening of the hearing guarantees that an election

will be delayed for more than a month from the time the hearing closes, whenever that is. This is due to the mandatory 7-day briefing and the 25 days required for the request for review.

Many of these pre-election hearings involve eligibility issues that can and would be deferred absent of deliberate desire for a delay. Parties have admitted as much.

The Regions have always had a practice of deferring resolution of eligibility questions to after the election if the parties agree to do so. Thus, in Detroit, as I'm assuming in other Regions, it has been the practice to approve election agreements even where 10 percent or more of the voting group eligibility is in dispute. This deferral by agreement of the parties avoids the lengthy litigation of complex factual issues and also avoids expenditure of time and effort which, more often than not, is mooted by the results of the election.

The proposed 20 percent rule that permits deferral of eligibility issues is a measure that would remove unnecessary obstacles to the efficient processing of these cases and minimize and focus the use of scarce Agency resources to those cases in which the issue makes a difference at a time it makes a difference.

The deferral of eligibility issues has existed and does exist in regional practice today beyond situations which the

parties agree, even in cases in which the parties have had a pre-election hearing and litigated eligibility issues.

For example, when there has been a pre-election hearing, in situations where the hearing record is not sufficiently developed to permit an eligibility decision to be made, even one that was expressly litigated, Regional Directors have directed that such voters be permitted to vote subject to challenge. Likewise, where an issue is raised in the hearing but the parties didn't take a position as to eligibility, Regional Directors have directed that these voters could vote subject to challenge.

In these situations, eligibility remained unresolved at the time of the election, and the issues were resolved post-election, if at all, if not mooted by the election results or other circumstances. This is the existing NLRB policy.

Finally, the issues related to the required statement of position in the pre-election hearing reflect little more than what is current standard pre-election hearing practice. At the onset of a hearing, it is the Hearing Officer's job, through consultation and questioning of the parties, to define the outstanding issues and obtain the respective positions.

The requirement the parties present evidence via an offer of proof is also a common practice to preserve the rights of parties with respect to those issues while avoiding

needless expenditure of resources.

I commend the Board for the continuation of the focus on the important work that the Agency does. The proposed rules in many respects merely standardize good regional practices as I have known them and modestly update such practices in conformity with modern day communication methods.

Thank you for consideration of my position.

CHAIRMAN LIEBMAN: Thank you. Do my colleagues have questions? Member Hayes.

MEMBER HAYES: Yes. In terms of the 20 percent rule, could you share with us what your views are? What is required by 9(c)'s statutory requirement of an appropriate hearing?

MS. BACHELDER: Well, I'm not sure I can reflect on what 9(c) requires. I can only tell you what has been practiced in the Region, and what I think is workable in going forward. I'm not expert on 9(c). I understand 9(c) to be what the Regions have always done, and I don't see this as much different.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything else? I wondered if you wanted to comment at all on the blocking charge issue?

MS. BACHELDER: My experience with the blocking charge is that what the Regions are doing is going to great extent to avoid having elections blocked. I have filed charges that

I thought should block elections, and when that happens, the Region expedites the investigation and gets a decision, and very rarely in my experience in the Regions do blocking charges result in actual blocking.

CHAIRMAN LIEBMAN: Thank you for being with us here today and for your thoughts.

Our next witness will be Brian Caufield, and after him will be Marshall Babson.

MR. CAUFIELD: Good morning, Chairman Liebman, Members Becker, Hayes, and Pearce. My name is Brian Caufield. I'm a management side labor relations attorney with the firm of Fox Rothschild, a firm with 16 offices and over 500 attorneys nationwide.

Prior to Fox Rothschild, I served the public as a Field Attorney with this Agency in Region 22, the Newark, New Jersey Regional Office. During my tenure with the Agency, I participated in the Washington Exchange Program, a fine program by the way, and was detailed to the Office of Solicitor and worked for then Acting Solicitor Hank Breiteneicher.

My remarks come from the perspective of having worked on both the GC and Board side and in private practice.

In my opinion, the proposed rules will do three things, increase litigation, not achieve uniformity, and limit the educational process.

With respect to the increased litigation, the proposed revisions allow for a hearing to occur 7 days after the Notice of Hearing, only if a genuine issue exists in a statement of position over the eligibility or inclusion of 20 percent or more of the unit. The initial determination of whether a genuine issue exists is to be made by a Hearing Officer, not a Regional Director, and can be made without presentation of witnesses, for example, by way of the statement of position or through an offer of proof.

What is wrong with this? First, the parties who fail to identify an issue in the statement of position, except for jurisdiction, will be forever barred from raising it. Second, a Hearing Officer, which is the hearing's gatekeeper really, is oftentimes not a long-term Agency employee, especially considering that Regions for the most part develop R case teams which consists of newer agents, and these R case teams basically are designed to teach new agents the R case process and to assist in processing the R cases more expeditiously. Thus, the determination to open the record and move forward with the hearing will often be made by individuals who are less experienced than the practitioners who are representing their party's interest before them.

How will this foster less agreement and more litigation? The extremely short amount of time from filing of the petition to hearing, seven days, issue preclusion and the

potential to be denied a hearing will, in my view, lead to employer counsel, erring on the side of caution, and raising issues in the statement of position that may not, after proper investigation by employer counsel, be genuine issues subject to litigation. In other words, if after even a cursory review, mechanics even remotely share a community of interest with drivers, I'm going to raise it in the statement of position. If, again after a cursory review, line leaders remotely appear to have a supervisory status indicia, I'm going to raise it in the statement of position. And, I'm going to do this to protect my client's interest even though there may be in the end, not a finding of the community of interest for supervisory status. However, because I likely would not have had the time to fully investigate these issues, I would not sign a stipulated election agreement. Instead, I would err on the side of caution, raise the issues in the statement of position, and argue to the Hearing Officer that there is a genuine issue involving inclusion or eligibility of 20 percent or more of the proposed unit.

Now, with respect to uniformity, the rules, the proposed rules rather, shift a review of the Regional Director's pre-election decision to after the election so that the review can be taken with post-election challenges. The proposed rules further provide that the Board has the discretion to deny pre- and post-election review, leaving the decision to

the careered Regional Directors. This process cuts against uniformity. Why? Because it potentially takes away the final decision making from a five-member Board that issues precedential decisions and places it in the hands of over 30 plus Regional Directors and Resident Officers that issue non-binding decisions.

Furthermore, splitting the traditional decision and direction of election to two, the direction of election and then the decision which must issue by the time of the tally of ballots, may create an undue pressure for Regional Directors to rush their decisionmaking process.

With respect to limiting the educational process, the issue of whether employees want to be represented by a union is joined with the filing of a petition.

Before the filing, union representation is a non-issue for many employers. For weeks, possibly months, before the filing of the petition, the union has promised employees, among other things, higher wages, better benefits, complete job protection from discipline and layoffs. Thus, the time between the filing of the petition and the election is the time for the employer to fulfill its obligation in educating its employees on what the process is all about and what it is that the employees obtain from union representation, which is the right to sit down with the employer and negotiate, not an automatic right to higher wages and benefits and job

protection.

The educational process these days is not limited to traditional campaign methods, of meetings and cute cartoon handouts. The current electorate is much more sophisticated than it was in the past. The advent of internet search tools has increased employee awareness of the unionization process. Thus, today's secret ballot voter is much more educated about the process than ever before.

The proposed rush to the voting booth will reduce the time the employees have to learn about the process and possibly result in a less educated voter.

In sum, the Board's proposed rules have the potential to increase litigation, create disparity across the Regions, and limit the educational process.

I respectfully urge the Board to adequately balance the interest of the stakeholders, to ensure that the current process suffers no detriment, and I thank you for your time today.

CHAIRMAN LIEBMAN: Thank you very much for being here with us. Do my colleagues have any questions?

MEMBER BECKER: I just want to clarify one thing and see if it changes your view. The proposal does not provide for preclusion of eligibility issues in any way. That is, the proposal provides that eligibility issues, even if they're not raised in the statement of position or at the hearing,

can be raised by a challenge. Does that change your view as to your concern about erring on the side of caution?

MR. CAUFIELD: It doesn't and here's why. Because if it is left for the challenge procedure, and a certification of representative issues, it typically issues with the unit that is proposed and that those who are challenged are not within that unit when the certification of representative issues. So then you have to leave that to the bargaining process, and if you're entrenched in your positions, you're entrenched in your positions. That is a permissive subject, the scope of the unit and so you really don't -- you may never come to a resolution on the inclusion of those challenge ballots especially when they're not determinative. So I'd rather front end it instead of back ending it.

MEMBER BECKER: On the question about the uniformity issue, I guess one could make an analogy to the Supreme Court's discretionary jurisdiction. So the Supreme Court likewise across many statutes has a role in ensuring uniformity and yet its jurisdiction is discretionary in almost all instances. Do you see a difference here in terms of whether the Board could still ensure uniformity even though it would have discretion not to review post-election issues?

MR. CAUFIELD: I know that from practice, you know, coming from a Region where you thought you knew how that

Region ran, and you assumed that it was the same across every Region, you know, again coming from Region 22 believing that, okay, all Regions act the same, and then getting into private practice and realizing that Region 29 has a little bit different spin on it. Region 2 has a little bit different spin. Now, I'm down in Region 4, a completely different spin or way to process a case.

So in terms of leaving those decisions to the Regional Directors, you may get different opinions in different cases and, you know, one Region may not and does not have to rely on a decision and direction of election, now a decision, in making their decision. It's going to be completely up to them. They do have to follow your rulings, and so that's where I see the uniformity remaining. I mean it happens now, but I don't see the uniformity ending with these proposed rules.

CHAIRMAN LIEBMAN: Just a quick question. Can you estimate what amount of time you need to do the investigation that you talked about? And I realize there are going to be differences depending on the size of the unit, but if you take into consideration the medium size unit is about 24.

MR. CAUFIELD: Well, I'll give you just a quick example. I won't name the client's name, but we had an election, a 24-hour operation, about 33 employees, 24-hour operation, took me nearly 2 days to develop the times for the election and

the days because you want to ensure that you have sufficient amount of times for all the employees to get to the polls. So in just that situation, that took me nearly two days to gather all the schedules, go through them all, make sure that vacations were covered, people were actually at work so they'd have an opportunity to vote.

You know, oftentimes if it's a small employer, you're not getting the call right away. They're wondering, what is -- who is the National Labor Relations Board? But large employers, certainly they have outside counsel on speed dial. They sometimes even have in-house labor counsel. So those employers are positioned to make a fairly quick decision.

But myself, when a petition comes into my office, and I have to investigate it, I know in my mind I have 14 days because I don't want to go beyond that. I know the Regions have this rule of 14 to 18 days, they want to have that hearing and want to get it done. So I know I have 14 to 18 days to make a determination to, do we want to litigate? Would we want to enter a stipulated election agreement? That has worked.

CHAIRMAN LIEBMAN: We thank you for being here --

MR. CAUFIELD: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts with us. Our next witness will be Marshall Babson and then next up will be Professor Lofaso. Good morning.

MR. BABSON: Good morning. Thank you. The colloquy with Mr. Caufield reminded me, people often ask, what's the most important thing that you learned at the NLRB? I think I learned a lot of things at the NLRB, but one of the things that I surely learned is that the Regional Directors are very powerful people in the Agency.

CHAIRMAN LIEBMAN: Can I stop you for one moment? Something I meant to do for our Court Reporter. A lot of the speakers are using the expression R case, and just so the Court Reporter knows, R is the letter R. It stands for representation. Sorry. Please --

MR. BABSON: No problem.

CHAIRMAN LIEBMAN: -- go ahead and introduce yourself.

MR. BABSON: My name is Marshall Babson. I'm a partner at the law firm of Seyfarth Shaw and a former member of the NLRB. Seyfarth Shaw has one of the largest labor practices in the United States, about 400 labor and employment lawyers. I served on the National Labor Relations Board during the Reagan Administration from 1985 to 1988, and it is a pleasure to be here today, and I very respectfully offer these comments and observations.

I thought what could I possibly add or suggest that might be helpful and add something to what I was sure and confident from my many friends and colleagues who are present today and tomorrow, that might allow you to focus attention

on some elements or aspects of this process which I think are important. And the most significant element or aspect of this to me was process.

When I thought back about some of the more significant litigation in which the Agency has been involved in the last couple of years, I immediately thought of the two-member Board case, New Process Steel. I thought of the recent, relatively recent decision of U.S. Chamber of Commerce v. Brown, both Justice Stevens' opinions and interestingly cases I think that raise issues that are related to the comments that I wanted to make.

I think that most fair practitioners would not -- object to the Agency seeking to improve election procedures. We all understand that trying to find a more efficient or efficacious manner or method of resolving questions concerning representation is really at the heart of this statute, and change, of course, as we know, for those of us who are students of administrative law, is not something which is foreign to the Agency. In fact, there's been a lot of criticism through the years that there's been too much change, but in my view, it's because the premises for change have not always been satisfied or at least have not been sufficiently rationalized.

And so when I went through this proposal in detail, I decided that I would leave to others at the appropriate time

to make specific comments, and I'm sure you'll hear many of them today and tomorrow and through the comment period about particular elements or aspects. These are all live issues. It doesn't make a difference whether or not 10 percent or 20 percent of the unit is in question at the time an election is conducted. These are live issues which will command your attention.

Do the voters need to know who their fellow bargaining unit members will be? Does that have some real practical significance for collective bargaining when you sit down at the bargaining table? Does it make a difference for the employer and the employees to know who are the supervisors during the course of this?

But those are questions again which I think will be addressed and considered, and what I found at least lacking in some material or fundamental respect in this proposal was an accommodation of all of the legs I think that need to be satisfied for change. There's no question in my mind that change is contemplated by the statute, whether it's procedural change or substantive change to further the policies and procedures of the Act.

But the issue it seems to me at hand is the Board has done an outstanding job of suggesting how delay can be a problem in terms of effectuating rights, but we have this nagging question that I think was at the forefront of the two

cases that I mentioned earlier that went to the Court in the last few years, Brown and New Process. It's the 800-pound gorilla which is standing in the room, and that is how do we accomplish all of the objectives of the statute?

We know the Wagner Act was intended to promote collective bargaining for those of us who believe in collective bargaining. What does that mean having had a statute that it was again amended 12 years later and which causes someone like Justice Stevens, who I do not view as being an opponent of collective bargaining, to say that this is a statute which is suffused with the notions of debate, compromise, open discussion, that these choices with regard to collective bargaining, which is still the policy of the United States, nevertheless must be accommodated, that people need to be able to make an informed choice.

I found one passing reference in the rules, maybe I missed another, but one to speech, many to speed, and I think this is something that I would like to see the Board account for. You're going to hear a lot of practical input from a lot of experienced people on both sides. I think process, administrative process requires you to tackle this two-headed nature of the statute, to understand that this proposal, in fact, this is not -- these are not -- lists that people are throwing up or bringing to you. These are real live issues, but the statute itself I believe, and administrative process,

requires some accommodation of these competing interests in the statute.

CHAIRMAN LIEBMAN: Thank you very much. Do my colleagues have follow-up questions?

Well, then let me ask you if you might take a minute or so to tell us how you think we should go about an accommodation.

MR. BABSON: Well, I think that is difficult. Obviously you need to listen carefully and consider all the comments that are made on both sides. I don't think that it's something -- I don't think it's an empty gesture when people stand up and say an employer needs time to inform the electorate. I think the Agency has to account for this issue. I mean how does one accommodate the need for speed with regard to resolving questions concerning representation and this large notion, you know, we've heard it said many times about these competing purposes.

I think I made reference, perhaps I didn't, in my prepared remarks to the Duke Law Review article that was written in 2009 by Fisk and Malamud, the NLRB, an Agency in administrative exile, there's a real fulsome discussion of the dual purposes of the statute, and I don't think, both with regard to these proposals, Chairman Liebman, and other things that have come beforehand, that it's enough just simply to say that this is a policy preference or this is a

choice.

I think this has nothing to do with Democrats or Republicans. It has nothing to do with liberals or conservatives. It has to do with administrative jurisprudence it seems to me, and people who complain about policy oscillation I think can find some comfort in administrative principles that require not only a choice that's different but a choice that's grounded in better practice and a choice that's grounded in the dual purposes of the statute.

So I don't think there's a ready answer on this particular issue, but I think what it means is, is that as you're going about the process, and I say this very respectfully, that I think that the Board would help itself enormously to explain how the choices that are made are consistent with these principles. These choices are something more than my favorite flavor of ice cream.

There have been Board Members for the last 20 years or more who have thought that the first opportunity they had, whatever their political stripe, the first opportunity they had to make a policy choice, that they would make that choice. I think it's more than that. More than that is required. You have to demonstrate that there's a problem, and I think you've articulated that there has been a problem. Serious practitioners will acknowledge that there have been

delays on occasion.

As Ed Miller said many times, one has to be careful that you don't allow the outlier to pull along everything else, but I think that one reasonably can say that there have been problems, but you have to demonstrate that the choices that are made are an improvement and they're highly consistent with the statute, but as the Chairman herself has acknowledged, this is a statute with dual purposes.

Someone has described it as a statute at war with itself. I think it need not be, but it definitely is a challenge that must be accommodated.

CHAIRMAN LIEBMAN: Thank you for your remarks and for being with us today.

MR. BABSON: Thank you.

CHAIRMAN LIEBMAN: The next speaker is Professor Anne Marie Lofaso, and after her will be Eric Schweitzer.

DR. LOFASO: Good morning, Madam Chairman, and Honorable Members of this Board.

My name is Anne Marie Lofaso. I'm an Associate Dean and Professor of Law at West Virginia University, where I write and teach about labor law. I also spent 10 years here at the National Labor Relations Board in the Appellate and Supreme Court Branches, and I have a doctorate in comparative labor law from Oxford.

The Board should be commended for acting under its

statutory rulemaking authority to modernize outdated and confusing rules. The current rules are in some cases redundant. In other cases, there's no rule at all which results in regional variation which in time leads to unpredictability. It also allows unscrupulous parties to take advantage of built-in bureaucratic delay resulting in tactical delay.

These amendments, while modest, will go a long way toward fixing the well-known problems associated with the current election rules. This is good government acting at its best.

The views of affected parties are well understood. Employers want longer time periods to attempt to persuade their employees not to form a union. Unions want shorter time periods because they fear that the longer time period, the greater the chance of employer interference.

But the question for this Board is not whether longer or shorter time periods are perceived as favoring one party or another. The question for this Board is how it can most fairly and efficiently determine whether employees want representation.

These amendments give employees a final and fair resolution on the question concerning representation without unnecessary delay.

I have three points to make. These amendments modernize

outdated rules and make them more readable, make government run more efficiently by liberalizing information and by addressing the main problem of delay, while still allowing ample time for full debates, and deliver better service to the public. These amendments strengthen the secret ballot election process, a process that Chamber fought so hard to maintain.

Point 1, these amendments modernize the election rules by permitting the electronic filing and transmission of documents. These changes are consistent with the efforts of other tribunals to modernize their own rules such as the electronic case filing initiative of the Federal Courts. The Board's efforts to make the rules more readable are also consistent with the efforts of other tribunals such as the Federal Courts restyling project, an effort to rewrite all Federal Rules in plain English.

Point 2, these amendments also make government more efficient in two ways. First, they liberalize information available to all parties. The basic requirement for an efficient process is greater initial information. The amendments require parties to release information readily within their control, no later than the pre-election hearing. Information such as the names, addresses, telephone numbers and e-mail addresses of employees is information that is well within an employer's control. This, too, is consistent with

the recent developments of mandatory initial disclosure under the Federal Rules.

Similarly, the amendments require the parties to submit position statements no later than the pre-election hearing. To make it easier for the parties to comply with this requirement, the Board has offered the assistance of a Hearing Officer. This amendment provides a mechanism for quickly identifying the issues. This, too, is consistent with the trend in federal pleading requirements especially after Iqbal. The purpose of raising issues in early stages is to resolve issues as quickly as possible so that non-meritorious issues do not go any further which would result in lost resources.

These requirements do not favor either party. Instead, they make the first steps in the process clear and more efficient.

These amendments also make government run more efficiently by streamlining election procedures. The current system encourages death by 1,000 cuts. The amendments eliminate unnecessary bureaucratic delay, thereby diminishing opportunities for unscrupulous parties to take advantage of systemic delay.

By eliminating pre-election voter eligibility challenges that are unlikely to affect the election and pre-election requests for review, by giving the Board the discretion to

deny post-election rulings thereby allowing the Regional Director to make a prompt, final decision, and by consolidating review of the Regional Director's rulings through a single post-election request, the Board's efforts are once again consistent with the Federal Rules under which litigants get only one pre-answer motion.

Point 3, these amendments also deliver better service to the public, not only by modernizing the system and making it run more efficiently, but also by creating uniformity which leads to predictability. Predictability is always good for business. Uniform standards also leave less room for unscrupulous parties to game the system.

Opponents of the rule inaccurately contend that the rule cuts off debate. These amendments deal only with the time period between the election petition and the election itself. Employers and unions have ample time to make their views known during this time period as well as prior to the filing of the election petition. Indeed, many employers now show as part of their first day orientation short films about why unions are unnecessary.

Let me conclude with this. If some employers are truly concerned with full debate, I suggest that they give unions access to their property and debate the pros and cons of unionization.

Thank you for your time.

CHAIRMAN LIEBMAN: Thank you for your thoughts. Colleagues have questions?

Since you talked about uniformity, I wondered if you would want to reflect on the prior speaker's comments that this will actually result in less uniformity because there will be Regional Directors making different decisions rather than just the Board.

DR. LOFASO: Well, there is guidance, first of all, in terms of this is procedural guidance. If what he means by that is substantive, lack of substantive uniformity, there is actually a review process that the Board will have. There's still a post-review election -- post-election review. So the Board would be able to maintain which I think would be very important for National Labor policy.

CHAIRMAN LIEBMAN: Thanks for being with us today --

DR. LOFASO: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts.

Our next speaker is Eric Schweitzer, and up after him will be Scott Pedigo.

MR. SCHWEITZER: Good morning. Madam Chairman, Members of the Board. My name is Eric Schweitzer. I'm with the law firm of Ogletree Deakins in the Charleston, South Carolina office where I've practiced labor and employment law for over 35 years now.

In Charleston, we can't say hello in five minutes. So

I'm going to -- I'm going to speak as fast as I can, but I expect I'll only get partially through the remarks.

I'm here representing the Council on Labor Law Equality with whom I'm sure you all are familiar. My partner, Hal Coxson was planning to be here today and wasn't feeling great this morning. So he sends his regards.

I'd like to first quote from President Barack Obama, in 2009. "The strongest democracies flourish from frequent and lively debate." In my opinion, the proposed amendments don't carry out President Obama's message there.

As the United States Supreme Court held recently, in fact, in 2008, congressional policy favors uninhibited, robust and wide-open debate on matters concerning union representation so long as that does not include unlawful speech or conduct, the Chamber of Commerce v. Brown decision.

The free speech provisions of Section 8(c) are dependent on the opportunity to speak. Limiting the reasonable opportunity for such uninhibited, robust and wide-open speech is the equivalent to denying it altogether.

Cutting short the representation process is an unwarranted curtailment of free speech.

In addition, the proposed amendments will severely limit the opportunity for employees who are facing a representation election to conduct their own independent research on the issues and engage in discussion and debate with their fellow

employees regarding the results of their research.

Second, unions file petitions at their peak strength, often after months or longer of quiet campaigning, many times without the employer's knowledge. If unions were required to notify the employer at the outset of their campaign, that would be one thing, but often the first the employer, and quite possibly many of the employees, learn of the campaign is upon receipt of the petition. In fact, I think in the proposed rules, the expedited Excelsior list, the comments regarding that proposal is to be sure that all employees know what's going on.

Third, the requirement that the employer file a statement of position regarding an appropriate unit within seven days, actually five working days, and waive any issues not raised is a denial of due process and fundamental fairness. It is certainly not consistent with Rule 26(a) of the Federal Rules of Civil Procedure as the proposal asserts. The Rules of Federal Procedure, as litigators, under the Rules of Federal Procedure, do not preclude a party from amending its disclosures at any time, Rule 26(c), nor does it prevent a party from raising and litigating any issue about which it learns during the course of the litigation. It is not uncommon for a party to move to amend pleadings to conform to the evidence presented, and Federal Judges are typically very liberal in so doing in the interest of

fundamental fairness and the administration of justice.

I further note that unlike the procedures set forth in Section 9 of the Act, and the Board's existing rules in civil litigation, for which the Federal Rules of Procedures were crafted, the parties are allowed to engage to broad discovery before going to trial. The purpose of that discovery is to learn the other side's position and evidence and to avoid trial by ambush.

Under the proposed amendments, a party's statement of position may not be obtained until the first day of the hearing, leaving the other party or parties unable to clearly identify or appreciate the issues to be presented until too late.

I had one example, not too terribly long ago, where the union representative demanded the hearing. I was ready to stipulate. He subpoenaed 35 or 40 employees from the plant, actually shut down a large portion of the manufacturing plant. We got to the hearing, and he had no issues whatsoever.

Next, the proposed delay of voter eligibility and unit challenges until after the election denies the employees of information to cast an informed vote. As one of the previous speakers mentioned and as experienced labor professionals know, employees many times make up their minds on unionization, based not on union propaganda or employer

campaigning, but on their own research and the views of their fellow employees who will be in the same bargaining unit. They may or may not want their putative supervisor or lead man to be in the same unit. They may or may not want to be in the same unit with other job classifications. Denying them that knowledge before the election is asking them to vote for a pig in a poke.

Also, adding e-mail addresses of potential voters to the information and Excelsior list may seem simply like keeping up with modern technology but, in fact, it raises serious legal and practical questions. The Board should know that employees will consider it an invasion of their privacy for an employer to disclose their home e-mail addresses, and it's unclear whether it's home e-mail addresses or only business e-mail addresses that would be required. Even if the latter, it raises concerns about solicitation under the Register-Guard decision.

These are among the many reasons we oppose the proposed new rules.

In closing, I'd like to quote from Justice Oliver Wendell Holmes. "To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of their right to state unpopular views also deprives others of the right to listen to their views."

Thank you, Madam Chairman.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER PEARCE: Yeah, I've got two questions.

CHAIRMAN LIEBMAN: Member Pearce.

MEMBER PEARCE: You mentioned that it's problematic for the statement of position to be presented so close to the hearing. I'm paraphrasing but --

MR. SCHWEITZER: My understanding is that that's a possibility. I know it was requested earlier, but I believe in the proposed rulemaking it says it has to be there on the first day, preferably it be there earlier.

MEMBER PEARCE: What would be your suggestion in that regard?

MR. SCHWEITZER: I think having a statement of position is a fine idea. My concern is not with that requirement, but with the requirement that if during the course of the hearing a party learns of some other issues or perhaps one side takes a position on the unit that hasn't been anticipated, they should be able to modify response and raise other issues.

My reading of the proposed rulemaking is you state your position, and then no matter what, that's it, and you cannot present any evidence or otherwise argue anything other than in your statement of position. I think that's too restrictive. I think any legitimate unit issue ought to be the subject of the hearing, whether or not it was stated in the position.

MEMBER HAYES: I'd like to follow up on that. The rules, the proposed rules more or less equate the statement of position to almost like an answer to a complaint in civil litigation. I wonder if you could comment first on -- utilizing what are essentially adversarial rules, the Rules of Civil Procedure, in what is essentially a fact-finding procedure, number one, and number two, to the extent that we are borrowing from the Federal Civil Rules and if that analogy holds any weight, that it's more or less like the answer, an answer is due 21 days after a complaint is served, but in this instance, we're asking employers to present an answer or be precluded, to join issues within five working days. Is that in your judgment a sufficient amount of time and is the utilization of the Federal Rules appropriate in that context?

MR. SCHWEITZER: First of all, that is a good question. I would say that if we're going to use some of the Civil Rules, then I think we should use more of the Civil Rules than just Rule 26. Rule 26 serves a good purpose. Disclosure of position of the party. Keep in mind, in my remarks though, under those rules, there is discovery. There is no discovery in our cases. So I think it's an adequate amount of time to state a position which will be clad in iron from which you cannot change at any point in time irrespective of what the other party or parties raise in the

hearing.

So if we're going to use the Rules of Civil Procedure, and they've worked very well for a huge amount of litigation in this country, they work, it is fair to all parties. Let's use all of them and which would allow for liberal amendment in the interest of justice.

CHAIRMAN LIEBMAN: Member Becker.

MEMBER BECKER: Mr. Babson mentioned an article by Professors Fisk and Malamud, and one of the things that they decry in the article is the Board's lack of capacity to do empirical research. In terms of the question of when campaigning begins, we do see cases which clearly indicate campaigning is going on before a petition is filed. Now, you've indicated that many times unions begin their campaigns without the employer's knowledge. Are you aware of any systematic or semi-systematic evidence about how often that occurs or when the two parties actually begin their campaigns vis-à-vis the filing of the petition?

MR. SCHWEITZER: I can speak, of course, almost only to my own experience. The underground campaign, if you will, the silent campaign, is now the standard. It is very, very rare that we see an open, above board, overt campaign even in very, very large units. A case that I'm familiar with in my hometown, there was a union election. The union prevailed, and after they counted the ballots, the lead union organizer,

a nice gentleman, went up to the plant manager and they shook hands, and he pulled out a photograph, and it was of the groundbreaking for the facility which had occurred some years earlier. And this was a totally below the radar campaign by the way up until the petition, and he showed it to him and, of course, the plant manager said, yeah, I remember that picture. And he said, well, you see the two gentlemen in the back, waving at the camera. He said yes. He said those are our organizers. They've been here for three years. Very, very effective.

I also know from my own experience that union organizers are very, very capable at isolating groups of employees that will be involved in a campaign and those that will not. A good friend of mine is an ex-union organizer and talked with me about some of the strategies that they employ. So you really have different components.

You will have the under-the-radar campaign, almost always these days, small unit, large unit, it doesn't seem to make a difference. You will have some group of employees who are not included in any campaigning at all and, of course, your proposed rules want to get the Excelsior list out much earlier in somewhat of an acknowledgment of that.

Despite what everyone says is the high level of sophistication of the employers, many, many times they are totally unaware of the campaign until the petition is

actually filed.

In the case I mentioned where the gentlemen were waving at the camera at the groundbreaking, years before, totally unaware of it until the day before the petition was filed. So it seems to be very, very common and not all the employees know about it.

CHAIRMAN LIEBMAN: Thank you, Mr. Schweitzer --

MR. SCHWEITZER: Thank you very much.

CHAIRMAN LIEBMAN: -- for your thoughtful comments.

Our next witness will be Mr. Scott Pedigo. I hope I pronounced that correctly.

MR. PEDIGO: Pedigo.

CHAIRMAN LIEBMAN: Pedigo.

MR. PEDIGO: Yes.

CHAIRMAN LIEBMAN: Pedigo, excuse me. And after him will be Mr. Peter Kirsanow.

MR. PEDIGO: Madam Chairman and Board Members, my name is Scott Pedigo, and I'm the President of Local 304 of the Utility Workers Union of America, from Shinnston, West Virginia. I'm here today with my colleague, Rich Cossell. He has diverted all his time for me to speak. He is with our national organizers.

Over the past eight years, I've been involved in three organizing campaigns at my workplace for Allegheny Energy. I have witnessed firsthand the actions an employer will take to

prevent its employees from having a voice in their workplace. I'm here to offer testimony based upon personal experience for your consideration.

The first item I would like to address is the theory that employers are ambushed by elections that are decreasing the timeline to get to election is detrimental to the employer. These are theories that have absolutely no basis in fact. During each of our three campaigns to become union, our employer was well aware that we were seeking representation long before a petition was ever filed.

Each campaign lasted a minimum of six months, and our last campaign took over a year to get the support needed to win an election. Our employer always knew within a matter of a few weeks that we were actively pursuing unionization. All of our campaigns were conducted in the light of day for months before filing for the election, and the company held many anti-union meetings leading up to days that were openly advertised meetings to inform the membership. There is no ambush of employees or employers. Excuse me.

We support shortening of the timeframes for the pre-election hearing and the number of days to election day.

By this point, in all of our campaigns, the company used this time to ramp up their anti-union campaign, and with even more mandatory meetings, topped off with one-on-one or two-on-one brow beating sessions, designed to intimidate

employees from continuing their support for the drive.

During our most recent campaign, the company, knowing they were losing the war for our voice, they went as far as to target some committee members with false or overreaching discipline. Some of these resulted in the national organizers filing unfair labor practice charges against the company. The company's hope was that this would delay the election even further so they could try to make up the ground they had lost.

I'm here to say that thankfully our organizers were able to avoid delaying the election, and on a positive note, we were successful in settling all these charges when our new employer took over.

The company didn't quit with their campaign after we had won the right for representation. They targeted a strong supporter for retaliation, and despite their own written policy, overreached on discipline and terminated the employee. Despite the fact that they lost every step of the way, they continued on their course of retribution until the new owner took over. I'm happy to report this employee has returned to work and was made whole by the employer.

Our employer used ratepayer money to fund a very aggressive anti-union campaign through the use of union busting firms. This practice did not end with the loss in the election. The employer continued their use between

campaigns to try to prevent the solidarity necessary to win. With the present reporting rules, they are able to cleverly hide these costs without ever informing the ratepayers as to how much this service affected their bills.

It is our experience that the present rules too heavily benefit the employer. With the amount of time it takes to build the support to win representation, the employer has more than sufficient time to try and persuade the employees that they will take care of them. The additional time provided by the present rules greatly increases the employer's chance of success simply by working the system.

I would like to close with thanking you for the time and consideration to present my observation of the rules based upon my experience.

CHAIRMAN LIEBMAN: Thank you very much. Do my colleagues have questions?

MR. PEDIGO: Thank you.

CHAIRMAN LIEBMAN: Thank you very much.

Our next speaker then will be Peter Kirsanow, and next up after him will be Professor Sam Estreicher.

Good morning, Mr. Kirsanow.

MR. KIRSANOW: Thank you and Members of the Board. I'm Peter Kirsanow of the law firm of Benesch, Friedlander, Coplan, and Aronoff in Cleveland, Ohio, with offices all across the United States.

I'm here on behalf of the National Association of Manufacturers. The National Association of Manufacturers is the preeminent manufacturing association in the United States and also the largest industrial trade association in the country, representing manufacturers, large and small, in a variety of industrial sectors, all industrial sectors, in fact, in all 50 states.

Manufacturing is the largest driver of economic growth in the country, contributing $1.6 trillion to the economy. There are tens of thousands of manufacturers that have a keen interest in the promulgation of the proposed rules, and would respectfully submit that the aggregate and separate effects of the rules would have a significant adverse effect on manufacturing, a meaningful exercise of employees' Section 7 rights, employer 8(c) rights, and the workplace in general.

There are a number of early identifiable, substantially deleterious effects of the rules, but for purposes of this hearing, NAM will reserve comment on all but two issues, the truncating of the period between filing of the representation petition and the conduct of the election, and the backloading representation issues.

To paraphrase Member Hayes, the rules would eviscerate the ability of employees to make an informed choice of their Section 7 rights and eviscerate the ability of employers to communicate their positions to their employees under Section

8(c).

The proposed rule would slow the robust free and uninhibited exercise of their rights of debate and to the free-wheeling use of the written and spoken words in the union context as contemplated by Congress when it enacted the National Labor Relations Act, also enunciated in Letter Carriers v. Austin, in the Supreme Court, and we should not have any illusions.

The cumulative effect of the proposed rules reducing the median time period from the current 38 days to anywhere from 10 to 21 days would have the profound effect on the ability of employers to communicate their message to their employees and deprive them of the right to get vital information to the employees regarding their rights and the possible effects of unionization.

Even under current median of 38 days, many employers have a difficult time saying all that they wish to their employees about the issues.

Now, this applies predominantly to smaller employers, but larger companies as well. Consider the traditional campaign scenario. The union, as you may have heard just a moment ago, spent six to eight months gathering signatures for authorization cards, and during that period, it will convey its message regarding the benefits of unionization to the employees with few legal constraints, and the employer,

in the main, although I don't know of any empirical studies, I will tell you there's a host of anecdotal stories with respect to this, completely oblivious to the fact that a representation campaign is underway, and not all employees are hearing the particular message either. The employer's completely oblivious and not all employees are subject to the message either.

The employee population, or portions thereof, thus hearing an unrebutted story, a one-sided story, not necessarily an accurate one, they may not be hearing about all the downsides of the unionization effort. They may not hear about union dues, fees, and assessments. They may not hear of the union's political posture or social agenda with which the employee may disagree. They may not hear about some of the struggles of unionized companies that may be faltering or going out of business, and the union controls the filing of the election petition which to a large degree determines the approximate date of the election, and this will be the first time in most cases that employer will have any idea that a campaign is underway. It may also be the first time that many employees are aware that a campaign is underway and there's a mere five and a half weeks to the election in the main.

It takes many, if not most, employers, even the larger ones, up to two weeks to figure out what it is that they even

want to say about the particular issue, and thereafter, they'll have three to four to weeks to communicate that message to the employees, in contrast to the 30 to 40 weeks the union may have already used to communicate its message, and logistics are even more challenging for employers that don't have a centralized workplace.

With the proposed rules implemented, the election would be conducted before many employers would have even figured out what it is they need or want to say to their employees regarding the unionization issue.

This effectively deprives the employer of its 8(c) right, the First Amendment incorporated into the labor context, and it will destroy or hinder employees' Section 7 rights, essentially reducing it to a fiction, and this is compounded by the fact many of the procedural issues you've heard about with respect to the election are either rushed or backloaded, and it imposes, the rules will impose strict determinative pleading requirements on the employer, the non-petitioning party. The employer is required to craft a position on a variety of issues within seven days or forever forfeit the right to do so.

And this would deprive many employers of the effective right to legal counsel and thus due process and arguably impede its right to petition the government for the address of grievances.

Moreover, the scope of review of, of the post-election scope of review will be limited and discretionary. For those of us who have been doing this for a while, the rules are enormously beneficial to unions. Indeed, those of us who have been through a few hundred representation elections over the years have a difficult time conceiving of how a union could not win an election in any given circumstance under the proposed rules, especially if the Board fashions a new understanding of what constitutes an appropriate bargaining unit.

But they will be profoundly harmful to employees who will be forced to make an uninformed decision with respect to one of the most important aspects of their lives, and profoundly harmful to employers who will be removed from and have little input into determination to unionize the workplace.

For the foregoing reasons and those that will be submitted in our comments, NAM respectfully requests that the Board reconsider issuance of the proposed rules.

Thank you, Madam Chairman.

CHAIRMAN LIEBMAN: Thank you, Mr. Kirsanow, for your thoughts. Any questions? Member Becker.

MEMBER BECKER: You very eloquently articulate the importance of a campaign period, but I think we would all agree that it just can't make sense to have the length of

that campaign period hinge on the accident of what issues are litigated. That is, currently we have a system where the length of the campaign period depends on how many issues are litigated, and how complicated they are. That certainly doesn't make sense, does it, where we hinge this very important period that you described, the length of it, on the accident of what litigation there is?

MR. KIRSANOW: I think former Member Babson indicated that there are competing concerns in the National Labor Relations Board, and I think you articulated one very fine one. That is, you want to make sure that you do this in an expeditious process, but by the same token, you want to protect very important procedural concerns on behalf of the employees and the employer and frankly the union. You want to make sure you get it right in the first instance or as close to right as you possibly can get.

To some extent, some cases may be delayed by virtue of following procedure. Those procedures have arisen over the course of 70 years for good reason, but by the same token, I think it's enormously important that we make sure that we have the ability to communicate both the union message, the company message, the employee message, and also given the fact that the median right now is 38 days, 95.6 percent of cases are resolved in 56 days, that doesn't strike me as being particularly long and, in fact, if we want to get it

right, because this is an important thing, for employees, for employers, for the union, adding a couple of more weeks to the process shouldn't be a problem. We should be able to get it right, and right now I believe that we're looking for a solution in search of a problem.

MEMBER BECKER: Just a follow-up question, and again we're always in search of data which is as reliable as possible. You talk about a party's ability to communicate, and the only empirical study that I'm aware of is from my old labor law professor, Jack Getman, and he conducted a study of Board representation elections now some years ago, and found that surveying employees after the election, there was a very marked difference between the number of communications they had had from the employer and the number of employer meetings they had gone to versus the number of communications and union meetings.

You describe a very different world, but again are you aware or is your client aware of any empirical data on that question post-dating the Getman study?

MR. KIRSANOW: As I indicated we do not. I can tell you about my own anecdotal information as could any other management side labor lawyer, but let me suggest with respect to the Getman study that sometimes recency is promising. In other words, if an employee has heard the union or the company message over the last five weeks, it tends to stick

in his mind in terms of the number of times he's heard it as opposed to having heard maybe the same number or possibly more messages from the union over a six to eight month period.

CHAIRMAN LIEBMAN: Let me just ask a quick question similar to one I asked earlier, and you're someone you've said has done a lot of these campaigns. What is the -- can you estimate the time it would take in your mind for the employer to have an opportunity for expressing its views, and I understand that can vary according to the size of the workplace, but again, taking our median size of 24.

MR. KIRSANOW: Thank you, Chairman Liebman. You're right. It does vary, and with this median size of 24, that presumes a relatively small employer. Typically what happens is the employer, as I think Mr. Caufield indicated, he gets a notice and doesn't know who the National Labor Relations Board is because he's concentrating on making widgets. He tries to figure it out, and then calls his lawyer who is an estates and wills attorney, and that attorney says you need a labor lawyer. A couple of days go by and then he finally finds a labor lawyer. They start discussing what needs to go on. Several days have passed. The labor lawyer comes in, tries to get a climate survey of the particular employer. What are the issues that are going on? What do you think the employees are concerned about? Several more days pass.

In the meantime, the employer's also trying to assess with his labor lawyer what are the various pre-election issues that need to be addressed, supervisory status, scope of the unit, et cetera.

Trying to assess what it is that the employees need to hear may take several days, could take several weeks, depending upon the nature of the employer, whether it's 24 or 2400. And I would say that under the current system, where we've got a median of 38 days, I would say from my own experience all employers feel extraordinarily rushed under those 38 days.

With all due respect to some of the other individuals who have testified thus far, I recognize that my competency is limited, but I always feel extraordinarily unprepared. My client feels as if they don't have enough time to get all of their messages out, and also keep in mind that some employers do not have a centralized work location. They've got to go out to outlying facilities, or they've got to communicate with their employees who don't arrive at the same workplace every single day. That presents challenges. It presents challenges for the union, too. It strikes me that possibly the more time someone has to make an informed choice, to make a communication to the employees regarding an essential issue regarding their workplace, the better off all will be.

CHAIRMAN LIEBMAN: Thank you for your thoughts.

MR. KIRSANOW: Thank you.

CHAIRMAN LIEBMAN: Thank you for being with us today.

Our next witness will be Professor Sam Estreicher. Just to alert everyone, I think we will take a short break after Professor Estreicher.

PROF. ESTREICHER: Thank you. That gives everyone a strong incentive to want me to finish quickly, and five minutes is barely enough for any academic to clear his throat, but I'm from New York and I speak quickly. Madam Chairman and Members of the Board, I thank you for this opportunity to express my personal views.

I'm in the broad support with the general lines of the proposed rulemaking. There are problems, and I want to discuss a couple of recommendations I might have, but the modernized Excelsior list is a good thing. I don't think there's a serious personal privacy issue, if you limit it to the work e-mails, and there could be some sort of a consent procedure to deal with the privacy issues.

I think also the elimination of the discretionary review period, pre-election review of the Board, is an unqualified gain because my understanding is it's been barely utilized and it triggers an automatic waiting period for no good reason, my study indicated.

So those are very good things. In general, professionalizing the R case and requiring the parties to

make an offer of proof to have a basis for their position, that's all for the good, and in general, trying to reduce the time between the filing of the petition and the election is a good. It's not an absolute good. Former Member Babson made this point. There are countervailing values. One important value is I believe the need for an informed employee electorate.

The U.S. system is one of the hard in, hard out. It's hard to get a union in. It's hard to get a union out. Until we move to system where decertification is informal, we have to have some integrity to the employee choice.

I think a lot of progress has been made on the time period between the filing of the petition and the election. It used to be a 50-day median, so said the Dunlop Commission. It's now 38-day median. I think that median is going to improve with the elimination, I haven't done the math, because I'm math allergic like most lawyers, but once you eliminate that waiting period for pre-election review of the Board, it's going to improve.

I'm not sure you can improve that median much more, and so I would like the Board to think about generally an application of the proposed rule, sort of with a rule of reason with some flexibility in the Regional Director. I don't think you can improve that median, and the reason I say that, you will improve it somewhat, because of the

elimination of the discretionary review waiting period, but you're not going to improve it a great deal more than that, and it may not be desirable for a variety of reasons.

One reason is I think a problem lies elsewhere. The problem lies with the especially heavily litigated cases. The problem lies with blocked charges, and I'm going to talk about that in a moment. We need more data on this, but I think that much of the tail of this distribution, and I'm not a statistician, but is a good median, but then there's a long tail, and the long tail are the cases that take a great deal of time from the filing of the petition to the election. Many of those are blocked cases.

I think if you're going to introduce an element of union access to the employee electorate, there's going to be a need for time as well, and I think that's desirable, too, in the interest of informed employee electorate.

Also the point has been made about small employers. The median is 24. We need more data on small employers in Board elections, but my instinct is at least in Region 2, if you've got more than one employee, you're within the Board's jurisdiction. Many of those cases involve very small employers, and if you look at the first contract failure cases, many of them involved very small employers, employer with very small units. It's not clear if they're viable units for collective bargaining.

So my point is it's going to be hard to reduce this median significantly beyond what you can accomplish with the elimination of pre-election review.

Let me offer some suggestions. Again I support in the main much of what is in the proposed rulemaking.

Four suggestions. One, I think the Board should seriously consider largely eliminating the blocking charge. There may be some extreme cases where it makes sense, but the general postponement approach or backloading approach of the proposed rule, which I think is a good idea, should apply to blocking charges as well. I haven't done -- by the way, there's been very little empirical research done in labor law, and the Board can work with the academics in making that data more useful. So it would be nice to know how many unfair labor practices actually occur in organizing campaigns. How many discharges occur? I think we can get that kind of information.

So if you're going to ask me about empirical work, I think I'm the only one who has done it, and there isn't much out there. Maybe Kate Bronfenbrenner as well. The Getman study is very old, and you can talk about that if you'd like.

I think we should eliminate the blocking charge. If the charging party is not happy with the outcome of the election, a charge, if it then results in a compliance, can be adjudicated, and the one year election bar would not apply if

there's an unfair labor practice that mars the election outcome. But the general message should be this Agency provides elections on a fairly prompt basis, whoever is petitioning.

Secondly, I'm not sure about this, but I'd like to see more explanation as to why the Petitioner in a typical case, which is the labor organization, is not required to file its petition within an appropriate unit under well-established Board law. What the proposed rule contemplates is an expedited process, which I support in general, but there ought to be a burden on the organization. It's not that great a burden, but to file the petition within an established unit. If it's filing a petition in the unit that seeks an extension of existing law, or a change in existing law, that should not bring within it this expedited procedure. It should go back to the pre-existing procedure.

The third recommendation, here I'd urge the Board to take this very seriously, the preclusive effect of the statement of position. The statement of position is a good idea. The employers that have said to you that the discovery analogy doesn't work have something in it. Most of these are small employers. They don't have HR departments. They don't have legal departments. It's just not fair. It's not going to stick. Fairness is essential to acceptability of what you're trying to do and acceptability that will allow your

change to persist over a change in administration.

The statement of position in my view should only preclude -- should only be a tool to identify for the Regional Director the issues that must be adjudicated pre-election. This is basically the approach that you've taken with respect to the eligibility of individual voters. Take it with respect to the appropriate unit as well. You will then meet head on a lot of the criticism you're getting from the employer community. You will be promoting fairness to small employers. This isn't just fairness to give them a chance to run their campaign, but just fundamental sort of process fairness, and you will be promoting I believe the acceptability of this rule.

What's the rule? The rule is tell us what's at issue? If you think there's a need for a plenary pre-election hearing, tell us what's at issue. If not, it's all getting backloaded to the post-election period provided that the labor organization makes out a prima facie case of an appropriate unit as I've suggested earlier.

The fourth recommendation, in general, the idea of putting off the determination of the individuals exclusionary, sorry, the non-eligible status of certain individuals to the post-election period is a very good idea because very often they're being used as gambits, but there are cases, and it seems to me the Board ought to be open to

this, there are cases where an employer legitimately needs to know whether these folks are supervisors because the employer is using them or will use them in the campaign, and there needs to be some earlier determination in those cases.

Now, obviously this can be abused. The answer to abuse is not to have an absolutely inflexible rule but to empower your Regional Directors to only recognize the exceptional case.

So those are my recommendations. None of them take away from my endorsement of the proposed rulemaking, and I applaud the Agency.

CHAIRMAN LIEBMAN: Do my colleagues have any questions?

MEMBER PEARCE: Yes. Can you explain a little bit about the preclusive effect of the statement of position? What would you feel would be a better way to address it?

PROF. ESTREICHER: You tell the -- well, typically we're talking about a petitioning labor organization, and the respondent is the employer. It's not always the case, I understand. If the employer says, and this all has to do with implementing the statutory right to a pre-election hearing, and we're saying the union has to have a prima facie case that it's an appropriate unit.

Now, you are saying you want to have a plenary hearing. What is your case for a plenary hearing? We think the election can go forward. Well, the employer says, well,

we've got potential supervisors here. Well, we're going to allow you to challenge those ballots, put them in reserve, and we'll decide that status later on. Or I think there's an inappropriate unit. Well, what's the issue about the appropriate unit? Make your case now.

We're not going to say you're precluded from relitigating that post-election. That's my problem. There's the preclusion rule that if you don't make the case now, there is a post-election preclusion. I think that's going too far. It should set the agenda for the pre-election hearing because the employer's saying, look, there's something out of the ordinary here. The Board's presumptive appropriate rule, a unit, does not work here. I'm a very special employer. I organize it differently. I'm a decentralized operation, whatever. I'm a metropolitan operation. Well, you have to make that case if you want a hearing.

If you don't make that case, the election goes forward, but you can still challenge that post-election. Now, again, that's not going to be an easy challenge to the employer I assume based on Board law, but you challenge that post-election. It is -- strikes me as draconian, and it will unsettle a lot of communities in the court to say that even small employers on this very collapsed timeframe, which in general makes a lot of sense, but to say that people have to

fully determine their legal positions. It's not going to sustain itself.

MEMBER PEARCE: With regard to the union bearing the --

PROF. ESTREICHER: By the way, I would support -- excuse me one second. I would support a rule of estoppel, if you do make the point and there is a hearing, then you're bound by the outcome.

MEMBER PEARCE: I see.

PROF. ESTREICHER: And I think Mr. Schweitzer had some good idea about a good cause showing. That's what I heard from him. Good cause showing. So these are all rule of reason items that will help promote the acceptability of what you are doing, and --

MEMBER PEARCE: So you're not suggesting two bites of the apple.

PROF. ESTREICHER: If you raise the point, yes, that makes sense. Because that would then be the respondent's choice.

MEMBER PEARCE: Now --

PROF. ESTREICHER: You were saying something about the labor organization.

MEMBER PEARCE: Yes. The prima facie showing on the part of the petitioner is to establish an appropriate unit or what are you talking about? Are you talking about an appropriate unit based on judicatory standards or --

PROF. ESTREICHER: An appropriate unit based on the Board's existing law. I don't think it's that demanding, but I think it's necessary to the theory of what you are doing. The theory of what you are doing is that the union makes a prima facie case, that is if a question concerning representation is present. That's why you're dispensing with all this other stuff unless the employer puts something in issue. So that's the logic of it. So I think the kind of -- I understand. I've been in this area. We call it a fact-finding process. I understand. It's an adversarial process.

CHAIRMAN LIEBMAN: You want to wrap up, Professor Estreicher.

PROF. ESTREICHER: I'm done. Thank you very much.

CHAIRMAN LIEBMAN: Do you have any more questions?

Thank you. I let the time go a little longer since you've studied and written on this issue so much, Professor Estreicher.

I want to thank all of our morning witnesses. At this time, we're going to take a short break. I'll remind everyone to take your badge and number with you. We have escorts to direct you to the restrooms. If you're going to leave the building, remember you need to be escorted on the elevator, and you need to return your badge and number and don't forget to get your ID.

We are going to reconvene promptly in 12 minutes, which

is I guess about 10 minutes of, 9 minutes of. We hope you will return and join us for the rest of the morning.

(Off the record.)

CHAIRMAN LIEBMAN: We're back on the record.

Our first witness up will be Michael Prendergast, and after him will be Hope Singer. Good morning.

MR. PRENDERGAST: Good morning, Madam Chairman, Honorable Members of the Board. My name is Michael Prendergast. I'm a partner with the law firm of Holland and Knight. I'm speaking today in opposition to the proposed amendments.

One of the speakers used the phrase, and I've heard it used elsewhere, that in a lot of ways, the amendments come across the, particularly the employer community as really a solution in search of a problem that doesn't exist.

As Member Hayes summarized in his dissent to the proposed regulations, most of the elections are taking place well within the ambitious goals set by the Office of the General Counsel. There are a few aberrations, but the amendments aren't addressed to the causes of those aberrations and won't address those situations, will not expedite the commencement of bargaining, and will in many cases, where review is still allowed, will simply shift review to the time period after the election and we believe at great cost.

It will do so at the cost of we think confusing the electorate, leaving potential supervisors in the unit. Folks will not be sure exactly what unit they will be voting to join or not to join. This is particularly problematic in the case of supervisors, where someone who may be a supervisor who is left in the bargaining unit, it puts an employer in a difficult position. Do they let that potential supervisor engage in campaign activities that if they are found to be a supervisor, they would not otherwise be allowed to do, and that could be potentially disruptive, and we think it runs the risk of destroying the laboratory conditions that the Board has fought so many years to keep in the election process.

Of course, most significantly, and most speakers have addressed, is that what these amendments are really all about is shortening the pre-election period, and the effect that that will have on limiting the free speech of employers and squelching the robust debate that Congress sought to encourage through Section 8(c) of the Act.

Employees need to know the facts about the important decision of whether or not to select a collective bargaining representative. They need to know why they should even bother to vote. We still see frequently in our campaigns that employees are told by union organizers, look, if you don't want the union, just don't vote, but don't ruin it for

everybody else when, in fact, the true facts are that the majority of those voting control whether the union represents the entire bargaining unit.

Employees need to know about the unions trying to represent them. We see frequently unions will brag about their outstanding pension plans and not bother to tell people that their pension plan had to file a notice of critical status with the Department of Labor.

Employees need to know what collective bargaining is, what collective bargaining is not. They need to know that it is not a guarantee of benefits. They need to know about the risk of strikes and the effect that that could have on them and their families. They need to know about union by-laws that could subject them to trial and fines if they try to cross a picket line.

Unfortunately, experience shows that employees are not getting those facts from the union, and if they don't get those facts from the employers, they won't get them anywhere else.

The amendments as written, we feel, will go a long way to ensure that employees are voting in the dark on an issue that may be one of the most important issues that ever face them in their working careers.

Finally, I'd like to address the issue of the Excelsior list. Anyone with an e-mail address today -- pretty much

anyone with an e-mail address today knows how to operate Google, and if you don't, you can just ask your first or second grader and they'll show you. Employees know how to share their e-mail addresses with the unions if they want to do that, but what this will be is a further unwarranted intrusion on employees' privacy. Organizing drives are often very, very emotional, and a lot of times it includes supporters' personal attacks on employees who want to exercise their right to refrain from supporting the union and absent violence or specific threats of violence, this Board has usually held that that conduct is not only allowed but protected. So employees have to put up with insults, name calling, rude behavior, on the job, in the break room, on their way to and from work. The proposed amendments will ensure that they'll also have to put up with that behavior as unions spam their e-mails accounts during the organizing drive.

Thank you very much for your time and your consideration.

CHAIRMAN LIEBMAN: Thank you for your comments. Do my colleagues have any questions?

MEMBER BECKER: I have a question about your supervisor concern, which is really how do you see this as different? As I understand the current system, if there's a close question on a supervisor, a request for review is often

filed. If the Board grants the request for review, we typically aren't able to rule on that question before the election and yet the election is not stayed. So you have that open question. The election goes on. If it's a close question, even after certification, if there is certification, you may have a technical refusal to bargain on the supervisor question as you often did in the supervisor context, and so you have that uncertainty now. How do you see the proposal as different in that respect?

MR. PRENDERGAST: The proposals now would put off any dispute not involving 20 percent of the bargaining unit to have the election. We see that as resulting in those issues more frequently being left towards after the election.

MEMBER HAYES: If I can just follow that up, with respect to not so much when the decision is made, but when the record is made, if there are supervisory issues that are raised in a pre-election context, does 9(c) require that there be a hearing with respect to that if a party insists on a hearing?

MR. PRENDERGAST: Member Hayes, I'm not exactly sure.

CHAIRMAN LIEBMAN: Let me ask one question about e-mail addresses. The Excelsior list, of course, for however long it's been around, has required turning over employee home addresses, and how do you see e-mail addresses being more of a problem? It seems to me -- it's easier for me to delete an

e-mail than to turn away someone who's at my front door. So I'm curious of your thoughts.

MR. PRENDERGAST: We have frequently organized drives. Our employer clients are faced with employees who are extremely irate about getting mail sent to their homes, and why was my name given to the union. We have to tell them that that was required by the Board's procedures. That's why we all have spam filters today because those irritating, unwanted e-mails are coming into our workplace, and a lot of times when people get -- when people have someone's e-mail address, there's a lot of other things people can do with their e-mail addresses, finding their social media sites, et cetera, and it's just a further intrusion on employees' privacy. If employees want to share their e-mail addresses with the union, they know how to do it.

CHAIRMAN LIEBMAN: Thank you. Thank you for your comments and for being here today.

Our next speaker is Hope Singer, and up after that will be Oliver Bell. Good morning.

MS. SINGER: Good morning, Chairman Liebman, Members Becker, Hayes, and Pearce. Thank you for allowing me to testify before you this morning. I truly appreciate it.

My name is Hope Singer. I started working for the National Labor Relations Board in 1979 as a law student in Region 22 in Newark, New Jersey, and was hired as a Field

Attorney in Newark in the fall of 1980. I stayed here for five truly, wonderful, remarkable years, and at that time transferred to Region 31 in Los Angeles at the end of 1985. After a short period at Region 31, I went into private practice in Los Angeles, in March 1987, and I've stayed in private practice with pretty much my same firm with different names, which I won't share with you because that will take up the rest of my five minutes.

The time that I've spent practicing as a union labor lawyer has been almost exclusively as a traditional union labor lawyer, unlike many other union lawyers who go into parts of employment practice law. I do nothing but exclusive representation of labor organizations as labor organizations, and I do that in Los Angeles County. If Los Angeles County were a state, it would be larger than 42 other states. If Los Angeles County were counted as an individual geographic entity, it would probably be better known that over 10 million people live and work in Los Angeles, and of that 10 million are 12 percent of all of the unionized workers in the United States in Los Angeles County.

You would probably not be surprised to hear that in the private sector in Los Angeles, the entertainment industry is collectively the largest employer in Southern California.

When I thought about what I could add to these proceedings, anticipating that 30 or 40 or 50 speakers were

going to before you, and many of them on the union side making one set of arguments while others on the management side making their arguments, what I thought I would try to do is bring some perspective from the other side of the country.

The union density in the movie and television industry is among the highest in the United States. However, unlike the images many people have of what it means to make a movie, many of the movie crews, and I'm not talking about the casts, the directors, the writers, although some of this is true for them as well, I'm talking about the middle class people who work as camera operators, hairdressers, makeup people, who make movies. Those movie crews who work turning out films do not do it on the back lots of employer studios such as Paramount or Twentieth Century Fox with the images that we have of how movies were made from the movies of the forties. That just doesn't exist anymore.

What happens is that when most movies or television series are made, they're made by employers that are created for the distinct and specific purpose of creating that one product. So if, for example, a movie was going to be made called The Board, an employer would be created that would be called something like The Board, Inc. or The Board Movie, Inc., and everyone who worked on that movie would be employed by that one employer. It would be created for the sole purpose of making that one movie or creating that one

television series. And once the movie had been completed, the employer disappears and the itinerant workforce disperses much like their counterparts in the construction industry but without an 8(e) type of situation, and so the next time, they go to another employer. If they want to be represented by a union with that employer, they have to organize once again.

In this industry, with its high union density, there's little doubt that most, if not all, of the employees who are able to want to work in jobs where they are represented by labor organizations. They've been able to establish decent, middle class wages. They've been able to establish health and pension funds that will take care of themselves and their families, and through the earning of these middle class wages, Los Angeles has become in large part of over the last half century, a community where people can take care of themselves and their families through the work in that industry.

When a new employer is established to make a movie and a substantial portion of the crew is hired usually from the Los Angeles area, where the most skilled workers are, they're very likely to be union members and, as I said, anxious and eager to continue with their union representation for the reasons stated above.

Under the current system, any employer who wishes to ensure that there will be no union representation, if the

employees seek an election under the Board, can have that wish met and the movie will be completed, released in theaters, distributed worldwide, with advanced DVD purchases available on Amazon and ultimately in your neighborhood convenience store where you can pick it up before an election could even be held.

In light of these significant delays, workers in this industry often choose an alternate, albeit legal method of obtaining recognition for the union. They seek to represent them. They strike. They shut down the production, thereby exercising their legally protected right to obtain union representation but with the potential of economic impact on the community that could have been avoided if these folks had access to an election system that worked.

I see that the red light is flashing. I would ask for another 30 seconds to 1 minute if I may.

CHAIRMAN LIEBMAN: Surely.

MS. SINGER: My recollection of the history of the Act is that one of the reasons in passing the Act was to avoid labor strife that brought economic consequences into the community.

I'm fascinated by the stories that the media picks up to run in any particular area and in labor in particular. Of the dozens, and possibly hundreds of strikes in the entertainment community, the media recently focused on a

strike that occurred on a reality TV show called The Biggest Loser, which occurred last fall. Forty or fifty employees struck and eventually won recognition. The story was covered not only in Southern California but throughout the country, and it struck me as somewhat incongruous that within this context, the fact that the workers had to resort to a strike, causing the employer to lose money, causing the workers to lose money, causing a shutdown of a fairly significant production, that the biggest loser was the workers and the employer because they were the ones who lost because the workers could not get an election in a timely fashion. Thank you.

CHAIRMAN LIEBMAN: Thank you. Do my colleagues have questions?

Thank you for coming all the way here to share your thoughts with us.

Our next speaker will be Oliver Bell, and up after him will be Christine Owens. Good morning, Mr. Bell.

MR. BELL: Good morning, ma'am. Madam Chair, Members of the Board, it is great to be here this morning. Also I'd like to acknowledge the guests and members of the audience we have from organized labor, employers, trade associations and, most of all, the employees present or viewing this via webcast who have the most at stake in this entire process.

Thank you for allowing me the opportunity to share my

perspective with you. My name is Oliver Bell. I'm from Austin, Texas. I am the CEO of Oliver Bell, Incorporated, and the founder of the Texas Labor and Employee Relations Consortium.

As a non-attorney practitioner of human resources, labor relations, and positive employee relations strategies, I believe I have a valuable and relevant perspective on these proposed rules.

Just quickly, a background piece. Bell, Inc. is a labor relations consulting firm offering advice to employers who have the goal of improving the overall work environment for their employees, our clients, our union and non-union, employers who seek to provide attractive wages, benefits and educate employees about their business. The Consortium includes senior leaders in operations, human resources, and labor relations that want to stay abreast of workplace trends, implement best practices in the areas of conflict resolution, communications, leadership, wages, benefits, et cetera.

Why is this constituency concerned about the proposed rule change? They are interested in these changes because it affects their employees. They have indicated that regardless of whatever political pressure exists, the Board should resist indulging the special interests of employers, unions, or academia.

Most employers understand that it is the NLRB's duty to protect the rights of employees to make a free choice regarding representation, and that it is proper that the Board would encourage an election process in which employees have sufficient time to hear and process relevant information prior to voting on the issues.

Should any of the Board rules regarding the election process be changed? I think that there are some administrative rules which clearly would be an improvement if they were changed. In reviewing the Board's election rules and regulations fact sheet, at first look one might think that there's not much to it. Why be concerned? Change away. A closer look reveals the proposal, in some cases, is actually genuine change for some areas and changes that reflect the fundamental shift away from protecting employee rights in other areas. The latter begs the question whether the changes, in fact, give in to special interests.

Let's take a quick look at recent Board performance. I won't belabor you with it because so many people have quoted that today, but your case intake was up 10 percent last year for FY 2010. Ninety percent of all cases were conducted within 56 days of filing. You've heard the number 38 several times regarding the median to election, but also the average to election has been 31 days, the average time to election, and 92 percent of petitions have voluntary election

agreements.

So I think those are important things to note, and this performance evaluation would indicate that the current process is running well, so it raises the question of why change?

Let me touch on that from kind of a question and answer perspective. Do the rules protect and support employees in the election environment or do they create a questionable and potentially unstable environment? On NLRB Form 707, the Notice of Election, it is clearly stated that the Board wants all employers to be fully informed about their rights under federal law and wants unions and employers to know what is expected of them in an election.

Even the federally published guide to the Labor Relations Act states that the purpose of creating the layman's guide was to ensure that all parties fully understand their rights and obligations under law.

During representation cases, when I do consulting, we encourage employees to use all possible sources of relevant information including radio, TV, print media, the internet, especially government agency websites and union websites and to attend company meetings and union meetings to get information. An employee who has access to information can make an informed decision for or against unionization, and then that decision is truly in their best interest.

The challenge unions have today, in my opinion, is that even though they win a majority of contested elections, often when employees have access to information, they tend to back away from unions before an election can be called. That is not a NLRB problem. That is a messaging problem. It's a challenge in communicating a value proposition of unionization. So it's not an election process problem.

Does a shortened election cycle provide employees with a more democratic process or create a reckless process? I submit it would be a bit more reckless, also more harried.

In the last several weeks, the term ambush election has come into vogue from several different sources. I think what this means is an election that would be viewed as a contrived process in which one party has an unfair advantage of calling essentially the time and date of the election.

As a former Army officer, West Point Airborne Ranger, one thing we learned in the principles of war was to be able to choose the time and place of battle. If you can do that, you can win the majority of the time.

Also just in terms of performance, if you look at unfair labor practices, because employers quite often bear the brunt of being told that they're bad actors, and this is historic data which has run a trend line, but in FY 10, there were 23,500 and change ULPs filed. As the historic trend line goes, over two-thirds of those or right at two-thirds of

those were dismissed or withdrawn. About 34 to 35 percent of those were actually settled. They might have had hearings, but they were settled. Only 1 1/2 percent actually went to hearing and had to be fully adjudicated. So that would seem to indicate that things were going well.

In closing, the proposed rule changes will not result in greater rights and protections for employees. They would, in fact, result in lesser employee protections and will only favor unions, thereby creating a process that is flawed by design. May I have an additional minute, ma'am?

CHAIRMAN LIEBMAN: Surely.

MR. BELL: Thank you. The Board mission is not to advocate for or against unionization but to advocate for a process that allows employees to make a choice free from intimidation and coercion. This should also include free from a process that might encourage process manipulation. By your own internal assessment, you are delivering well on your goals.

Having a union is no guarantee of a great work life, nor is not having a union, but current private sector employees have sent a clear message. Only 1 in 14 employees is in a union currently in the private sector. They don't get the value proposition. Really employees are business people. This is about the deal. If they think the deal is good, they're going to buy into the deal.

How does an employee evaluate the deal? It could be any number of things. It could be wages and benefits. It could be schedules. It could be work life balance. It could be advancement opportunity. It could be workplace diversity. But a good deal is in the eye of the employee, and I trust them to be able to assess that whether they're union or non-union.

Finally, beyond that, I encourage expanding this inquiry. I think this is an exceptional process, and one thing I would like to do for everyone that has spoke today, my hat's off to you and to the gentleman, Mr. Pedigo -- is he still here? I mean I think that was great that he came up, and any employee that comes up to state their opinion whether they're in favor of unionization, whether they're not in favor of unionization, but when they have the gumption to come stand up here and let you know where they stand, I think that that's great, and I think that's important.

Two days of comment really is not enough. I have the privilege of serving also as the Chairman of the Board of the Texas Department of Criminal Justice. We do a number of public meetings, and if we were doing something of this scope and magnitude, you're talking about something here that will impact 100 million employees, we would probably take a little bit more than two days to hear what everybody has to say face-to-face. So if there's any way that you can expand this

process, this is outstanding.

Again, thank you for your time, Madam Chair.

CHAIRMAN LIEBMAN: Thank you for being here and sharing your thoughts with us. Do any of my colleagues have questions?

MEMBER PEARCE: I have a couple. Mr. Bell, thanks for coming and speaking.

MR. BELL: Yes.

MEMBER PEARCE: When you quoted this average that several of the other previous speakers quoted, this 38-day average --

MR. BELL: Yes.

MEMBER PEARCE: -- do you realize that that 38-day average includes stipulated elections?

MR. BELL: I looked at it as the entire process. So I think that's great.

MEMBER PEARCE: Okay. Would -- I would like to inform you, if you haven't already read it, that those elections that are -- that go to hearing, those processes that go to hearing, the average amount of time between petition and election is between 82 and 123 days.

MR. BELL: Well, in the -- and I don't question that fact. I would think that -- there was someone that made a statement earlier also about outliers. If according to your own statistics, 92 percent of the elections are by agreement,

so by stipulation. The fact that we have some that go longer, I think that that's a process, one, in some cases it's unfortunate, but sometimes there are complicated issues involved. In my own background, in terms of having worked a number of R cases, seldom have we had something get extended like that. I had the opportunity to work with a lot of different law firms, but I would say the overwhelming majority of our elections have occurred within 42 days from petition to election.

MEMBER PEARCE: Okay. And you understand that the proposed rules that are under consideration now are primarily for procedures that don't really contemplate stipulated elections.

MR. BELL: Yes, and in terms of streamlining the process itself, and maybe in the rush to get through a page and a half or however that goes, it wasn't clear. I think that some of those proposed changes actually would strengthen the process overall. I mean I see no reason to be opposed to electronic submission. I mean it is 2011. I think a lot of the question that has been brought up has just been in terms of human response time prior to being able to push that button to send the message off.

MEMBER PEARCE: Thank you.

MR. BELL: Any other questions?

CHAIRMAN LIEBMAN: Thank you very much for coming here

today and sharing your thinking with us.

MR. BELL: Thank you for allowing me to speak.

CHAIRMAN LIEBMAN: So our next witness will be Christine Owens, and after that will be William Barrett.

Good morning.

MS. OWENS: Good morning. Good morning, Madam Chair and other Members of the Board. I appreciate the opportunity to talk with you today about the NLRB's proposed rule changes regarding representation elections, and we will expand on these comments, on these remarks in the comments that we submit next month.

The National Employment Law Project is a non-partisan organization that for 40 years has engaged in research, education, litigation support, and politic advocacy to promote the workplace rights and economic interests of low wage and unemployed workers. The overwhelming majority of workers for whom we advocate are women, people of color, and immigrants, and most are not represented by unions.

While others have addressed the particulars of the proposed rule changes, my remarks will focus on the low wage workforce with the goal of highlight why two particular changes, the rules contemplate, first, streamlining the election process by eliminating most pre-election hearings and, second, providing greater access to information more quickly to enhance communication among workers and between

workers and the union that they seek to be represented by, why these changes are of such value to low wage workers.

Low wage workers make up approximately 25 percent of the workforce. Low wage jobs are among those projected to grow the most throughout this decade, and to date, in this recovery, the bulk of job growth has been in low wage occupations.

Union representation provides a powerful economic -- for low wage workers, providing a 21 percent pay differential for unionized low wage workers in the bottom 10 percent of the wage scale compared to their non-union counterparts. Among the demographic groups that comprise the low wage workforce, which again is mostly women, African-Americans, Latinos, and immigrants, the union premium in the form of higher wages and greater access to health insurance and employer provided retirement coverage is significant.

Among these groups in the lowest paid 15 occupations, the wage premium for unionized workers is as much as 19.5 percent, and unionization increases the likelihood of employer provided health coverage by up to 41 percent, and of employer provided retirement savings by up to 29.2 percentage points.

Low wage workers represented by unions are also more likely to have access to a host of additional employee benefits such as lengthy periods of paid leave, along with

the basic due process rights that a contract provides as well as representation and a collective voice for enforcing basic statutory rights such as safe workplaces, fair pay, and non-discrimination, and that's particularly critical because Agency resources, while they have increased over the last few years, are still inadequate to the task of reaching the workplaces in the American economy. It's also critical because as I'll report, in a second, low wage workers experience particularly high rates of violations of workplace protections and low wage workers have much greater job insecurity. So a union contract provides greater security.

Notwithstanding the large share of the workforce and the growing share of the workforce comprised by low wage workers, their representation by unions is inadequate. Fewer than 8 percent of workers in sales and office jobs are unionized or represented by unions, and fewer than 12 percent in service occupations are represented by unions, compared with 17 percent in construction and manufacturing and more than 20 percent of professionals.

There are multiple reasons why low wage workers are underrepresented by unions, not the least of which is their economic vulnerability and perceived disposability. It makes them less able and less willing to endure the lengthy process, the uncertainty, the risk of retaliation, and the added pressures associated with a union organizing drive.

Low wage workers are extremely economically tenuous. One-quarter are the sole source of earnings for their households. Another third provide more than half of their household incomes. Half of low wage workers live in low income families.

Compounding and associated with this economic vulnerability, the low wage labor market is characterized by considerable churning and high rates of turnover. Roughly 60 percent of low wage workers work in firms where annual turnover is 50 percent. Low wage workers are easily displaced and easily replaced, making job retention a challenge and an urgent need.

Low wage workers experience high rates of workplace violations. In a survey that NELP conducted with university researchers in New York, Chicago, and LA in 2008, we found that one-quarter of the surveyed low wage workers had not been paid legally required minimum wages in the preceding weeks, and of those who had worked overtime, three-quarters did not get overtime pay. Among the 12 percent of workers who had experienced workplace injuries, only 8 percent filed for workers' compensation, and of those, half experienced some sort of adverse employer reaction in response to their filing.

This same survey found that among workers who did complain or try to form a union, 43 percent were subjected to

retaliation, and significantly, a large share of surveyed workers, 20 percent who experienced a serious workplace violation, such as dangerous working conditions or sub-minimum wage pay, did not pursue complaints or attempt to form a union because of fear of retaliation or the perception that doing so was futile.

This economic vulnerability of low wage workers, the urgency of getting and keeping jobs, their high rates of turnover, their awareness that employers can easily replace them, the high frequency of violations and retaliation, the known violations that occurred during union organizing efforts combine to dampen the tenacity required for workers to see the process through to exercise their right to organize.

As Professor Jennifer Gordon has written in the context of low wage immigrant workers, slow processing, limited enforcement powers, and complex bureaucracies discourage the assertion of workplace rights by low wage workers.

We believe that the proposed rule changes overall will create more uniformity and certainty for all parties and provide a fairer, more efficient and more transparent process. This is crucial to the right of all workers and particularly low wage workers to exercise their right to organize and bargain collectively. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for contributing

your perspective. Does anyone have a question?

Thank you for being with us today.

Our next speaker is William Barrett, and next up after him will be Ross Eisenbrey. Good morning.

MR. BARRETT: Good morning, Madam Chairman. My name is William Barrett. I'm with the law firm Williams Mullen. We are also here on behalf of our client, Universal Leaf Corporation. I'm going to split my five minutes actually with my partner, David Burton, and as a result, my time is very limited. So I'm just going to make a couple of brief points.

I've been a management side labor lawyer since 1992, after I had left 4 years as a trial attorney with Region 14 St. Louis of the National Labor Relations Board. In four years at the Board, I had the privilege of conducting myself at least 50 representation elections and served as Hearing Officer numerous times along with the normal casework of ULP investigations and trials.

It's my view that the R case processing of the NLRB is certainly one of the shining stars of the Agency's work. I don't think it's a process that's broken. I don't think it's been at all demonstrated that there are serious delays affecting the process. I don't think we ought to have a situation where aberrational handfuls of cases affect rules that then are going to be put onto the vast majority of the

rest of the work.

My main concern is with what we see as potential procedural due process violations and incumbent on the loss of the right to litigate potentially significant statutory and procedural issues if they are not identified in an initial position statement submitted within mere days of receiving the petition. Whether or not the employer was aware of an underground union organizing campaign prior to the petition being filed, it is almost certain that the legal issues that will be attendant to being filed with that position statement won't have been examined in any sort of depth.

The Chairman has talked a few times about the stereotypical size of the average employer bargaining unit of 24. That's typically a very small employer. One of the problems with that person is they get the petition. If it comes in late in the week, that owner, that manager may not be available. It takes time to get connected with the employer, and usually there's only one or two decision makers in that business.

In a larger business, on the other hand, that might be an integrated operation with multiple job sites and employees in far-flung places, you have the problem that marshaling the personnel data relevant to filling out and completing all the positions on the position statement at risk of losing the

ability to litigate those is a difficult process. It's not something that is a one phone call process.

As a result, I think what you'll see is practitioners on the management side will throw the literal kitchen sink into these position statements in an effort to preserve all possible issues to litigate later on.

It's been compared in the proposal that the Rules of Civil Procedure are similar to what we're trying to do here, but as has already been noted, an answer to a complaint is due in 21 days from the filing of the complaint in the federal system and 30 days in state systems. Seven days is simply not an analog, especially given the fact that in an answer, sometimes your answer is we don't know. We don't have the information and so therefore it's denied, and you always have the ability to amend the complaint here. And so the preclusive effect that results from denying the opportunity to litigate later is going to have some severe consequences, and I think it may well result in the fact that companies, management side labor lawyers will be perhaps less likely to agree to a stipulated election agreement which is what guides about 90 percent of the election work today, and I would hate to see us lose the opportunity to have the vast majority of cases litigated and processed in a timely fashion. Thank you.

CHAIRMAN LIEBMAN: Thank you very much. Mr. Burton.

MR. BURTON: Thank you. Again, my name is David Burton from the law firm of Williams Mullen, and I want to focus very quickly on the issue of post-election challenges and handling many of the representational issues post-election.

The standard is going to be 20 percent. Generally if a Hearing Officer can determine that less than 20 percent of the unit is at issue, that will be decided after the tally of the ballots, subject to a challenge, if it is outcome determinative of the election.

Now, anecdotally -- no empirical evidence. Anecdotally, generally most elections that I have worked on are decided by less than 20 percent of the vote. That means we're going to have a larger backdate or backlog of post-determination decisions.

Now, the concern that we represent here is an issue that you do not have an informed voter. Member Hayes addressed this issue in his dissent and pointed out the Beverly case, and I think that case raises a very important issue. A voter has to decide whether or not the union is in their best interest. That decision cannot always be made if that voter does not know who or what the unit will be that he or she is voting for.

Furthermore, under the Act, the employer has the right of free speech as many people have talked about today. An important tool or an important part of the process is the

employer communicating with its employees, whether or not it believes that unit is appropriate for the employees. By setting this issue towards the end, after the election, employers do not know what they're going to be able to argue. They don't know what that appropriate unit will be. Neither do the employees. That can create some confusion. It also possibly takes away that employee's right to exercise a free vote and understand what they are voting for.

Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions for either one of these speakers?

MR. BURTON: Thank you.

CHAIRMAN LIEBMAN: Thank you then, both of you, for coming and being with us today.

Our next speaker is Ross Eisenbrey, and then we will conclude the morning session with Mr. Ronald Holland.

Good morning.

MR. EISENBREY: Thank you very much. Madam Chairman, I'm Ross Eisenbrey from the Economic Policy Institute, and Mr. Bell told you a few minutes ago that employees are business people making a deal. If he's right, they've been getting a raw deal, indicating that the process is flawed and they're getting bad information.

Many of the employer witnesses are telling you that the rules are fine. They like them the way they are. They don't

need changed, that they're working perfectly more or less, but the -- in my view, has been a failure in a very important way. It's failed to meet one of the fundamental purposes of the National Labor Relations Act. The way it's been administered has failed to meet one of the fundamental purposes, which is to encourage collective bargaining and help equalize the very unequal bargaining power of corporate employers and individual employees. The consequences for average workers and for the economy have been very serious.

The Board's rules have been tilted to favor anti-union employers. There's, in my view, an excessive weight given to the employer's rights and too little to the rights of employees and the unions. The employees are denied access to union organizers in the workplace, to information about the benefits of organizing, but they're bombarded with fear-mongering and personal intimidation by employers who know there is no effective punishment even for egregious violations of the law. You'll hear much more about this from other witnesses including Professor Kate Bronfenbrenner of Cornell.

The proposed rule will help level the playing field a little by making it easier for unions and employees to communicate with each other and by reducing procedural delays that serve only to create opportunities for anti-union employers to intimidate workers.

The failure of the Board over the last 40 years to protect the right of employees to form unions can be seen in the numbers. Union representation in the private sector has fallen from about 30 percent of workers in 1970 to 7 percent today. This decline didn't reflect the preferences of the employees. Polling over that time reveals that 30 to 50 percent of non-union workers wanted a union, but they didn't get one. There can be no collective bargaining without unions, and there's no other effective mechanism in our economic system to ensure that the wealth we create is fairly shared between employees and the corporations that employ them.

As union representation and employee bargaining power have declined, inequality has grown. Economists agree that the loss of union representation, as inequality has grown, is more than a coincidence. It's a substantial factor. When union representation was at its peak, the ratio of CEO pay to the pay of the average worker was about 25 to 1. Today it's more than 250 to 1.

Middle class families derive almost all of their income from wages and salaries, and wage stagnation is the main cause of stagnating family incomes. The typical worker has seen stagnating wages for a long time. While productivity grew 80 percent between 1970 and 2009, the hourly wage of the median worker grew only by 10 percent, with all of this

growth occurring from 1996 to 2002. Workers have produced more and more, but they haven't had the leverage in the workplace to win a proportionate share of the nation's growing wealth.

A share of national income claimed by the bottom 90 percent of Americans fell from 65 percent in 1968 to just 52 percent in 2008, while the share of the top 1 percent nearly doubled from 11 to 21 percent. Last year alone, that meant a transfer of more than $1 trillion from the bottom 90 percent, the middle class, the working class, and the poor, to the top 1 percent.

The consequences of this growing inequality are very serious. As the middle class's share of national income declines, the entire economy is destabilized. To maintain their living standards, families, and especially women, have increased their work hours and resorted to heavy borrowing. In the early 2000s, families used their home equity as a piggy bank until the housing bubble burst, destroying trillions of dollars of home equity and shutting off that strategy. Now, unable to borrow freely, consumers have retrenched, and the economy is dragging with 16 percent of the workforce unemployed or underemployed.

Finding a way forward from wage stagnation and worsening inequality depends on increasing the bargaining power of America's workers, which can be accomplished only through

collective bargaining.

In February, two years ago, 40 noted economists, including three winners of the Nobel Prize, issued a statement calling on Congress and the Board to restore the right of employees to form unions and engage in collective bargaining. In their words, a rising tide lifts all boats, only when labor and management bargain on relatively equal terms. In recent decades, most bargaining power has resided with management. The current recession will further weaken the ability of workers to bargain individually. More than ever, workers need to bargain together.

To sum up, the proposed rule will provide some modest help. It provides better access for employees to unions and for unions to employees through the changes in the Excelsior list, and anything that does away with unnecessary delay is a good thing that will prevent employees from being subjected to campaigns of fear and harassment which they are currently subjected to. Thank you very much.

CHAIRMAN LIEBMAN: Thank you for contributing your perspective here. Does anyone have any questions?

MEMBER HAYES: Just quickly. Are you -- I'm trying to understand what you're suggesting is the appropriate metric for us to be determining whether or not our procedures and rules with regard to representation cases are fair.

MR. EISENBREY: I'm suggesting that when you're

balancing and you're paying excessive attention to the rights of employers, to their free speech rights and losing sight of the bigger issue, which is are you succeeding in one of the fundamental purposes of encouraging collective bargaining, you've got to look at your record and say we've been failing, and you should, therefore, when you're making those balances, be more considerate of the right of employees to get the union that they want.

MEMBER HAYES: Well, that suggests to me that you would then judge the efficacy of our rules by in how many instances it leads to a union certification. Is that correct?

MR. EISENBREY: I think if you step back from how the Act has been administered and look at it, you'd have to say that with 50 percent, 30 to 50 percent of non-union workers over a period of 20 years saying we want a union and throughout that period union representation falling, you'd have to say that you're doing something wrong.

MEMBER HAYES: I'm asking how you judge in terms of petitions that are filed? Are our rules better if they yield a higher number of certifications, of union wins? Is that fairness?

MR. EISENBREY: I think for the good of the economy, yes, that that's absolutely true, that if employees start off wanting a union and they're dissuaded because your rules give employers free reign to intimidate them, then you've got a

failure on your hands.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything else?

Thank you, Mr. Eisenbrey, for being with us today.

MR. EISENBREY: Thank you.

CHAIRMAN LIEBMAN: Mr. Ronald Holland is our next speaker. Good morning.

MR. HOLLAND: Good morning, Madam Chairman, Members of the Board.

My name is Ron Holland. I'm a partner with the law firm Sheppard Mullin Richter and Hampton in San Francisco. My partner, Ellen Bronchetti, and I, who is here in the audience, appreciate the opportunity to appear and provide a practitioner's perspective, a West Coast practitioner's perspective. Ms. Singer, good morning.

Sheppard Mullin, if you don't know, is a large law firm with 550 lawyers or so, approximately 85 of whom practice labor and employment. Many of us practice routinely before the Board in its Regional Offices.

While the apparent intent of the Board's proposed changes is to level the playing field, to give employees expanded rights to organize, and to streamline the process from petition to election, we believe that there will be practical consequences of the proposed changes that will have an impact on invading employee rights to privacy, chilling

employees' exercise of their Section 7 rights, and increasing delay and costs for all of those involved.

Now, based on this morning's testimony, I'm going to limit my remarks to the proposed required inclusion of additional private information such as phone numbers and e-mail addresses on the Excelsior list provided to labor organizations, and we're going to also briefly comment on the 20 percent rule whereby pre-election disputes affecting less than 20 percent of the proposed unit will be dealt with post-election. However, if you have any questions regarding any of the proposed rules, I'd be happy to answer them if I can.

In summary, the impact of the proposed Excelsior list changes will further invade employee privacy without any compelling interest to do so. The potential misuse and unanticipated consequences of providing this information to petitioning labor organizations outweighs any argument that this information is necessary to communicate with potential bargaining unit members.

The Board's proposed 20 percent rule is frankly a don't ask, don't tell approach to pre-election eligibility issues. If the dispute affects less than 20 percent, like whether it's single, individual, or as a supervisor, the Board will no longer ask whether that individual is eligible, nor will it tell the parties or the voter if the voter is eligible until after the election. This simple yet drastic change is

likely to delay the certification results and increase the number of rerun elections, a result which is at odds with the very purpose of the Board's proposed rulemaking.

Current Board law, with regard to the Excelsior changes, current Board law and rules, carefully balances an individual's privacy rights and the union's need to communicate with potential unit members.

Now, being from California by way of Queens, New York, my state of residence currently has a stated commitment to individual privacy. It's in the constitution actually, Article 1, Section 1 of the California constitution says all people are by nature are free and independent and have inalienable rights. Among these are enjoying defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Madam Chairman, you commented earlier that if we already give out home addresses, what's the big deal if we give out e-mail addresses? It's a simple deletion of an e-mail. I beg to differ.

Here the Board proposes to go far beyond disclosing one's home address where you can simply shut the door, go back to dinner, and be done with it. The simple deletion of an e-mail and another e-mail and another e-mail and 100 e-mails and 100 e-mails to your coworkers on workplace e-mail, on your workplace cell phone if it's via text, you're

surely going to disrupt the workplace and intrude on an individual's right to privacy.

This personal information in most instances is only given out for the purpose of emergency contact. I know many of us have to give that information to our employers. We don't give it out to the employer so they can give it to a third party labor organization. We give it out in the event that there's a death or an emergency at work, so our family can be contacted. That's why we give it out.

From a privacy standpoint, employees should have the choice as to whether or not to provide their phone numbers or e-mail addresses. Certainly, at the very least, there should be some notice requirement. As one of my colleagues commented earlier, many employees are shocked and surprised to find out that their home addresses are being given to a union as part of the election process. This is something that they're unaware of, being unsophisticated in union elections.

Yet simply now by going to work and because 30 percent of their coworkers desire union representation, the federal government will now require the disclosure of their home addresses, personal cell phones, work cell phones, e-mail addresses.

Boy, time goes quickly, doesn't it.

CHAIRMAN LIEBMAN: And you came all the way from San

Francisco.

MR. HOLLAND: I know, and you guys are cutting me off here. I'm going to go ahead and skip to the 20 percent rule if I may, just briefly.

One of my colleagues commented earlier that that change changes the standard of an appropriate unit to any appropriate unit, and I believe that that's true. By delaying consideration of unit issues, it's unclear if you're a voter what group you're voting for, what group of representation you'll be voting for. In addition, you're making obsolete in my opinion the community of interest factors. If you have a facility that has 500 drivers in one location and 75 drivers in another location, if my math is right, that's less than 20 percent, the union can petition for that unit where, in fact, maybe there are different lines of business, different supervisors, different compensation scales and there's actually no community of interest between those two groups.

Only after the election does the issue of whether these two groups should be lumped together for purposes of bargaining, an employer -- may I continue?

CHAIRMAN LIEBMAN: Yes.

MR. HOLLAND: -- an employer after a long, emotional, expensive campaign, who loses that campaign at the end of the 42-day period or whatever period it is, now is faced with the

question, do I contest or do I just cave? Do I try to work it out at the bargaining table, or do I pursue my legal right to have the community of interest factors tested and these two groups separate, notwithstanding the fact that the 75 in the smaller unit, their votes are minimized, if not made irrelevant completely.

CHAIRMAN LIEBMAN: Thank you. Did you need another minute?

MR. HOLLAND: Well --

CHAIRMAN LIEBMAN: Is there something else you want to add?

MR. HOLLAND: Sure. I jumped around quite a bit, but I think one perspective on the supervisor issue, as many who have discussed the issue have talked about, if you have a supervisor in the unit and it's unclear whether the supervisor is a lead person in part of the unit or a supervisor, the issue is how will the employer utilize the supervisor, but I haven't heard anyone say what is the effect on the individual who is in limbo? The lead person or supervisor now doesn't understand whether he can actually engage in conduct on behalf of the employer because that's where their sympathies lie. They lie with the employer and would be a no vote, but knowing that their conduct may actually affect and overturn the results of the election, their right to free speech, their right to provide their

opinion to the bargaining unit if they're actually in the unit may be completely stifled and restricted, and I haven't heard that position, but it's certainly ironic coming from the management side labor lawyer to be concerned about the individual's right of expression as part of the campaign process, but I'm not sure that I've seen a comment or actually any discussion on that particular issue.

CHAIRMAN LIEBMAN: Thank you for your thoughts. Any questions?

MEMBER BECKER: I've got a quick question on the e-mail point which hasn't been discussed a lot this morning, so I appreciate your bringing it up. Again, we are unfortunately handicapped by having only the information available to us really through cases, but we do have a number of cases where we see employers campaigning by e-mail, and I'm just curious why you would think it would be more of an invasion of privacy after a petition is filed for the union to get a list which includes e-mail and to be on a campaign via an e-mail message versus the employer doing the same thing, which is currently the case.

MR. HOLLAND: Well, the employer, right now, first of all, the employer's property is that e-mail address when it comes to an employer network, if we're talking about a workplace e-mail as opposed to a personal e-mail, and so that's one point. The employer is paying for an employee's

time. They have them there, and they do have the right, as the Board has articulated, to hold captive audience meetings, to furnish employees information about a variety of issues.

But the second complicating factor I think is the development of the solicitation policies for employers and the development of rules regarding the personal use of e-mail. Many of these policies are terribly comprehensive now, and if the union now has the ability, in fact, they're encouraged to utilize workplace e-mails to issue mass e-mails, I posit that you're going to have a variety of issues come up with violations of no solicitation policies during the campaign period. You're going to have discipline of workers who are violating those policies. Indeed, it really seems that you're encouraging employers to ensure that they're monitoring employees' e-mail and monitoring their use of the internet as part of the campaign process or in an effort before the campaign to ensure, of course, no change during the critical period.

The unanticipated consequences of that is that an employee who now is used to sending out personal e-mails, are used to having a correspondence between their coworkers or their supervisor via e-mail is now unsure as to whether they're being watched. During that critical period now, they feel since the union has their addresses and the union is corresponding with them, now they feel like they're being

watched, and maybe there's been no increase in monitoring whatsoever, but at the same time, it's going to have those unanticipated consequences that none of us can really predict right now with regard to the workplace, workplace morale, and just simply how workers communicate in the workplace with each other.

MEMBER BECKER: Do you have any sense just based on your own experience how common it is for the employers that you represent to use e-mail to communicate during a campaign?

MR. HOLLAND: It depends on the employer certainly. You know, many of my clients are in trucking, the solid waste industry, and most of those individuals don't have computers, don't have e-mail access, at least not in the workplace. However, many of my clients do have employees who have not only workplace e-mail but carry BlackBerrys or phones or cell phones where they can retrieve their e-mail. It depends. It depends on whether we're looking at traditional say manufacturing and transportation jobs or some of them more -- some of the newer industries that are currently being targeted for organization by labor organizations.

CHAIRMAN LIEBMAN: I think we're going to break for lunch now. For everyone who spoke this morning, we are very grateful to you for your thinking and your time. It was a very interesting airing of views, and we thank you.

For those of you who may not be returning after lunch,

we want to thank you for being here and participating. Don't forget to return your badge and number at the security desk in the lobby. Those of you who are returning after lunch, remember to bring your badge and number with you. You're going to have to go through security again on the way back. You probably should take your belongings with you, and we look forward to seeing everyone again after lunch. Our first speaker will be Christopher Cozza, and we will resume at 1:00 p.m. promptly. Thank you.

(Whereupon, at 11:52 a.m., a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

(Time Noted: 1:00 p.m.)

CHAIRMAN LIEBMAN: Okay, I think we can get started now. Thanks everyone for being here this afternoon. I think we probably have some new people in the audience, a new group of speakers. So, if those who were here this morning will forgive me, I'm going to just quickly run through some of the guidelines that I've been asked to discuss with you.

First of all, very important, when you checked in this morning, you were given a badge and a number. Please keep those with you at all times. And if you leave the room, please take it with you. You'll need it to get back in the room. Most important, remember at the end of the day when you leave to return the badge and number so you can retrieve your ID.

Also, there are two exits from the room, one to my left, which is the main entrance to the room, and an exit also to my right. You can exit out of either one. There are restrooms located outside the hearing room to the left and right. We have staff in the hallway who can help escort you anywhere you need to go, including back to the first floor.

This afternoon we will take a mid-afternoon break probably around 2:30. If you need to move around during the hearing time, please do so quietly. Obviously, if you're a speaker, we are delighted to have you stay with us through

the afternoon. But if you need to leave, we understand, and you are free to do so.

So, just a few guidelines for the speakers. We are going to follow the order of speakers that's set out on the list that was given to you when you entered the room. Every person scheduled to make an oral presentation will be given five minutes to present his or her remarks, and the Board members will then have an opportunity to pose questions. After that, the speaker will be excused. Every speaker should be ready to proceed in turn, and please move quickly to the podium. We ask that you introduce yourself and indicate who you're representing, if anyone, and if you have someone with you, please feel free to also introduce that person. Your five minutes will start after the introductions.

Our Deputy Executive Secretary Gary Shinners seated below me, to my right, is our timekeeper.

There are lights on the podium to assist you. Your five minutes to speak will start, as I said, after the introductions. You'll have -- the green light will go on at that point. The yellow light will go on indicating you have one minute remaining, and the red light indicates that your time has expired. I think people who were here this morning will be able to say that I'm not a tyrant about the time clock, but it is important that you observe the lights

generally, so we can try to keep on schedule. If you have a written statement that you wish to put in the record, please give it to our Executive Secretary Les Heltzer, who is in the room to my left. Please do that before you leave for the day.

If my colleagues have additional questions for you based on the written testimony or the written statements that you provide today, we may decide to pose written questions to you. I've asked them to make those available within seven days. And you will have until the close of the comment period for this rulemaking on August 22nd to supply your written answers.

Just a couple of final points, please note the meeting is limited to issues related to the proposed amendments to the Board's rules governing our representation case procedures and other proposals for improving representation case procedures. No other issues are to be considered at this meeting today. I want to especially alert our speakers that they should not discuss matters which are currently pending before the Board, as there are important rules pertaining to ex parte communications that we don't want you to violate.

So, with that, I ask everyone to turn off cell phones or other devices. And unless my colleagues have anything to say at this point, I think we can proceed to call our first

witness of the afternoon, Mr. Christopher Cozza. Next up will be Andrew Kramer.

Mr. Cozza?

Oh, okay, so, Mr. Cozza it seems is not here. And so, we'll start with Andy Kramer.

Welcome. Good afternoon.

MR. KRAMER: Good afternoon. Thank you, Chair Liebman and Members of the Board. I appreciate the opportunity to be here this afternoon. My name is Andy Kramer. I'm a partner in the Washington office of Jones Day. I'm here representing HR Policy Association, which has had a long and sustained interest in the issues being presented by the Notice of Proposed Rulemaking. We appreciate the offer to provide comments today as well as written comments, which we will provide in August.

While the Notice of Proposed Rulemaking raises a number of questions, I'm going to concentrate on three particular areas that are of importance to the association and its members, but I note it's not to the exclusion of other issues which will be covered in our written comments.

At the outset, we believe that by allowing a Regional Director or a Hearing Officer to deny an employer or another non-petitioning party the right to a pre-election hearing with respect to the appropriateness of the petitioned unit, if the dispute concerns rather the eligibility or inclusion

of individuals who would constitute less than 20 percent of the unit, is counter to the direct language of Section 9(c) of the Act and the requirement of the Act to hold the hearing if there is reasonable cause to believe that a question concerning representation exists.

Even more fundamental is the fact that the Board, as one of the reasons for this proposed rule, is to try to minimize disputes and litigation. Unfortunately, I think the 20 percent rule will on occasion actually be the very opposite. It will, among other things, bring into play issues which are likely to deal with more litigation and not less, including supervisory status issues which are critically important for the parties to know who might be a supervisor during a campaign. The fact that an arbitrary bright line rule of 20 percent might not present, that will not help an employer or the petitioning union in terms of knowing who could be an advocate for one or the other during the representation process. If you add to that the removal of discretionary Board review, we think the 20 percent rule is not a proper application of what the Board's policies should be in this area.

Equally problematic, and maybe even more so in my view, relates to the required filing of statements of position. Time today is far too short to go into all of the problems raised, but let me just note a few that I think are important

for the Board to hopefully consider as you listen today and as you review the written comments.

I don't have a problem that an employer should take a position as to whether a unit is appropriate. I think an employer should take a position one way or another saying the unit is not appropriate and present evidence as to why that unit is not appropriate. That's a far cry, however, from requiring an employer to not only offer an alternate unit selection, but one that is most similar to what the parties might agree to. This to me is a burden that I think is improper under the statute, but moreover will cause significant issues and problems as you move forward. And some of those problems were even discussed this morning in the sense of preclusion issues, which I will get to in a second, in terms of both preclusion of your right to a hearing initially as well as post-election challenge.

Similarly, the information that's required from the employer about alternative units would provide a petitioning union with information it's not seeking, though even relevant to its own petition. This information would include full names, work location shifts, and job classifications. That goes to the petitioning union. Another list that the Regional Director gets relates to the Excelsior list issues of e-mail, telephone numbers, home addresses. I have no idea what happens to that list. Numerous concerns, however, in my

view are raised for the need for such information. If you're simply asking the employer to say contest the unit, that's one thing. Here what you're doing is providing information, that to me the only real value is to beat the future union organizing efforts for groups of employees that the union is not even seeking in that particular representation case.

Finally, and perhaps most important of all, the statement of position requirement, like the 20 percent rule, will likely disfranchise a number of employers from their right to a hearing on whether or not the petition is an appropriate one and contest post-election issues. Within a seven-day period and perhaps even a shorter period of time, employers are going to be required to basically affirmatively put forward positions, positions which I believe are way too short in terms of time and will end up actually leading to preclusion issues.

The final point that I would make in my limited time is the Excelsior list issues, because it's clearly uncertain from the proposed rule as to whether e-mail addresses and phone numbers are work addresses or home numbers. In either case, they're going to represent both property as well as privacy concerns, very significant. And I would also note as a practical matter that we live in an electronic world. I don't mean to suggest that you can't limit some way from seven days, but to just go down to two because the

information is there would not be enough.

My time is up. Thank you very much, and I appreciate the opportunity to speak.

CHAIRMAN LIEBMAN: Thank you.

Does anyone have any questions?

MEMBER PEARCE: This 20 percent rule, the -- if I understand you correctly, you're saying that relying on a 20 percent rule would deprive the employer due process of 10(c) -- a 10(c) right?

MR. KRAMER: Well, it's a 9(c).

MEMBER PEARCE: 9(c), excuse me.

MR. KRAMER: Right, it'd be a 9(c) right, because the statute talks about a hearing if a question concerning representation exists. Angelica Healthcare is a Board case where that issue did come up. It's noted in the proposed rules, and it's distinguished by the majority in the proposed rules. I would argue that I don't agree with that rationale. But the point is, Angelica Healthcare clearly is the case, and Member Cohen actually I believe was at that time before Member Cohen was on the Board. But to me, Member Pearce, I do believe that's a statutory issue over and above the practical one that I raised as well.

MEMBER PEARCE: Now, if it's 20 percent or less, and as the current rules stand now, if there is a small percentage that are an issue, the Regional Director has the discretion

to have them vote under challenge. And if the challenge is a determinative, then there's a post-election proceeding. And this process provides similar availability of process in that regard. How does this differ?

MR. KRAMER: Well, first of all, I'm not sure I agree with you that this process so provides. As I noted, you have two sections that come out entirely new to us, no dialogue, no discussion. Here we have a proposed rule. One is the 20 percent rule that says automatically if I have a unit of 500, and 100 people could be contested, I don't have a hearing about those 100 people. That we'll just go ahead and vote them subject to challenge. Now, maybe you do; maybe you don't because then comes the statement of position.

What happens in the statement of position if I didn't mark all of these people off, and I didn't say that this 100 group was there? Member Pearce, under my reading of this, I waive that. I'm not sure I get to go back to that. I'm not sure what happens in that case because it's not simply pre-petitions, as at any time you are precluded, if I remember the actual wording in the register. So, to me, I think this is part of the serious problem that you have with both of them together interplay that there's a serious issue.

But I'll give you a practical one that I think actually Professor Estreicher noted this morning in his testimony. Why shouldn't a party know who is a supervisor for purposes

of an election when you're asking that person to potentially be an agent? What possible reason is there to say that that should not be one of the core issues that the Board should be interested to make sure? There's been enough litigation over the years, including at the Supreme Court, about who is a supervisor. Why wouldn't we want to have those issues decided? And what you're doing is a bright line test, and I understand that. It's a bright line test of 20 percent. But I think tied together, I'm not sure we do have those rights.

MEMBER BECKER: I'm puzzled -- I really am -- in terms of what you describe as the proposal versus the current practice. One thing the Board was clear about, I think, in prior precedent is even if the parties don't wish to defer eligibility issues, there is no right to a decision on those issues, only to litigate them. In many cases, it's certainly been our experience that when there's a supervisor issue that's disputed, and there's a request for review that's granted, there's no decision prior to the election. And, of course, if the cases go up to the Court of Appeals, the status remains uncertain. So, there's no right currently to a decision on supervisory status prior to the election.

MR. KRAMER: But there's a right to a hearing.

MEMBER BECKER: But what I'm trying to understand is how does that help the parties?

MR. KRAMER: Because it informs the parties. As a

practical matter -- look, first of all, pardon, because I didn't get into it. It's my concern about the whole rule, because most elections are consent or stip elections in vast majority because parties agree to it because we deal with those issues, Member Becker. I'm not arguing about that.

What I'm simply saying is this is a bright line test. This isn't an issue of saying -- this is you don't get the hearing, okay. You don't even get the facts out there. You don't let somebody get informed. I know I hopefully am a good enough lawyer and counsel to my clients where I have facts that I didn't know or might come out that I might have a different view of where things go, and I'd rather know that early rather than late. And I'd rather be able to deal with that early rather than late. I'm not one who is going to say that there's no benefit of that because I think there is a benefit.

And by the way, I think in most cases you're absolutely right. In my own experience after 40-some years, it's absolutely right. We don't have a lot of that. But when we do, I think I've been informed, okay. And I think what I'm simply raising is for the Board to consider those issues as you go forward with it. Because what you're simply saying is --

MEMBER BECKER: How does that stop the employer from informing itself? The employer has a question about whether

certain individuals are supervisors. As the case law stands now, there's no right to a final decision pre-election.

MR. KRAMER: But there's a right to a hearing.

MEMBER BECKER: But I'm really struggling to understand how that difference affects the employer's ability to plan and decide who can be used in election and in what way. We're not precluding if these provisions are adopted. There'd be no preclusion of the employer from conducting any kind of investigation into the facts that it wishes to.

MR. KRAMER: An employer can conduct any investigation. This is a one-way. This is the Board saying you don't get a hearing. This is the Board saying we're not going to provide you with the opportunity to explore this issue and have the Regional Director decide the issue. You're absolutely right. The Board doesn't have to decide the issue, but you've eliminated Board review anyway. You've eliminated Board review at the early stage in this proposal, so there is no Board review in this proposal.

MEMBER BECKER: But under the current procedure, the Board when it grants review doesn't issue a decision.

MR. KRAMER: But under the current procedures, the Board reviews it as a request for review.

MEMBER BECKER: Correct.

MR. KRAMER: All right, and the Board can decide to review it, or it doesn't have to decide to review it. But at

least you have that opportunity. You're saying here there is no opportunity. You're saying here it's okay to remove that right. I'm saying I disagree with you.

MEMBER BECKER: It's a related question. Again, I'm trying to understand the difference between current practice as you have experienced it and the proposal. In terms of the obligation described in the proposal to make an alternative proposal when the scope of the unit is contested, it's certainly been my experience that you don't have under the current practice a party coming in and simply saying the unit is inappropriate. What the party does is say the unit is inappropriate because it should also include this facility, or it should also include these classifications. That is, from what I see, we're simply codifying what is already current practice.

MR. KRAMER: Let me deal with that because I think that's great because it actually came up at lunch today. Because there was a case when I started my career years ago in Chicago to deal directly with this, because then it raises a serious question of how this all would work in that context.

Okay, let's assume we have a single unit store. Okay, and I'm the employer and I say, no, I think there are three stores. Okay, for interchange, personnel, common -- I don't have to explain. All right, so we say that should be the

unit. Okay, now, under the proposed notice, as I read it now, you know -- this is just out just a little less than a month, so I'm not as familiar as maybe you are or I should be, but it's pretty quick to be up here talking about them. But the fact of the matter is is that I then say, okay, I think it's a three-store unit. And let's assume that in my statement of position I put in a three-store unit rather. Okay, and the union still wanted the one store, couldn't get agreement, and it's abandoned. Okay, and they don't seek the three-store unit because they don't have a showing of interest, or whatever reason or what have you. They then come back with a three-store unit a little bit later. Am I precluded from now saying, well, maybe it's not a three-store unit? I now have looked at it more carefully, and it's a six-store unit or a city-wide unit. How does that all work? And why does the employer have to put the most similar unit as distinct because I normally, when I did the three-store unit, didn't think of the most similar to what the unit would be appropriate. I was thinking of what might be the appropriate unit. So, how does the most similar rule have any application?

Then my final question with respect to that is is, okay, because I understand what you're -- what the purpose is, but then it says, employer, you provide all of this additional information on this other unit. But why would I provide that

information on the other unit when the only question is is whether the unit that the union is seeking is most appropriate? It doesn't have to be most appropriate. It's an appropriate unit. I'm sorry. It doesn't have to be the most appropriate under the Act. To do it, that's my concern, Member Becker.

That's my concern. And these are real concerns that I have as to how this works, okay. And they're concerns. I understand what you're saying abut current law. What I'm simply saying is this changes a lot. This changes the dynamics. This has other consequences to it. And all I would ask the Board is to give careful consideration as you go forward with respect to it, because these are significant issues that we have to deal with in terms of it. And I appreciate your time. I'm sorry.

MEMBER BECKER: If I could just ask one follow-up question?

MR. KRAMER: Sure.

MEMBER BECKER: Let's take the scenario that you're describing. So, union petitions for one-facility unit. Employer says I believe that's an inappropriate unit, and the most similar appropriate unit in my view would be this unit which includes these additional facilities and modifications. Wouldn't it help the ensuing discussion in terms of trying to work out that dispute for everybody to know who's working in

those classifications?

MR. KRAMER: I -- look, I think there are vehicles -- this goes to a process point. I only wish there had been dialogue on some of this because I think there are vehicles where it does help.

But the point is helping is one thing; mandating specific information of the type being asked is more than simply helping to know. Because typically, when in the case that I gave you, which I tried a long time ago, we did present what other classes were there. We had to present because we were arguing that the unit was inappropriate. All of that came out, but that wasn't names and addresses. That wasn't who the job titles were. That wasn't anything else. That was demonstrating that we thought under Board law the appropriate unit was X rather than Y. That's my point.

CHAIRMAN LIEBMAN: Thank you very much. Thank you for your thoughtfulness.

MR. KRAMER: Thank you very much. I appreciate your time and attention. Thank you.

CHAIRMAN LIEBMAN: Thank you for helping us out.

And our next speaker is going to be Thomas Meiklejohn, and after that will be Michael Hunter.

So, good morning -- good afternoon.

MR. MEIKLEJOHN: Good afternoon. Thank you, Chairman Liebman, distinguished Members of the Board. My name is

Thomas Meiklejohn. I'm with the law firm of Livingston, Adler, Pulda, Meiklejohn & Kelly in Hartford, Connecticut. I've appeared on behalf of unions in representation cases in the Boston office, Hartford, Brooklyn, and Manhattan. I also worked as a Field Attorney and a supervising attorney for the Board in Hartford and in Philadelphia before that. I come here to speak -- I'd like to speak.

Well, first, I guess I'd like to resist the temptation to -- I may not, but I'll try to resist the temptation to get into a debate with the previous speaker, but I probably won't resist it. I was going to speak from, try to speak from the perspective of a practitioner. I appear in front of a number of different court and administrative bodies, a practitioner who believes that litigation should be a process for resolving the issues that are before the body to be decided and not a process for achieving other ends. I'm not -- you know, we all have an idea of what ends we think the parties sometimes seek to achieve in representation case hearings.

But with all respect to Mr. Kramer, clarifying who the parties can use as their advocates in a campaign is not the function of a representation case hearing. The function of a representation case hearing is to determine whether the unit proposed by the union or the petitioners is an appropriate unit and who would be eligible to vote as members of that bargaining unit. And, frankly, as a practical matter, the

employer has tremendous access to information about who, what authority alleged potential supervisors might exercise. And the union is often shooting in the dark and taking a big risk in allowing potential supervisors to become their advocates in a campaign.

But the way to deal with that is to not have a hearing on an issue that's not necessary to resolve the core question of whether there is a -- whether the petitioned-for employees have a community of interest. So, I guess my first point is just that I don't see anything particularly radical in limiting the issues to ones that are necessary to deciding the questions before the Board or before the Regional Director.

And I don't see anything particularly radical at all in requiring the parties to clearly state a position beyond, you know, this particular unit is not appropriate. In my experience in Hartford, and I will say and throw my two cents worth for the Hartford Regional Office. They do an excellent job in most cases of putting the employer's attorney in a position where they have to state what their position is if there's going to be a hearing. And, in fact, most of the management attorneys that I deal with, generally speaking, do state a clear position on what the bargaining unit is. But there are those exceptions.

There are the employers who come in and describe a unit

using job descriptions and job titles that the employees have never heard of. And if the employees and the union don't have access to the names of the people, then we don't know who they're really litigating about. We can't figure out -- I do remember clearly one hearing where the employer litigated job classifications for two days and on the third day came in and said, oops, well, that's really not the job titles that we use in this particular factory. It was a factory. This was awhile ago, obviously.

So, the information that the Board is asking is the kind of information that I think in any kind of litigation you expect to have available to you before the hearing starts, and it enables opposing counsel to figure out what the issues are and what's relevant. And it allows the Hearing Officer to determine what evidence does and does not need to be admitted.

So, that leaves me 45 seconds to do my prepared remarks. So, I will just mention one case that I had in the past year involving a company called Autumn Transport. We received what's still called the Excelsior list, bad names and addresses. These were the names and addresses that the company used to communicate -- that the company had in its records, and dozens of those addresses were incorrect because the employer didn't use addresses to communicate with its employees. Employees were required to provide current,

accurate telephone numbers where they could be reached, but the addresses that the union got were, by and large, pretty or almost useless. So, simple changes like requiring names and addresses will enable the unions to communicate with the voters in the same fashion that the employers are already communicating with their employees. Thank you.

CHAIRMAN LIEBMAN: Any questions?

MEMBER HAYES: I just have a couple of quick questions. First, I guess, is that I guess you'd know that the bulk of R cases proceed to election on the basis of a voluntary agreement between the parties. I'm wondering if you have any view as to whether or not the proposed rules would decrease the likelihood of the parties entering into voluntary agreements.

MR. MEIKLEJOHN: Actually, I did give that some thought when they first came out. I had some hesitancy about it, but I think that by requiring the parties to clarify their positions and take their positions quickly that in the long run there may be an adjustment period, but I think in the long run it will result in an improvement in that regard. You know, in my view, it's the Regions and the Regional personnel who are most effective in getting those agreements. It requires cooperation from the parties. And I think that if you view this collection of rules as a whole, it provides the Regional personnel with additional tools to use in

bringing the parties to an agreement.

MEMBER HAYES: And just if I can to follow up on one other thing, is my understanding of your position correct that Section 9(c) of the Act doesn't statutorily require a hearing in the event the parties raise issues with respect to the supervisory status of named individuals?

MR. MEIKLEJOHN: 9(c) requires a hearing when there's a -- to determine whether there is a question concerning representation. And the precise parameters of the bargaining unit are not necessary to be determined in order to address the 9(c) question.

CHAIRMAN LIEBMAN: Anything further?

MEMBER PEARCE: With regard to this case, this Autumn Transport where you got a lot of information that was not up to date, the proposed rules are asking for additional information in the Excelsior list. How do you think that that would impact on scenarios like you described in Autumn Transport?

MR. MEIKLEJOHN: What I'm saying is that the employer had in this case it was cell phone or telephone numbers that were critical. They had certain information that they used to communicate. In a particular case, you may not know whether the employer, you know, communicates by e-mail or telephone or whatever. But in this case, they would have had to provide telephones. That was the information that the

employer used to communicate with the employees. And really just, you know, providing names -- I mean, providing addresses, you know, is what the rule required. It's all they had to do. But it was really hiding information from the union. It was the telephone numbers in that case that would have been useful. In many other circumstances, I think, in the modern workplace it would be e-mail addresses.

MEMBER PEARCE: Thank you.

CHAIRMAN LIEBMAN: Thank you very much. We appreciate your contribution.

Our next speaker will be Michael Hunter, and after him Ron Mikell.

Good afternoon.

MR. HUNTER: Good afternoon, Chairman Liebman and Members of the Board. I appreciate the opportunity to be here. My name is Michael Hunter. I am a union attorney based in Columbus, Ohio.

I primarily want to address the Board to encourage you to adopt the preliminary view that questions concerning the eligibility or inclusion of individuals into a bargaining unit that constitute less than 20 percent of the potential unit should be deferred until after the election, and that persons in that disputed area should be permitted to vote under challenge.

There appear to be two broad categories of resistance to

this proposal. The first is that the employee in not knowing the final composition of the unit upon which they're voting, would somehow be deprived of a meaningful right to vote, and secondly, that employers will be deprived of a pre-petition or pre-election determination as to the supervisory status of alleged supervisors who occupy the disputed positions.

Going to the first objection or concern regarding the composition and scope of the unit, it should be noted that the Board has proposed that, in situations where there are individuals who are going to vote under challenge, that the final notice of election would set forth notice to the employees of that situation and would let the employees know how that may ultimately be determined. In that case, there really is no difference in that procedure than what currently takes place, for example, in a Sonotone election, where the professionals have the right to vote on inclusion or non-inclusion in the wider unit, and there is some uncertainty for an employee in either unit as to what's the ultimate composition of this unit going to be.

The same occurs when two unions may petition for equally appropriate units, maybe one plant versus three or what have you, and there's a self-determination election. As long as the notice of election informs the employees of what they're voting on and what the potential outcomes could be, and particularly with the proposed rule what the methodology may

be to resolve those potential disputes, there simply is no infringement upon the meaningful right to vote.

The second broad objection to the proposed procedure is that the employer, and the union for that matter, could be deprived of a pre-election determination as to the supervisory status of individuals who one party or the other believe should be in the unit. The proposal to allow such individuals to vote under challenge is simply an extension of procedures that already exist. When the hearing record is inconclusive as to the supervisory status or the managerial status of particular individuals, those individuals have been permitted to vote under challenge. And the courts have approved this process as a well-established method by which the Board assures the speedy running of representation elections. Under Harborside Healthcare, unions as well as employers take their chances when there are supervisory issues in dispute, and unions take their chances as well as employers if there's pro-union or anti-union coercion on the part of a supervisor. However, it's not a case of whether or not that individual is predetermined to be a supervisor or not that matters. It's the supervisor's behavior in the election campaign that matters. And whether they're determined to be a supervisor or not prior to the election, it's their status and behavior that determines whether or not they can taint an election and not whether they were

permitted to vote under challenge. Thank you.

CHAIRMAN LIEBMAN: Thank you.

MR. HUNTER: Any questions?

MEMBER HAYES: I just have one quick question, and that is is it conceivable that the scope or the composition of the unit might not be an issue which a voter would want to know before he or she cast their ballot?

MR. HUNTER: Might not want to know?

MEMBER HAYES: Yes. In other words, the scope or the composition of the bargaining unit, is it conceivable that that would have an influence on how an individual employee might vote?

MR. HUNTER: I'm not sure it would, but the Court of Appeals certainly seem to think it's possible that it would, that if they don't know what the potentialities are that it might have an outcome. I think as a practical matter, people vote whether they want to be represented by a union or they don't. But I do think it's clear that if the notice of election tells people what the potentialities are, such as you're having in a Sonotone election, that there's no problem with it.

MEMBER HAYES: But would that notice cure some of the problems, in your view, that the Courts of Appeals have suggested with respect to the voters knowing the scope and the composition of the unit?

MR. HUNTER: Member Hayes, I believe it would. If you look at Morgan Manor, for example, when the Fourth Circuit in their unpublished decision denied enforcement in that case, they did indicate that that decision may have been different if the employees in that situation knew there was a -- knew that the LPNs in that case were in play. And it's because they didn't know that they were in play that that became a problem. And here when the notice lets people know what's in play, I just don't think there's a problem.

CHAIRMAN LIEBMAN: Other questions?

Thank you for being with us today.

MR. HUNTER: Thank you.

CHAIRMAN LIEBMAN: Our next witness is Ron -- I hope I'm pronouncing it correctly -- Mikell.

MR. MIKELL: You have pronounced it correctly.

CHAIRMAN LIEBMAN: I have, good.

And up next will be Ron Meisburg.

Good morning -- good afternoon, Mr. Mikell.

MR. MIKELL: Good afternoon, Chairman. My name is Ronald Mikell, and I stand here today representing my union, the Federal Contract Guards of America, and also at the request of colleagues up in Briarcliff Manor, New York, of the United Federation of Special Police and Security Officers.

We're essentially both of us 9(b)(3) unions representing

guards and security professionals in this field. I appreciate the chance to speak to the Board. I want you to know that I've followed all of you for years, and it's like meeting famous people.

I've read Mr. Member Hayes' dissent to the new rules, and I've listened with rapt attention to Mr. Kramer, and I think that you folks sitting up here in Washington, D.C., as we all are -- I happen to live and work up here -- but it's easy to see where you can turn 5 minutes into 22 minutes like Mr. Kramer does, and you understand the whole concept of delay in R cases.

MEMBER BECKER: I think that was mostly my fault.

MR. MIKELL: I lay some of it at your feet, Member Becker. Yes, sir, I do.

First of all, I listened to Mr. Holland, you know, in the morning session talk about the right of privacy and his concern out of California and the California constitution and about telephone numbers and e-mails and how those things would be terrible in the hands of the union. It almost sounded like the arguments made against Excelsior back a few years ago. The fact is, in order to reasonably maintain the laboratory conditions and give the unions and the companies a chance to have their story told, everybody's got to have the same seat at the table. Now, in the modern era, you know, the lack of access to cell phones and e-mails locks out a

legitimate attempt to communicate on most issues. I have members that I represent who don't have a regular phone. All they have is a cell phone. The way people get in touch with me, whether it's my wife or my son when he's in Iraq, is he calls my cell phone with my 503 area code.

And by the way, while I'm here in front of the Board, I wish to commend to you the good people of the Regional offices, especially the folks at Subregion 36 who really know what they're doing. Out there in the hinterland, there are a lot of people that really know what they're doing. That's one of the reasons that I like the rulemaking. You leave some of these decisions to the Regional Director.

Now, I tell you the whole idea of the expedited policies and the anticipated rulemaking, this is one of the reasons I'm very much in favor of it. Delay is the enemy of all of us. And when one of these cases, one of these R cases achieves the patina of age, nobody has been done any good at all. You know, recently my union was arguing a case out of the boot of Texas, 16-RC-10929, FJC Security. We filed that in March.

CHAIRMAN LIEBMAN: I just want to stop you for a moment.

MR. MIKELL: Yes, ma'am. It's been resolved, ma'am.

CHAIRMAN LIEBMAN: It's been resolved? Okay, good, good, good, thanks.

MR. MIKELL: I remember that.

CHAIRMAN LIEBMAN: I didn't want you to walk into any problems.

MR. MIKELL: I'm not going to fly in the face of the ex parte rules. But that case was filed around St. Patrick's Day in 2010 and resolved in June of 2011, and that was all about whether or not somebody was an appropriate part of the unit. And we had two or three before election hearings and one afterwards. And these rules would have kept that from happening, and the issue would have been resolved a lot sooner.

You know, delay is the friend of the incumbent power, whether that's the incumbent union or it's the company with their authorities over these employees. In that particular case that I cited, we were arguing with the incumbent union, which eventually we threw out. But the people that we represent now in the particular location say they wanted them out a long time ago. But because everything could be appealed all the way to the Board on every single issue, on every single time, then everything that was done was delayed and delayed and delayed.

Now, the resolution, and I hold to what the gentleman from Connecticut had to say, is essentially that it's better to resolve these things. And resolution is what we should all be about. Now, I am not a member of the bar. I have beaten several of them at the bar and in front of the

National Labor Relations Board, and that's the beauty of the NLRB. It's not necessarily set up just for some high-end, high-paid management or labor attorney, but for people who are there to express their rights and their views in front of somebody that can resolve them.

And, again, I hit you with the R word, resolution. If there's any doubt, let me speak quite clearly that I speak in favor of the new rules. And I've conducted several elections, and a lot of times the extra times that the good gentleman Mr. Kramer would want to use for the employer to speak, it's mostly used to just denigrate the union and not used to advance the point. Ad hominem arguments are no one's right. And, again, I speak in favor of the rule. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for being here.

Does anyone have some questions?

Is there any aspect of the rule you'd like to see improved?

MR. MIKELL: Oh, that I'd like to see improved?

CHAIRMAN LIEBMAN: Yes.

MR. MIKELL: Well, I have to tell you, ma'am, as a unionist, I still believe in and think that there's a lot of efficacy in that Employee Free Choice Act, but I don't know that that will ever get anywhere.

CHAIRMAN LIEBMAN: We're not here to debate that one.

MR. MIKELL: I knew that that would be your answer,

ma'am. But the expeditious use and the fact that all of us communicate these days with e-mail and with cell phones, and I think it was just this last week Verizon announced they're not even going to publish the White Pages anymore, you know, and distribute them all over the place. So, people are moving away from the addresses and telephones and regular mail. And so many people use P.O. Boxes that you can't really communicate with these people. But the employer must always be able to so he can at least tell them when to come to work, okay?

CHAIRMAN LIEBMAN: Okay, thank you very much for being here.

MR. MIKELL: Thank you, Chair.

CHAIRMAN LIEBMAN: Our next speaker is Ron Meisburg.

Good afternoon, Mr. Meisburg.

And then next up will be Professor Kaplan.

Welcome.

MR. MEISBURG: Thank you, Madam Chairwoman, Members of the Board. Good afternoon. My name is Ronald Meisburg, and I'm with the law firm of Proskauer Rose, and I'm here to represent the United States Chamber of Commerce. We appreciate the opportunity to participate in this proceeding.

There can be no doubt that the Board's proposal raises very important issues for the labor management community. In the coming weeks, we're going to continue to work to identify

and consider the issues presented by your proposal and to do the research and analysis necessary to draft and file comments by the August 22nd deadline.

As we go forward, however, we believe that meaningful discussion in this area requires some mutual acknowledgment of some important points. The first is that employers have a legitimate and substantial interest in NLRB representation proceedings and the rules that govern them. While this may not be universally acknowledged, we think it unassailable. After all, an employer undertakes risk, invests money, develops a business plan, makes commitments to vendors, suppliers, customers, hires and supervises the employees. And while the interest of employers may not eclipse those of other interested parties, they are undeniably legitimate and substantial, and they include the right of the employer to communicate effectively with its employees about unions and union representation.

Second, we believe that a great number of employers involved in representation proceedings are relatively small. This is strongly suggested by the Board's statistics showing that the median size of units and representation elections in the last decade is between 23 and 26 employees, and, of course, that means half of the elections held involve less than that number. The Chamber is particularly interested in this because more than 96 percent of the Chamber's members

are small businesses with less than 100 employees, and 70 percent of those have less than 10 employees.

Now, most of us here in this room are very familiar with the arcane labor law terms and rules and concepts involved in representation proceedings. And yet, even we can sometimes struggle with their meaning and application. So, we must not lose sight of the fact that a small employer faced with perhaps its first and only organizing campaign will not have anything like the familiarity and the expertise that we have. Instead, that employer will have to locate and retain counsel, and that takes time. While the stated goal of the proposed rules is to streamline the election process, we believe the rules must take into account the due process rights and realities of employers, especially small employers.

Third, it must be acknowledged that a union does already have substantial advantages in a representation proceeding. The prevailing wisdom seems to suggest that it is the employer who holds all of the cards because purportedly, it can without regard to the demands of running its business communicate constantly and incessantly with its employees about unions and unionization. On the other hand, it is the business of a union to organize and represent employees. A union may conduct an organizing campaign for weeks or months without an employer becoming aware of it. During that time,

the union can frame the election issues, communicate them to employees, and determine what unit it wants to seek. The union can file the petition at a time when it feels it is most advantageous to do so. The union will have had the opportunity to consider and prepare for any anticipated legal issues and will have its resources in place to handle that.

Simply put, we think that under the current system, unions do enjoy significant advantages. So, we believe that the proposed regulations and any suggested changes made for them need to be viewed through the lens of these facts. Otherwise, whether intended or not, there's a very significant and substantial risk that employers will be greatly disadvantaged in the exercise of their legal rights both to respond effectively and appropriately to election petitions and possibly to communicate with their employees as well.

And, finally, there is no deficiency in the Board's current handling of representation cases which demands changes contemplated by the proposed regulations. The Acting General Counsel has described the current representation case handling as outstanding. The Board continues to meet its overarching representation case handling goals that are mandated in connection with the Office of Management and Budget and the Office of Personnel Management. Unions do not appear to be disadvantaged by the current system, winning

upwards of 60 percent of elections that are held. And we believe a system that processes 92 percent of the petitions filed on stipulation should not lightly be set aside or changed without a good degree of deliberation, in which we appreciate the Board's opportunity for us to help you deliberate on this. And we look forward to further and full participation in this rulemaking proceeding.

CHAIRMAN LIEBMAN: Thank you, Mr. Meisburg.

Any questions?

MEMBER BECKER: I've got a question, and you can answer it in any of your roles, private lawyer, former General Counsel, counsel to the Chamber, but I think you're well positioned to answer it in all of those roles.

CHAIRMAN LIEBMAN: Board Member.

MEMBER BECKER: I've left one out? We put a set of options on the table in terms of blocking charges, and I'm just curious as to your view of what would be appropriate if we were to change the blocking charge policy. For example, the question of if one has a charge and if the General Counsel has found merit in the charge, should we simply go ahead with an election? Should the ballots be impounded? If you have any preliminary views on that question.

MR. MEISBURG: Well, thank you, Member Becker. I do appear today in one role, and that is to represent the Chamber of Commerce. But it is informed, obviously, by my

background and experience.

I don't think there's any question that blocking charges, if you looked there was an -- IG did an audit a few years ago of the Board's representation case handling, and the blocking charges were routinely the outliers that brought up the median times for handling cases. So, I think it's a legitimate, a very legitimate question for study. I don't have the answer to that here today. But I do say, and I have said in the past, I think the fact that the blocking charge may be responsible for skewing the statistics in a way is something that we'll certainly be addressing in our comments to you, and I think it is a very legitimate area for Board inquiry.

I wish I could be more insightful about that. I don't have an elegant solution for that this morning or this afternoon. I didn't have one this morning either.

CHAIRMAN LIEBMAN: Let me -- go ahead, please.

MEMBER PEARCE: How are you doing?

MR. MEISBURG: I'm doing all right.

MEMBER PEARCE: Great. Good to see you. With respect to the statistic that you did cite though, the 60 percent of the elections held being won by the union, it's probably even larger than that. But elections -- wouldn't you agree that elections held is the key phrase?

MR. MEISBURG: Sure, I know that there is a complaint to

say well, there's a lot of petitions withdrawn. I don't know that these rules would address that issue, I mean, if that's what you're driving at.

MEMBER PEARCE: Well, I mean, well, certainly, if the argument on the other side of the issue is that if it ain't broke because of the amount of success that unions have in the elections that are held, if we are to balance the ability of the parties to engage in collective bargaining with employee free choice and free speech, wouldn't you say part of our charge would be to make sure that if there is opportunity to file petitions, then they're not encumbered by a process in order for us to do that?

MR. MEISBURG: I don't think there's any question that you want to have a process that is efficient and fair, and I don't think there's any -- you know, it's all going to be about the details of what results in that. My citing the 60 percent statistic was merely an effort to demonstrate that the current process is not so skewed that it results in -- I don't know what a person would think needs to be the right number for that, but certainly it seems to me that any process that has resulted in 92 percent of matters being handled by stipulation and results in a 60 percent win rate by unions, it is to me within the range of a reasonable system. There will never be a perfect system, and I understand we can't stop aiming at trying to improve things.

But I don't think that the question about the percentage of wins and losses is more of a matter of trying to demonstrate that the current system is a reasonable system.

CHAIRMAN LIEBMAN: Anything further?

MEMBER HAYES: I just -- I guess I just have one question. It goes back to something that Mr. Kramer raised. In terms of what we have done in this proposed rulemaking, we have essentially with respect to blocking charges, we haven't proposed anything specific but invited a conversation in the first place. That's to be contrasted with everything else that has been done in the rule where it's very specific in terms of exactly what we would do. On reflection, would we have been better off, do you think, to have invited the conversation about the entire R case situation rather than just doing that selectively with respect to the blocking charges?

MR. MEISBURG: Well, you know, I don't -- you sit in the seats of responsibility. I do not. And so, I feel a little bit reluctant to second-guess discussions that were had that I wasn't party to that may have involved matters that I don't know about. But I can say that I do think in this kind of rulemaking, which is going to affect -- it will be the biggest change in the representation rules in the history of the Board. I think that an appropriate time of deliberation before proposing, along with an opportunity to have pre-

proposal input, particularly since the Board deals with, for example, the ABA regularly, other groups regularly, there are already avenues of communication and thought available.

I know when I was back early in my career at the Labor Department, and we did pre-proposal rules where we got comment from the regulated community before we even made a proposal. I don't think that that would have been a bad idea, but I don't want that to be taken as somehow I know all that you know, and therefore, I'm telling you what you should have done. But I do think that idea has merit.

CHAIRMAN LIEBMAN: Thank you.

Anything else?

Thank you for being with us today and for your thoughts.

MR. MEISBURG: Thank you very much for the opportunity.

CHAIRMAN LIEBMAN: Our next speaker is Professor Ethan Daniel Kaplan. Good afternoon.

PROF. KAPLAN: Good afternoon. Thank you, Chairman Liebman and Members of the Board for allowing me to speak. I am here to speak in favor of the proposal.

And first though, I would like to respond to a question that Member Hayes raised, which I think is a good question. He raised a question of whether or not it was important that people had the right to know who was in the unit before they voted. And, you know, I think with any type of rulemaking there are tradeoffs. And in an ideal world it would be great

to know who all the members of the Board -- members of the unit would be before making, you know, before casting a ballot. However, though I think there are substantial tradeoffs, which I'm going to address in a minute. I think that when you're dealing with 20 percent of the unit that for the people -- for most people who aren't being contested, it won't matter that much. I think the people where it will matter more is for the 20 percent who are under contestation. But precisely for those members, they will -- their ballots will only count if they end up being members of the unit. And, therefore, I don't think they'll have as much uncertainty in terms of the impact of their casted ballot as you might think.

So, now on to my comments, basically I would like to talk a little about empirical research and the impact of streamlining, expediting union election processes. And this research is not my own. I have some research that is related to the efficiency of production during union elections which, if I have time, I will address. And if not, I will submit in writing.

So, there's a decent body of literature, mostly in the Industry and Labor Relations Review. I'm an economist and in industrial relations do journals that do address this question. And most of the work that has been done has been done on Canada because Canada, one, has a very similar system

to the United States. It is decentralized to the provincial level, but they do have a somewhat similar system. And second of all, they actually have experimented in changing rules exactly, you know, not exactly similar to this rule, but similar in terms of having an expedited process or not. And the experience in Canada suggests that a rulemaking change like this would benefit unions, but it would benefit unions primarily through the reduction in unfair labor practices filed.

So, what the evidence seems to suggest is that when Canada switched, in particular for British Columbia, switched from a system where they had a suggested guideline on the number of days before a hearing to remand it, that there was an increase in union wins, that there was also an increase in percentage of filings that turned into elections. And since something like 30 percent, I believe, of filings never actually -- eventually get withdrawn, that is a large percentage of potential elections. And that most of the difference is highly correlated with whether or not unfair labor practices were filed, and also, unfair labor practices being filed seems to be very predictive when there's a longer time horizon of whether or not elections come to fruition and whether or not unions succeed.

So, if it were the case that there would just be a reduction in -- there would be an increase in union wins

because employers wouldn't have the ability to make their case, then I think that this would be, you know, at least a more questionable rule. But it seems that the empirical evidence suggests that, in fact, the reduction is mostly through firms using tactics that the Board itself oftentimes deems to be unfair, and it does end up having impacts on whether elections get -- filings get withdrawn and whether or not unions win. So, I think the Board has a difficult task in balancing workers' rights with firms' rights to represent themselves.

But I think the current rule is very sensible, and I think it goes a certain amount of the way towards adjusting the huge differential between the 7 percent unionization rate and the very high percentages, oftentimes more than 50 percent percentages that you see in polls of people who say that they wish to be in a union.

CHAIRMAN LIEBMAN: Thank you for your thoughts.

Questions?

I don't think you started off by telling us your association or who you are.

PROF. KAPLAN: Oh, I'm sorry. So, I'm a visiting professor currently at Columbia University, but I'm moving into the area. As of the fall, I'm going to be a professor at the University of Maryland, College Park in the Economics Department.

CHAIRMAN LIEBMAN: And are you studying these issues yourself, doing empirical research?

PROF. KAPLAN: So, actually, the empirical research that I didn't have time to talk about, but that I will try to expedite and submit before the August 22nd deadline, deals more with the impact on efficiency of production of prolonged election proceedings. So, there's been some body of work in economics that has looked at disruptive impacts on product quality. For instance, the Firestone Tire withdrawal, it turns out, was very related to labor relations disruptions. So, I'm actually looking at nurse unions in California. And so far what we're finding is that in the period leading up to a union election, there's a decline in quality of nurse service provision measured in a bunch of different ways, like urinary tract infection rates, falling rates, things like that.

In specific what we have not done but which I would like to do in light of this rulemaking contemplation is to look at how the length of the time from the filing to the election relates to the severity of the decline and also the length of the decline. But what we do find is that after the elections occur, there is recovery in the quality of service provision.

CHAIRMAN LIEBMAN: Thank you very much. We appreciate your being here today.

Our next speaker is Robert Garbini.

Good afternoon.

And after that will be Margaret McCann.

MR. GARBINI: Thank you. Madam Chairman and Members of the Board, I want to thank you for allowing me to speak. My name is Robert Garbini. I'm the president of the National Ready Mix Concrete Association founded in 1930. NRMC represents 1300 member companies and their subsidiaries that employ more than 125,000 American workers, of which many are unionized. The Association represents companies that operate in every congressional district in the United States. The industry is currently estimated to include more than 65,000 concrete mixer trucks.

NRMC represents a unique industry which relies on numerous employees located at many different production plants in order to provide a perishable product for a just-in-time basis on all hours of the day. Currently, the vast majority of the Ready Mix Concrete industry is made up of small businesses. As with most small businesses, owning and operating a Ready Mix Concrete company means that you are responsible for everything, whether it's ordering inventory, hiring employees, meeting environmental and safety regulations, dealing with an array of government mandates, and when appropriate even educating employees about union organizing decisions and their labor rights.

Due to the unique features of the Ready Mix Concrete

industry such as isolated plant locations, unpredictable delivery hours, dispersed employees, and unusual business hours, it is the opinion of NRMCA and its members that the NLRB's proposed rule will not allow companies ample time to accurately and thoroughly assess the process, actions, and options associated with a union election or to educate employees to make an informed decision.

Contrary to the intent of the proposed rule, we believe that the proposed timeframe will lead to a longer union election process. Many Ready Mix Concrete companies do not employ in-house counsels or experts knowledgeable about labor laws. As such, many of these same companies are located in rural areas, and thus legal counsel specializing in union organizing drives is not readily accessible. This very real scenario will lead to a greater number of pre and post-election complaints and possibly unfair labor practices due to objectionable actions on part of the employers who are unfamiliar with the intricate and confusing laws and rules governing union elections.

Furthermore, we believe that the proposed rule restricts employees' ability to hear from their employer on issues that involve and affect employees, employer, and union alike. This amounts to a grave disservice to employees' capacity to make an educated decision about their employment future. The ability of unions to hear from both union employers about

creating a collective bargaining relationship should be the foundation of any proposed rule to be built upon.

As mentioned, many Ready Mix Concrete companies are already unionized. It is their experience that a trustworthy, honest, and accountable open cohesion between union, employee, and employer is necessary for all parties to prosper and to maintain a productive working relationship. NRMC believes that this proposed rule does not adhere to these principles.

Also mentioned before, concrete companies have many employees that work at various hours at numerous concrete plants. The current rule, although not perfect, provides the flexibility for the concrete companies to reach out to each individual plant and the entire employee base in order to thoroughly inform them about a collective bargaining relationship, their rights, and the proposed roles of the union and employer should they choose to organize.

NRMC believes that the proposed rule will not allow companies ample time to hire legal counsel, accurately identify all of the issues needing consideration, draft a statement of position, determine employee categories, prepare an accurate preliminary voter list, discover relevant evidence and thoroughly educate the employees about creating a collective bargaining relationship. The flexibility in the current system allows companies to accurately and thoroughly

assess the process, actions, and options associated with the union election as well as to adequately educate employees and thus should be kept intact.

NRMC supports employees' rights to make informed decisions about their employment future. We also believe in protecting an employer's opportunity to be part of that process. Creating a collective bargaining relationship should not be a closed process or a snap decision.

NRMC encourages and urges the NLRB to refrain from issuing a final rule on these proposed changes. Thank you for allowing me to speak. I'm happy to answer any questions.

CHAIRMAN LIEBMAN: Thank you for being here.

Some questions? This gentleman didn't even use up his whole five minutes.

MR. GARBINI: Just in time.

CHAIRMAN LIEBMAN: You still have a minute. Anything more you want to add?

MEMBER BECKER: I've got one question just in terms of the folks you work with and what would be helpful to them in the process that you described. One of the things which hasn't been discussed today is in the proposed revisions that, if they were to be adopted, the petitioner would be obligated to serve immediately on the employer followed up by the Region serving as well a written description of the process accompanied by a written essentially narrative of

what the employer will have to do if it so wishes at the hearing.

I guess my question is will that be helpful in the preparation in your view, or what would be? That is, if we were attempting to make it more transparent, what the process consists of for people who may have had no experience previously and to specify exactly this is what's going to happen, and here are the choices you're going to have to make, and here's what you're going to have to do when the hearing opens. Will that be helpful, and what would be helpful?

MR. GARBINI: Well, to answer your question, Board Member Becker, I think that would be helpful. Certainly, it would be helpful, especially when a lot of these Ready Mix companies are one-plant operations. They might include no more than 15 or 20 employees, and many of them are the family owned companies. They've never probably had experience with a unionization or petition that goes on.

I think the problem is going to come in with the length of time or the amount of time though. I think that's an excellent suggestion, but I still think there's going to be some necessary time for them to prepare. They're not going to have the experience to be able to go out and say oh, I know exactly who to call. What do these terms mean and everything else? So, that's why at this point in time we're

urging that we just remain with the current rule.

CHAIRMAN LIEBMAN: Let me ask you a question based on your experience in this industry. A lot of the comments this morning have been about how these proposed rules would curtail an employer's ability to campaign with its employees and inform its employees of its point of view. Is there some kind of general practice that employers in your group do in terms of campaigning?

MR. GARBINI: I can't say with any certainty that there's very specific things that go on. I know a lot of the -- I'll say the companies that are familiar with the union process and so forth, they want to make sure that their employees, first and foremost, are taken care of, whether it's in the salary area and benefits and so forth. So, a lot of those things I can't say categorically that they act in this particular fashion, but I do know that a lot of them are very, very caring about their employees and try to ensure proper compensation. And if that's -- I don't consider that to be trying to -- of any move to try and prevent unionization. They're trying to say we're providing a very good standard of living for you, and that's our offer to you. But in any kind of other capacity, I couldn't address that.

CHAIRMAN LIEBMAN: You can't say. Anything else?

MEMBER BECKER: Do you have any idea what percentage of your industry is unionized?

MR. GARBINI: I think it's about 12 percent.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Garbini.

MR. GARBINI: Thank you.

CHAIRMAN LIEBMAN: Thank you for being with us today. I appreciate your comments.

And our next speaker will be Margaret McCann, and I think we'll take a break after.

MS. McCANN: Oh, after, okay.

CHAIRMAN LIEBMAN: No, after.

MS. MCCANN: I didn't know I had that effect on people.

CHAIRMAN LIEBMAN: Good afternoon. Welcome.

MS. McCANN: Good afternoon. I am Margaret McCann, and I am an attorney for the American Federation of State, County, and Municipal Employees. Before being an attorney with AFSCME, I was an attorney at the Labor Board, and I was also before becoming an attorney, I was a union organizer and a collective bargaining representative. I want to thank the Board for the opportunity to speak about the Board procedures, which speaking on behalf of an organization that is dedicated to workers' rights to organize and collectively bargain, the Board's processes are important to us and to all American workers.

We commend the Board for undertaking this process of revising the rules because process does matter. The Board is

charged with regulating the process of organizing and collective bargaining and accommodating the competing interests of the parties. The Board's election process is actually okay if you were in the 1960's. The Board needs to comport with today's technology and come into the 21st Century and the 21st Century world. The Board processes as they exist today have become hijacked by the employers.

How has it become that the employers -- that the election process has been subsumed by the employer's right to communicate to its workers? Under the Act, employers can communicate with their workers, and they should be able to as long as their communication is not threatening. But the Act was enacted so that workers could collectively communicate and bargain with their employers.

The premise that has been set forth today that somehow the proposed rule will stifle employer's speech is just not true. And any statements put forth today or tomorrow to the contrary are just inaccurate.

How can filing a representational petition electronically in realtime stifle employer's speech? It does not. How can sending an Excelsior list within two days instead of the current seven days stifle employer's speech? It does not. How can convening a hearing within consecutive days stifle employer's speech? It does not. What it does, it injects some certainty into the process so that all

parties, the employer, the union, and most of all the workers know when the hearing will convene.

How will having the employer take a position about the petitioned-for bargaining unit stifle employer's speech? It does not. In fact, that rule would be asking the employers to speak a little more, to tell the Board what they believe the petitioned-for bargaining unit represents. How can delaying 20 percent or fewer of the workers' eligibility status delay employer's speech? It does not. What the proposed rule does is allow the Board to control the election process, to eliminate undue delay, and provide certainty to all the parties.

The Supreme Court mandated that the Board should be promulgating rules that are recorded accurately, efficiently, and speedily. And the Board's proposed rule attempts to comply with this mandate. The proposed rule contains common sense changes to the election process. It is injecting fairness, provides certainty, and updates procedures in this technological age. Thank you. And I thank the Board for the opportunity of letting us address this important issue.

CHAIRMAN LIEBMAN: Thank you. Thank you for being here today.

Are there any questions?

Thank you very much.

Why don't we take a break at this point and be back

promptly at 2:30?

(Off the record.)

CHAIRMAN LIEBMAN: Let's go back on the record.

And our first speaker this afternoon will be Douglas Darch. And following him will be Professor McCartin.

Good afternoon.

MR. DARCH: Good afternoon, Chairman Liebman. Good afternoon to you, the Members of the Board, distinguished counsel who are joining us, guests, and Board staffers. I am here today on behalf of the Illinois Chamber of Commerce and the Wisconsin Manufacturers Association. Collectively, these two -- whoops. That's called a rather dramatic entrance, I believe. Fortunately, it didn't touch the ground, right, or we'd have to burn it.

The combined economies of the states of Illinois and Wisconsin exceed $895 billion, placing it among the roll call of nations at number 17, ahead of the Netherlands, Turkey, Indonesia, and Switzerland to name just a few. For 30 years I have practiced before the federal courts and before the National Labor Relations Board where I have appeared as an advocate in Section 8 proceedings as well as a representative under Section 9.

In the late 1980s and early 1990s, I represented employers in seven unit hearings involving the appropriateness of units limited to meat department

employees. I would like to share that experience as part of my comments. But if you will indulge me a moment, I need to put the case into context.

During the last 30 to 35 years, the retail sale of fresh meats underwent a transformation. The changes made the industry more cost efficient, which is good for the public. And in today's buzzwords, it created many new green jobs. What happened? The NLRB had developed a presumption in the 1930s and in the 1940s that in a retail grocery store, meat department employees constituted a separate appropriate bargaining unit because the butchers in the department employed traditional meat cutting skills. Traditional meat cutting skills were required or applied in the breaking of carcasses of beef and pork into retail cuts of meat. Also back then was a lot of lamb and veal, not so much today. But today carcass beef is no longer shipped to market. Rather, only boxed beef or case-ready beef is shipped. The traditional meat cutting skills are kept at the abattoirs and the waste products generated in the breaking of beef, such as fat, inedible tissue, and bone are kept at the site of the abattoirs as well.

The seven cases I referred to above all involved boxed beef retail stores, which the only work performed in the meat department was similar to the work performed by the deli clerks. One of these hearings eventually resulted in a

reported decision. It was Copps Food Center, 301 NLRB 398 (1991). And I invite the panel to review the first sentence of that decision. It recites that the case sat for two years and one week from January of 1989 to January of 1991 while the Board considered the Regional Director's decision and direction of election. The case is of note because the Board reversed the Regional Director's finding that a separate department of meat department employees was appropriate, and it eventually dismissed the petition.

And against that backdrop, I would like to make three points. Point number one, some of the delay that the Board is attempting to eliminate here, and I am loathe to use that word delay when it involves the processing of petitions, but the case Copps Food illustrates some of that delay is attributable to the Board's failure to manage its own internal processes. It appears that under the proposed rules the Board's solution is not to effect changes at the Board, but it is simply to outsource that process and send it to the Regions or simply cease doing the work altogether. If that work is substantial, as the comments accompanying the proposed rules suggest, there should be layoffs here at the Board headquarters, and I can tell you the management community will be alert to see whether layoffs occur. No layoffs mean the work was not substantial, and therefore, it does not serve as a justification for the rules change. In

any event, I trust the Board intends to lead by example and has already negotiated with its unions over this tentative decision to subcontract and its effects.

Now, to address the proposed rule change in Section 102.66, the introduction of evidence and rights of parties, in a Rule 56 proceeding, the Plaintiff, which would be the petitioner in the R hearing, files the Rule 56 motion. The presumption is the Defendant wins. Compliance with the law is presumed. The NLRB's proposed procedure turns that presumption upside down. At the NLRB, the petitioned-for unit is presumptively appropriate. Instead of having to overcome a presumption, the petitioner is aided by it. The motion is written, not oral. The parties file briefs, three of them, a brief in support, a response, and a reply. The court takes the motion under advisement and may hear oral arguments. In any event, it is only after a period of deliberation that the court issues a decision.

Now, consider the Board's proposed procedure. The Hearing Officer makes an off-the-cuff decision from the bench after hearing at most oral arguments. There is no opportunity for case study, deliberation, or reflection as to whether there are genuine issues of material fact. The Board should not presuppose a Hearing Officer can adequately address offer of proofs, complicated issues on the fly without benefits of proof.

In short, the Board is attempting to sacrifice getting it right on the altar of expediency. We urge the Board to modify its proposed rule to provide that if the parties dispute the appropriateness of the unit, the Hearing Officer shall immediately forthwith take evidence on the scope of the unit. Thank you.

MEMBER BECKER: First, I am completely sympathetic to your description of the delay which rests at our feet. But I wonder if you think this is accurate in terms of the proposal. The proposal does a couple of different things in terms of the Board's own caseload. So, the proposal suggests that the pre-election request for review would be eliminated. That's a fairly substantial amount of our weekly diet at present. And it proposes not simply that those cases just be shifted to the post-election process, but that many of them or some of them will be mooted out because of the election results.

So, in terms of the delay which is attributable to the Board, it does make some sense that if the proposal were to be adopted, the case load would be constricted in those two respects, and hopefully we could do a better job. Doesn't that make sense?

MR. DARCH: It absolutely does not, sir, and here's why. The reason is that with technology, the Board should be able to move its caseload through the process here faster, not

slower. It used to be the cases were done on note cards, and now you can use computers. You can do the research online instead of going to the library. You have precedent banks which are found much more quickly. If you've been in the private sector, you will know that there is a huge emphasis on reducing the amount of time spent on research because it's so easy to expedite the process.

And this Board's staff here has increased in size over the years, so presumably, and it has aged as well I might add through my own personal experience with a number of the members, but not of the Board of the staff, excuse me. I want to make that absolutely perfectly clear. But one would presume that with experience comes some degree of familiarity and the ability to handle it well.

I look at the weekly case reports, and I must say for a five member Board sitting or four member sitting in panels of three, it's not particularly a heavy case load compared to what is done, for example, in the Court of Appeals in Chicago where I practice and it's your home, I know. But you look at the case load that comes out of there, and it's much heavier, and they do do briefs, and they have oral argument, which the Board does not do here.

CHAIRMAN LIEBMAN: I just want to make one comment. I'm not going to touch your comment about aging, but Board staffs have, in fact, quite substantially been reduced over even the

13 years that I've been here, quite substantially.

MR. DARCH: Okay.

CHAIRMAN LIEBMAN: Our Board staffs have shrunk enormously. So, I just wanted to correct that.

MR. DARCH: I'm not limiting -- I'm not addressing the Regions. I'm talking about the headquarters staff.

CHAIRMAN LIEBMAN: That's what I'm talking about too. Quite substantial reduction. I'm sure even since the time former Member Cohen was here, his former staff is much smaller than it was when he was here. So, any other questions?

MR. DARCH: Can I volunteer one comment?

CHAIRMAN LIEBMAN: Sure.

MR. DARCH: And that is the rule that speaks of the parties or the petitioner -- not the petitioner, the employer making a recommendation as to the appropriateness of the unit, in the Copps Food cases, the parties had sat down and negotiated the appropriate unit before any of the hearings started. When the union was unable to organize in the unit, it then attempted to ignore the petition -- I mean, ignore the agreed upon unit, and you'll see that that matter is addressed in the Board's decision as well, saying that it should not -- the union was not bound to its agreement.

So, the suggestion I think that you're proposing here that by making the employer move forward with a suggestion as

to the appropriate unit is somehow going to speed up things, I think will only do so to the extent there is, if you will, honor among the parties and that there will be an effort to abide by that agreement. Otherwise, you're back to 92 percent of them are stipulated anyway, which I don't think advances the case at all. So, thank you very much.

CHAIRMAN LIEBMAN: Thank you for your comments.

Professor McCartin will be next, and after him Mr. Kirschner.

Good afternoon.

PROF. McCARTIN: Good afternoon.

CHAIRMAN LIEBMAN: Nice to have you here.

PROF. McCARTIN: Thank you. Thank you, Chairman Liebman, Members of the Board for giving me this opportunity to comment on the proposed rule change for representational proceedings. My name is Joseph McCartin. I'm an associate professor of history at Georgetown University, where I also serve as executive director of the Kalmanovitz Initiative for Labor and the Working Poor. Unlike many who have and will address you over the course of this session, I am not a lawyer, nor am I an employer or union representative or a worker whose fate will be directly affected by the proposed rule changes under consideration today. Rather, I come before you as an historian of the 20th Century, of 20th Century American labor relations and as one who has written

about the origins of the nation's policy toward collective bargaining, one whose present research is concerned with the problems of the nation's working poor. From my perspective as a scholar and a researcher, I would like to speak to several pertinent aspects of the proposed rule change.

First, the proposed rule change provides a marked improvement over present procedures in my view. It is responsive to the changing context within which your governing statute is applied in the real world, and yet it is modest in scope and content. Under present conditions, numerous obstacles can be raised to delay workers' access to a timely process through which to make a choice for or against union representation.

This proposed rule change reduces the opportunity for those who specialize in creating delays in representational proceedings through duplicative appeals and pre-election litigation. Yet it does so without weakening due process or compromising the legal rights of any party to a proceeding. Beyond ensuring timely elections, your rule change also facilitates worker's rights to obtain full, fair, and accurate information regarding whether to choose union representation. Employers have the right to speak to workers during work time and in the work place about unions, whereas unions and pro-union workers do not.

Many employers begin laying out their opposition to

unions and collective bargaining during the orientation process for new employees. In any workplace setting where employers are opposed to unionization of their employees, employees have ample opportunity to learn their employer's views. Indeed, they know those views well. Yet, fair elections require that both parties have a chance to make their case to an electorate.

Because unions can only communicate with workers away from the workplace, it is vital that employers provide promptly full and accurate contact information so that unions have the ability to provide their own information to workers in a timely manner. Your rule provides for this and thus helps ensure that when workers choose for or against union representation they do so with the full benefit of the full range of arguments before them.

Your rule also modernizes the way in which workers can communicate with this Board and its representatives, allowing the use of electronic technology at a time in which workers increasingly send and receive information electronically. This change is an important improvement and will save both time and money.

As a historian, I see these various provisions of your rule change united by a common theme, a good faith effort to respond to fundamentally significant changes and the context within which the labor law you are sworn to interpret and

uphold operates. To put it simply, history has moved on in ways that have made your existing rules increasingly archaic and inadequate. Indeed, since the statute was last amended and the rules governing representational proceedings were last adopted, the context within which workers exercised their rights to organize and bargain collectively has changed markedly.

A thriving industry of consultants has emerged who specialize in exploiting the existing rules, not to protect the legitimate rights of employers, but rather to create whatever delays they can throw up in order to delay and thus obstruct a worker's ability to choose a union. Employers have become decidedly more aggressive and persistent in their campaigns to dissuade workers from even considering exercising their rights guaranteed under the statute you uphold while unions and pro-union workers have continued to operate under the handicap of having unequal access to workers in order to present their side of the issue.

Since these rules were last revised, a communications revolution symbolized by the internet, e-mail, smart phones has transformed Americans and how Americans transmit and receive information. This change in context demands that rules be revised and updated in order to keep the fundamental balance between workers' rights and employer's rights that is provided for in your governing statute. This rule change is

no radical revision. Rather, it provides a sober, fair, necessary and timely modernization of procedures, one that keeps faith with the intention of the nation's labor law.

Let me conclude by noting that the Wagner Act was born in an era in which inequality was rampant and growing, in which democracy was threatened to cross the world by totalitarianisms of the left and right. The industrial democracy that your predecessors helped implement through the Act played a crucial role in bolstering this nation's credibility as a bastion of democracy. What you have done through this rule, I believe, is to update the both letter and intention of the Act which you are sworn to uphold and interpret, and therefore, I come before you to speak in favor of this rule change. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your thoughts. I appreciate your perspective here today.

Anybody want to ask a question?

PROF. McCARTIN: Thank you.

CHAIRMAN LIEBMAN: Thank you.

Mr. Kirschner is next, and then we'll have Dora Chen.

Good afternoon.

MR. KIRSCHNER: Good afternoon, Chairman Liebman and Members of the Board. I'm Curt Kirschner of Jones Day speaking on behalf of the American Hospital Association and the American Society of Healthcare Human Resources

Administration. The AHA represents more than 5,000 hospitals, health systems, and other healthcare organizations and 42,000 individual members. ASHHRA represents over 2,900 human resources healthcare professionals who serve in our nation's hospitals. AHA members run the gamut from large hospitals and health systems to small rural hospitals.

Over 40 percent of our nation's hospitals are standalone hospitals, often the sole healthcare provider for their communities. The burdens placed on these organizations affect the delivery of patient care throughout the country. The hospital community has significant concerns about the extensive rule changes proposed by the Board. The AHA and ASHHRA will be submitting written comments during the period allowed by the Board.

In light of the limited time available today, I'm going to only address the following four points. First, the Board's process in proposing these amendments is inconsistent with President Obama's executive order, the Board's own prior practices, and provides an inadequate opportunity for genuine public discussion about the proposed rule changes.

Second, the inadequate process leaves unanswered many questions about the actual net effect of so many changes occurring simultaneously, in particular with respect to the statement of position.

Third, the Board's proposal to have employers produce

overlapping employee lists on an expedited basis would impose unfair burdens on employers and place well-intentioned employers at the undue risk of violating the Act.

And, fourth, electronic signatures should not be accepted for the purposes of mandatory showing of interest and representation cases.

Starting with the first point, the NLRB's process appears to be inconsistent with President Obama's executive order with respect to the publishing of new rules. Executive Order 13563 provides that "before issuing a notice of proposed rulemaking, each Agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." The Board's cursory explanation in footnote 34 of the proposed rules that such advanced discussion was not provided in order to provide and obtain more orderly comments fails to demonstrate why advanced and genuine dialogue on such extensive and important rule changes was neither feasible nor appropriate. Spanning 35 three-column pages in the Federal Register, the proposed changes amend the Board's entire election process from start to finish. The only Board rule changes of somewhat comparable significance in the recent past relate to the establishment of appropriate bargaining units in acute care hospitals with which the AHA was

extensively involved. In those rule changing procedures, the NLRB gave interested parties substantial opportunity to participate in the rulemaking process, including advanced notice, Regional meetings, and opportunity to cross-examine, and the second notice with an extensive comment period. This process did not end all disputes, but it allowed all parties to vent their concerns and allowed the Board to set rule changes that withstood court review, including by the United States Supreme Court. Here the Board's rule changes modify over 100 sections of its election rules and affect a much broader scope of employers in the acute care roles. But the process being afforded by the Board appears truncated and almost perfunctory.

The second point, this lack of adequate process leaves unanswered many questions about the actual net effect of the rule changes. With so many overlapping and simultaneous changes, I think it's difficult to determine exactly what the effect will be of these. So, for example, with the compulsory statement of position, in the context of providing that in an expedited timeframe, this may result in employers or respondents doing what defendants normally do in civil litigation in their answers, which is to assert as many defenses as possible in order to avoid waiver. Employers will be forced essentially to put as much down on the paper to avoid waiver. Currently, Board procedures result in

election agreements in approximately 90 percent of all cases. These cases on average are resolved much more expeditiously than contested cases, but the net effect of the statement of position, the compulsory statement of position could be that you're going to end up with further contested hearings and thus more delay in actual holding the elections. We would suggest that the Board adopt for all of its rules the process that the Board is using with respect to blocking charges, that is to raise questions about that to investigate and get opinions on this. And if the Board was truly interested in reducing the time period for elections, the Board should look strongly at the blocking charge issue. Blocking, although the Board does not publish data on this, and it has been requested of the Board, based on a published 2008 study, it appears that blocking charges comprise one of the most significant, if not the most significant delay in representation cases, increasing the length of time to an election by about 100 days. So, we would request that the Board revisit its process and actually raise questions about the election process before and not proceed with the current proposed rules.

The third point that I'd like to raise just briefly is that the process of overlapping list of employees is going to place unfair burdens on employers. Hospital employers, like most employers, do not have their IT systems set up so that

they can with the push of a button push out lists of employees that are consistent with the way in which the Board's rules are. So, for example, identifying who's technical versus who's professional. Even more importantly, who meets the multi-factioned test of who is a supervisor and who doesn't? Having employers be forced to produce multiple versions of those lists in a short period of time places undue burden on employers and puts well-meaning employers at the risk of violating the law.

And then the final point is just that there's been no showing that there's any reason to accept electronic signatures for the mandatory showing of interest. That would pose significant administrative burdens in evaluating whether a valid showing of interest exists, and it creates a high potential for fraud and abuse. Thank you very much.

CHAIRMAN LIEBMAN: Thank you, Mr. Kirschner.

Questions?

MEMBER BECKER: I've got a -- it may seem like a technical question, but your association obviously represents a very broad spectrum of types of healthcare providers.

MR. KIRSCHNER: Correct.

MEMBER BECKER: And that has led to simple R cases and incredibly complex R cases, and several have gone up to the Supreme Court. So, there is a very wide spectrum of types of cases and types of employers and types of units that have

been petitioned for. The seven-day proposal, as the NPRM suggests, the seven days is taken to be consistent with Croft Metals, where the previous Board held that that was the minimum period considered consistent with due process and with the Act. But the proposal is currently to qualify that to say except for in special circumstances, and we specifically invited comment on whether that is the right term. So, I guess my question is given the wide variety of types of employers in your associations, wide variety of types of R cases, do you have any thoughts about what would be the appropriate qualifying term to accommodate the types of concerns you're describing in preparation?

MR. KIRSCHNER: I believe to answer that question you would need to know what is the employer required to do by the commencement of the hearing. If the employer has to walk in the door with a statement of position that definitively sets forth all positions at the risk of waiver, has a list of the required requested employees who would be under the union's list, and has a second list that has all of the employees listed on the employer's proposed list, I think seven days is inappropriate.

I think that, as I stated before, the mandate that the employer set forth all positions at the risk of waiver places employers, especially on such an expedited timeframe, in a position where they are going to be forced effectively to put

in more defenses than they otherwise would under the current rules. Under the current rules, the Board is successful. The parties are successful in reaching agreement in almost all cases. And I really fear that the expedited process that you're going down is going to result in people just automatically going to the hearing putting out the required information and then letting the Hearing Officer sort through that. And I think that's going to result in more contested elections and ultimately therefore a longer time period to get to the election than what you see in the current rules. But I think more dialogue about this would help ferret that out, and we would see how these different rule changes could possibly affect the actual process.

MEMBER PEARCE: Well, wouldn't you say that the current, the way the current rules are now, the current process is, and my experience as a practitioner makes me recall that in a representation proceeding where the parties have no obligation to provide any information with regard to issues, you find parties showing up and some parties feeling blind-sided, and the Board even being blind-sided by positions that are presented at the eleventh hour or are on the fly, which oftentimes creates the need for a continuance and a protracted nature of the process. In this proposal, not only do you have a statement of position, but there's a requirement of an offer of proof relative to the issues at

hand. Don't you think that that should eliminate a problem that currently exists?

MR. KIRSCHNER: With respect to the problem that currently exists, I am not here, the AHA, or ASHHRA is not here to try to defend bad actors. If people try to abuse the process, and you can see that on all sides of this situation, I think that there are ways to address that issue that are well short of the proposed rules that you're making. So, for example, requiring an employer to state a position I don't think is nearly as complicated of a rule change as what the Board has put forward. And I think that may help address some of the abuse that you might be referring to, but I'll also go back to the statistics.

In 90 percent of all cases, an agreement is reached. And so, the aberration, the abuse that may occur may be something that needs to be fixed, but it should not drive a wholesale change to the entire election procedure. And it's very important to in that agreement that the parties understand who is eligible to vote and who is not.

The supervisory issue is critically important to determine who is the employer needing to train in order to ensure that that person doesn't inadvertently violate the law. So, for example, one conversation between two employees about the union may be entirely fine, or if one of those persons happens to be a supervisor, and they ask the other

one what do you think about the election, and that person is actually a supervisor, the employer has now just violated the law under the current rules. And so, identifying in advance who is a supervisor is critically important, and I think that's one thing that happens under the current rules now is that because so many petitions end up in getting a stipulated election or consent election, I think the parties work out in advance largely who is going to be a supervisor and who is not. And that's very important to the process.

MEMBER PEARCE: The proposed rules would not abandon those opportunities. In fact, as was stated earlier, that 90 percent of stipulated elections should continue. The proposed rules seek to scale down the process that comes to light as a result of those issues that cannot be stipulated to or where parties do not reach agreement. So, and, of course, the statistics as I recited earlier with respect to those current cases where there is no stipulation are pretty -- we're talking about the time period between election, petition and election far exceeding that 38 number.

MR. KIRSCHNER: Correct, I think the average would be 58 days. And where there is a blocking charge, it can be substantially longer to actually having the election. So, there are many moving pieces here. Our request to the Board is that it carefully think through how these different pieces are going to affect each other, so it can come up with a set

of rule changes that are actually going to meet the goals of the Board and not themselves inadvertently put employers at risk and delay the election process.

CHAIRMAN LIEBMAN: Thank you for your thoughtful comments. Appreciate your participation.

MR. KIRSCHNER: Thank you.

CHAIRMAN LIEBMAN: Our next witness is Dora Chen, and after that we'll have Mr. Charles Cohen.

MS. CHEN: Members of the Board, my name is Dora Chen. I'm an Assistant General Counsel at the Service Employees International Union. We're a union of 2.2 million members in healthcare and building services. We've submitted the written testimony of our president, Mary Kay Henry, for your consideration. But here today we have Veronica Tench, an employee at St. Vincent's Medical Center who is going to speak on behalf of SEIU today.

CHAIRMAN LIEBMAN: Hi.

MS. TENCH: Good afternoon. Thank you for the opportunity to testify here today. My name, as she said, is Veronica Tench, and I work for St. Vincent Medical Center in Los Angeles since 1981, first as a nursing assistant and now I do work as a lab assistant. My coworkers and I began trying to form a union in our workplace 13 years ago, but it was not until last month that we finally succeeded. I am now a new member of Service Employees International union, United

Healthcare Workers West.

Our story helps show why the Board's proposed rules are necessary to modernize an election process that places too many barriers in front of workers like me, delaying and sometimes preventing us from voting altogether to gain a voice on our job. Our story also illustrates how employers have plenty of opportunity to speak to employees about unions and the kind of action they can take during a drawn-out process.

Looking back more than a decade ago to the time we started talking about joining a union, I remember both why we wanted to organize and how the delays in the process and worker intimidation played a part in stifling our efforts to form a union. Sadly, this process took so long that three of the respiratory therapists who were part of our original organizing effort have now passed away since then.

In 1998, we started the process of forming a union because we wanted to increase the number of staff assigned to each patient care unit per shift so we could better provide our patients with the high quality care they deserve. Our employer learned about our campaign. Long before we filed a petition at St. Vincent, managers tracked union activity and began an anti-union campaign.

Supervisors began meeting frequently with employees to advocate against the union and immediately distributed "say

no to union" fliers. They hired outside lawyers and held meetings with us about why we shouldn't join the union. Management also increased security at the hospital, posting security officers on patient care units to try to prevent us from talking to the union organizers.

My coworkers and I realized that we couldn't talk freely. We couldn't talk freely. I'm sorry. We couldn't talk freely about the union at work, so we had to meet outside the hospital to discuss these issues. Word got around that the hospital told some workers they have to pay more for parking if they join the union. A department manager went as far as to tell the employee that the union only wanted money from us. Even at this early stage, I don't think there were any employees who were unaware of St. Vincent's argument about the union.

We tried to move forward, but the hospital management stopped us from every angle. We persevered through this campaign and filed our petition January 5th of 2000. On February 1st, with just over two weeks to go until the election, it was announced that St. Vincent would be subcontracting 27 respiratory care therapists who were core union supports. This would prevent them from voting, completely undermining everything we had worked for.

We filed an unfair labor practice charge, and St. Vincent was eventually found to have violated Federal

law, but that was in 2007. After more than six years of litigation, management posted a notice and started employing the respiratory care therapists directly again, but we had to start organizing all over from the beginning.

Today at St. Vincent it is a different kind of employer, and we were allowed to vote in a fair and timely election on June 24th of this year. Although we succeeded in winning this new election, it was clear to us that the process that took 13 years to resolve was flawed and broken. If there were rules, if these new rules had been in effect back when we first started trying to organize, the election might already have been held before St. Vincent tried to subcontract my coworkers, and the 11 years of delay since then would have been avoided. I appreciate and strongly support the Board's effort to reduce unnecessary delays in the election process so that other workers who want a union won't have to wait 13 years to get one like I did.

And I thank you very much for allowing me to present this. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for being with us here today and for your comments.

Any questions?

I appreciate it.

Mr. Charles Cohen is next, and then John Brady, I guess. John Brady maybe and David Linton, I'm not sure.

Good morning or good afternoon, Mr. Cohen.

MR. COHEN: Good afternoon, Chairman Liebman and Members of the Board. Thank you for the opportunity to speak. I've been working under the Act for the past 40 years in various capacities, both for the NLRB and in private practice. While at the NLRB, I personally conducted NLRB elections, served as a Hearing Officer, litigated in the Court of Appeals and performed the myriad of other functions of a Board Agent, supervisor, and Deputy Regional Attorney. From 1994 to 1996, I had the honor of serving as a member of the Board.

In my representation of the Coalition for a Democratic Workplace, with the five-minute limitation, that gives approximately two seconds per page of the 145 pages that my printout was. If I can be presumptuous enough to state as a result of my experience, I believe that I know the tricks of employers. I know the tricks of unions. And I know the tricks of the NLRB.

Over four of the last five presidential administrations, the members of the NLRB have pushed the proverbial envelope. Appointees supported by Republicans and Democrats bear some measure of responsibility for the increased polarization. But these proposed rules which have brought us here today do not push the envelope; rather, they blow up that envelope and do violence to the fair administration of the Act.

In virtually every controversial initiative which I have

witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or gain the system. Unlike any of these other initiatives, this one transparently seeks to deprive law abiding and non-games playing employers of their rights to communicate under Section 8(c) of the Act.

The entire employer community is presumed to be on the wrong side, standing ready to trample the rights of employees. The proposal deprives employees of the right to receive key information from all sides in order to be fully informed on how and whether to express and exercise their Section 7 rights.

There are some points I believe you the Board and I know to be the case. Union density in the private sector has been on the decline and is currently below seven percent of the private sector work force. Whatever the cause, the scope of which is beyond this debate, it is deeply distressing to organized labor. Over the past 15 years, unions have been seeking alternatives to winning secret ballot elections, typically through neutrality and card check procedures often obtained through the pressure of corporate campaigns.

Unions have unsuccessfully sought legislation through the Employee Free Choice Act that would have functionally eliminated secret ballot elections conducted by the Board. It is commonly known that the longer the period of time

between the filing of an election petition and an election, the less likely it is that the employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred. There have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

So, what has the Board come up with? In my view it is a bag of tricks. It has proffered the gimmick of an emasculated hearing, summary judgment standards, offers of proof, preclusive rules to limit issues, Regional Director decisions devoid of explanation at the time of issuance, and frenetic time deadlines that disregard other obligations of employers and their counsel, all an attempt to get that election as soon as humanly possible and without giving the employer time to communicate with the employees. There will, of course, be no tears shed for unrealistic burdens on employer counsel.

Simultaneously with the proposal of these rules, the Department of Labor’s proposed persuader rules are designed to deprive employers of representation in the first place. An issue that's come up several times today is what would happen to the stip rate, the in excess of 90 percent. I

believe that that stip rate will plummet if these rules go into effect. And I used to be in enforcement, and we used to have over 60 attorneys a substantial portion of whose time was defending technical 8(a)(5) cases, certification test 8(a)(5) cases. That has become a dinosaur now. The number of certification test 8(a)(5) cases one can count on less than one hand.

If these rules go into effect, you'll be hiring staff to handle those cases because that will be the option of choice for employers who feel deprived by the system. In his dissent, Member Hayes has taken the unusual step of calling out his fellow employees on his view of the true reasons for the Board in proposing these rules. As a former Board member, I appreciate how difficult it is to make the kind of statement that he made in his dissent.

The majority has denied those motives to be true, stating that these rules are about efficiency and savings, asserting that the effect on the outcome of elections is unpredictable and irrelevant. Only the individual Board members know in their hearts and consciences what the true motivation is. But I feel compelled to observe that if the Board were called upon to assess motive or mixed motive, as it is often called upon to do, the present circumstances clearly would support an inference of outcome determinative rulemaking.

Several of the academic and public interest views expressed here today lay bare the desired effect of these rule changes themselves. That concludes my statement.

CHAIRMAN LIEBMAN: Thank you.

Any comments or questions?

MEMBER BECKER: The relationship between the hearing and the employer's ability to campaign, currently the hearing can cause that period to vary widely. I guess my question is what is the appropriate period, and why should it vary depending on the amount of litigation? That is, you stated a very strong position that a certain period of time is necessary, but why should that period of time hinge on the accident of what litigation takes place?

MR. COHEN: And, Member Becker, you, of course, asked that question earlier, and it is a good question, and I believe that analytically, it should not. But we have a system. We have a system that has achieved enormously beneficial results of plus 90 percent of people not availing themselves of that opportunity. As Professor Estreicher said, there's a certain legitimacy factor that has to go with that. If the situation is understood that is one thing, but if it is artificially compressed down to the period of time that we're talking about here, it is my belief that employers will view themselves as not being treated fairly and then look for something else which will give them at least some

modicum of time.

We've had many initiatives over the years that have resulted in the statistics today. They haven't all gone down easy to be sure, and I was on the Board when some of them came in. But we have adapted with that, and employers have had opportunities. Of course, there are some abusers of the system. And just as Mr. Kirschner said, I'm not here to defend those abusers of the system. We have the overwhelming percentage that are not abusers of the system. I believe the Board should be very careful about dismantling the system that it has now and, in the name of trying to get these quick elections, doing a lot of injustice and violence to the well-oiled machinery that is there today.

MEMBER PEARCE: As a former Board member and a practitioner before the Board and an employee of the Board and other capacities, you're familiar with certain aspects of the process that currently exist like, for example, the 25 day hold on elections after a hearing for a request for review when the purpose of that hold for elections is to give the Board the opportunity to decide the case, and it contemplates a stay of an election in that process. But in reality, less than one percent of requests for stays prior to the Board's decision get granted. The elections get held, and the ballots are impounded. Now, having that 25 days there, you'd have to concede, doesn't serve any real

practical purpose, does it?

MR. COHEN: I think it does not necessarily except a pesky little thing. The statute talks about having an appropriate hearing. I was on the Board when Angelica, Barre National, and Bennett Industries came down. I was in the majority in Bennett getting at the games-playing employer. This should not be about games. But we have a system where well over 90 percent of the employers are not even seeking to avail themselves, Member Pearce, of that 25-day stay period of time. That should tell us all that something is being right and that there may well be some abusers to it. But they are not carrying the day here. The tough, day-to-day efforts, the fact that the Regional Directors and the supervisors and the Field Examiners and the Field Attorneys sit on the parties with whom they deal and ensure that the time targets which have been established which are quick get enforced, those are the people that I think have brought this system to its successful state. And if you make these kinds of changes, you will be undoing that entire system and creating decades more of games to be played.

CHAIRMAN LIEBMAN: Can I ask a related question, similar to what Member Pearce asked? The 25-day period is built in even in those cases where there's no hearing. So, it's just part of the process. Is there any reason -- I actually don't think I've heard any speaker today criticize the part of the

proposal that talks about doing away with the pre-election request for review. And so, I'm just wondering what your view is. Given that the vast majority of cases are consented to or stipulated to, is there any reason to have this built-in 25-day waiting period?

MR. COHEN: Chairman Liebman, it's a chicken and egg situation that goes right back to Member Becker's question about should it all hinge on it. The world in which we live, for better or worse, has a trade, and that trade is I won't assert my legal rights and trigger a request period of time, and in exchange for that, I'm going to be treated fairly, I'm going to have an opportunity to communicate with my employees, and the system has worked over this period of time. If one's goal is to, come hell or high water, have the election in a 10 to 21 day period of time, then the Board might be able to make that happen. But I think ultimately if you look at your statistics five years down the road, you're not going to be getting any real benefit. There aren't going to be that many valid elections that are going to happen in that period of time, and you're going to create an opportunity for the various Circuit Courts of Appeal to pick at these rules one by one in terms of due process that has not been observed. And I believe at that point it's not worth the candle.

CHAIRMAN LIEBMAN: Thank you for your thoughts. I

appreciate your comments and your being here today.

Our next speaker is John Brady, and next up will be Brett McMahon.

Good afternoon.

MR. BRADY: Good afternoon. I'll be splitting my time with David today.

CHAIRMAN LIEBMAN: Okay.

MR. BRADY: My name is John Brady, and I'm a registered nurse. After 17 years of working at Backus Hospital in Norwich, Connecticut, I felt I could no longer care for my patients or my family properly without joining together with my coworkers and forming a union. We nurses spent several months discussing this. We began organizing with AFT Connecticut, an affiliate of the American Federation of Teachers. Management did not remain silent or neutral during this process, but fiercely argued against our forming a union. Despite daily encounters with managers who sought to impede our efforts, an overwhelming majority of regular staff nurses signed union cards.

On March 21 of this year, 30 of us signed a public letter to our CEO letting him know a majority of us wanted to collectively bargain in an attempt to demonstrate our majority to avoid the cost of the election process and to avoid delaying the clear will of the majority, but management flatly refused. We submitted our cards and petitioned for

recognition to the NLRB on March 28. The hospital responded that they wanted an election in mid-May and wanted to include all RNs. The date the hospital chose, 8 of the 30 nurses who had signed the public letter were on a scheduled vacation. The date was well beyond the 25-day waiting period and resulted in 44 days between filing and election.

When we asked why they wanted a date so far away, they told us it was so they would not interfere with national Nurses Week. When we pointed out the national nurses week was actually on the week they had chosen, the hospital said they had planned on celebrating a week early. Management's vague response that all nurses be included also left us with many questions about who they expected in the bargaining unit. We asked them to clarify, and we asked the election be held a week earlier, but they would not budge. They threatened that if we did not sign the stipulated agreement, they would make sure that the unit determination hearing be lengthy and difficult. They threatened to raise issues of supervisory status and casual employment status and made it clear that we would not get an election anytime soon if we did not agree to their terms. Reluctantly, we agreed.

The Excelsior list that the hospital provided on April 12th did not include any job titles, work site information, or reasonable contact information. There were people on the list we had never heard of. We asked the

hospital to clarify, but they refused. We had to drive all over the state to find these nurses. When we finally tracked them down, we found 39 of them were supervisors or not eligible to vote. We even discovered three who were not RNs.

Under the proposed rules, we would have received a clear list of eligible voters on April 4th. With phone numbers and e-mail addresses of other nurses, we would have had a real ability to communicate in private away from the intimidation and pressure of managers. We would not have had to wait 44 days for an opportunity to vote. By the time workers get to the stage of filing, they have had plenty of time to make up their mind. Including such an excessive bureaucratic delay only discourages workers from exercising their right to bargain collectively. Incidentally, during the 44 days between the filing and the election, management flooded our hospital with anti-union literature. They pulled nurses from their work and lectured them about the perils of joining together. At one point, two managers cornered me and pulled me into a storage room and pressured me to stop talking to other nurses. The hospital used the 44 days to create a high-pressure atmosphere. It was a long and difficult process. I am grateful we were able to hold together long enough. The rules should be changed so that no other nurses have to wait for their rights to be recognized. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you very much, Mr. Brady.

Mr. Linton?

MR. LINTON: Madam Liebman, thank you very much and Board members for the opportunity to appear here. My name is David Linton. I'm a professor of communication arts at Marymount Manhattan College. I'm also the president of the New York state conference of the American Association of University Professors. I'm appearing here at the invitation of the American Federation of Teachers and their New York affiliate, New York State United Teachers.

Marymount Manhattan College is a small school with a very modest endowment. We are largely tuition driven in our financial arrangements. Therefore, it came as a surprise that the administration hired an expensive law firm that ended up costing the school well over a million dollars in a failed attempt to break a collective bargaining drive that the clerical and support staff had instigated. Despite over a year and a half of hearings and delays, that's 18 months from filing to election, the staff voted by a margin of 65 to 27 to unionize. During that time, the administration frequently redirected the workload of nearly a dozen administrators, including four vice presidents, to meetings, hearings, and strategy sessions aimed at defeating the drive or dragging out the process.

For 25 years, I have been a faculty leader as well as a

mid-level administrator as I was chair of the humanities division of the college for 15 years. Because of my knowledge of the history and the employment practices and general operations of the college, I was invited to testify before the Labor Board by the union committee. I testified for three long sessions. There were a total of 46 days of protracted hearings in all. Much of the time that I was testifying was taken up with questions as to whether my part-time administrative assistant was actually a supervisor or a boss because she directed our work study students as to when they should go to copy machines or to pick up the mail. The administration's attorney repeatedly contended that since the work study students were somehow employees and that my assistant told them when to copy a syllabus that made her a boss. I was struck by the irony of this approach, since at other institutions law firms were arguing that graduate assistants and teaching assistants could not be considered employees and therefore were not eligible to unionize because they were students.

May I have an extra minute just to finish, please? Thank you. Meanwhile, not only did the drawn-out process have a demoralizing effect on the staff, it also took employees, those administrators who were working to defeat the union drive, but also the staff members who were being called to attend mandatory anti-union sessions away from

their real jobs of providing the best possible education to our tuition paying customers, our students. This is what I believe Professor Kaplan previously referred to as a negative productive impact. As I said, we're a small school with about 100 staff members, an equal number of faculty, and about 2,300 students. It's inconceivable that it should take so long and cost so much to settle a collective bargaining election at places like ours. Thank you very much.

CHAIRMAN LIEBMAN: Thank you for being here today and sharing your thoughts with us.

Any questions.

MR. LINTON: Thank you.

CHAIRMAN LIEBMAN: Thank you.

Next speaker is Brett McMahon, and then we'll close this afternoon with Michael Pearson.

Good afternoon.

MR. McMAHON: Good afternoon. My name is Brett McMahon. I'm a Vice-President for Business Development for Miller & Long Company, Inc. We're a concrete construction contractor here in the Washington, D.C. metropolitan area. I have been employed in the construction industry for about 19 years, and I come to you speaking as an employer. I am not a lawyer, so I'm in a decided minority here today.

Miller & Long was founded by two World War II veterans in 1947. Jack Miller and Jimmy Long started out with a

pickup truck and a wheelbarrow. Their first two employees were African-American men who were excluded from joining the unions that dominated the trades in those days. Those two men actually ended up retiring from Miller & Long after more than 40 years of employment each.

Throughout the '40s, '50s and '60s, Washington, D.C. was very much a union town in the construction trades. Strikes by truck drivers and other trades routinely shut down all the work in the city, and construction workers missed out on a lot of income, especially during the summers.

Starting in the '70s, things began to change. Unions began to get stuck on big public works projects such as the metro system, and the private commercial market took a chance on merits shop contractors. Workers then discovered they did not need a union in order to work in the construction industry. Construction boomed in the '80s, and unions found themselves further and further outside the cost model.

Today, other than elevator and escalator constructors, there is no specialty trade in which unions hold a majority. Labor's loss of market share was not the result of some designed, organized, orchestrated effort. It was the market. Every business model that fails to adapt to a changing market has a choice, to adapt or to disappear.

Nowadays, keeping hard working men and women employed is a serious challenge. Our competition is fierce. Margins are

extraordinarily tight if even existent. And it seems like every day there's a new regulation or proposed legislation that will make our investment even more risky. No private business person that I know of is very optimistic. The perception of our current government in the eyes of businessmen and women is simply this, the government is against us.

Miller & Long has been under some form of attempt at union organization for most of our 64 years in business. We have never had a vote because unions have never been able to demonstrate to our employees that they can get them a better deal than they already receive from us. We cannot imagine running a business where we would even need a go-between to relate to our employees. We respect our men and women, and we work hard to retain their respect as well. The proposed rule change profoundly disrespectful to the people that it would affect, namely workers around the country. It shows no respect for their intelligence or their judgment.

It is patently unfair to make it virtually impossible for an employer to present the other side of the organizer's pitch. How can anyone in good conscience take away the opportunity to discover the truth and weigh the options for someone. Were any of the lawyers in this room required to take the bar exam after their first year of law school? Or how many doctors had to take their MCATs as freshmen in

college? None of that seems reasonable because it would deprive the participant of a complete set of information. Why would you deny the same level of respect to workers during an organizing drive?

There have been numerous decisions by this Board that highlight hazards for unsuspecting workers. This Board allows organizers to exaggerate and make promises which have no weight during negotiations. I've cited a couple of examples. I won't bother reading them here. But is it remotely reasonable to expect that every person out there, every worker in this country would actually know the intricacies of all of this stuff? Frankly, as one who prides himself on at least being somewhat up to speed on this, I've learned so many things today. It has shocked me. And frankly, I don't know how it's even reasonable to expect anyone to keep with up with all of these things while you're trying to meet a payroll, meet with your accountant, your surety auditors, and everything else that goes with actually running a business.

Changing one's working conditions is a matter of utmost significance affecting the worker's immediate and long-term futures. Such a decision is more personal and important than any political election, yet we expect and we demand extended political campaigns where both sides get to make their case. A politician would be showing extraordinary disrespect to

voters if they were to stand for election without even campaigning. And what is to be feared from a reasonable argument given over a reasonable period of time?

Significant regulations already exist to limit the speech of the employer, yet no such restrictions exist for union organizers, and there's been no indication that a change such as the one proposed is necessary. There is no demand for it other than from pro-union allies. The small employer is nearly hamstrung to the start, even if they were aware of an organizing effort. Many employers are not aware of the effort until the organizer presents their cards. Most small businesses do not retain employment counsel. In fact, until the recent headlines, I doubt many small employers had ever even heard of the NLRB.

With all of the challenges in the current economy, it is unreasonable to expect an employer to drop everything and then respond in the potential timeframe contemplated by this rule. Again, what is to fear from a fully engaged presentation of the facts from the employer's perspective? Certainly, any Board charged with guaranteeing workplace rights should be guaranteeing that those workers are shown the proper respect, and that respect is demonstrated by ensuring that both sides of an argument that is so important to their working lives are given ample opportunity to be heard and understood. I see my red light is flashing. So,

with that I'll --

CHAIRMAN LIEBMAN: Do you need another minute?

MR. McMAHON: I would love to. Thank you. Under Section 8(c) of the National Labor Relations Act, an employer's right to free speech is protected, but this proposed rule undermines that right. What good is a right if there's no practical way to assert it? This Board should not adopt this rule. Were it to adopt this rule, the NLRB will have firmly planted itself on the side of unions and in opposition to employers and workers and, frankly, reason. Unions have been winning over 60 percent of the elections that are held, so what is the need for the change?

The NLRB is making itself in this respect a hazard to the economic well being of working people by chilling the entrepreneurial spirit of free enterprise. It has brought more prosperity to more people than any other system in human history. It is not now, nor will it ever be, the single catalyst that causes large layoffs or stifles job creation. Rather, it is the series of actions that this Board takes that adds to that weight that's affecting today's small business climate. Please don't adopt this rule. It's unwise in this economic climate, and it's unfair to workers and employers. Thank you.

CHAIRMAN LIEBMAN: Thank you.

Are there any questions?

MEMBER BECKER: How many employees do you have?

MR. McMAHON: 1,100.

MEMBER BECKER: And I think you said 40 years. How is that compared to over time?

MR. McMAHON: No, no, since 1947.

MEMBER BECKER: Since '47, more than 40 years.

MR. McMAHON: It's about 2,500 less than we had two and a half years ago.

MEMBER BECKER: And you indicated that throughout that time there have been various organizing efforts but never an election?

MR. McMAHON: That's true, including the current one by a labor union.

MEMBER BECKER: And how have you become aware of those efforts?

MR. McMAHON: Usually, somebody would say something. One of our employees would say, "Hey, guess what? Somebody handed me this. What is this all about?"

MEMBER BECKER: And typically what has been your response to that as a company?

MR. McMAHON: We have a whole prescribed set of things. We know we're given a little card of what you're allowed to say and what you're not allowed to say, which frankly is really kind of shocking that any process like that even exists in the relationship between the employee and the

employer. But as was noted earlier, somebody talked about what an employer or supervisor, who I guess we used to able to determine who that was. I guess we can't anymore. Whether somebody might inadvertently say something that violates the law. I mean, the whole process strikes employers, especially small business people. That's just ludicrous on its face that there's all this intervention. We get it a lot in the construction industry from Davis-Bacon on through. And to be honest, another issue as sort of an aside, when you're talking about units, I can tell you this from example, the definition of a laborer in Montgomery County, Maryland is different than that in Prince George's County, Maryland, and it's different than that in the District of Columbia.

MEMBER BECKER: Not our jurisdiction, fortunately.

MR. McMAHON: Well, but the point is, what unit are they? I mean, you get into a lot of varying, very difficult things as you get into this unit determination.

MEMBER BECKER: Thank you.

MEMBER PEARCE: So, your issue is not just with this proposed rule, but with how the Board's processes are generally?

MR. McMAHON: Yeah, I think there's been a series of things that most people honestly I don't think had ever been even remotely aware of the NLRB, or I am for one concerned by

all of that, especially at this time. I mean, if we have the luxury of full employment and happy profit margins and things like that, if the idea then is okay, well, let's experiment with some things, fine. But the last thing in the world you ought to be doing during a time where in my industry where it's 17 percent top line unemployment, the real unemployment figures are closer to 30. Our margins -- I don't know virtually anybody who made any money over the last year and a half. The idea that all of the sudden we end up in a situation where it's, to our mind, it's patently unfair the whole process, just drives people bananas, and I don't know why you'd want to do that at this time. That's my point.

MEMBER PEARCE: Thank you.

MR. McMAHON: Thank you.

CHAIRMAN LIEBMAN: Thank you.

And our last speaker for the afternoon is Michael Pearson.

MR. PEARSON: Good afternoon. I wish to thank the Board for allowing me the opportunity to present my opinions concerning proposed changes to the Board's representation case procedures. My name is Michael D. Pearson. I was a Field Examiner with Region 7 of the NLRB in Detroit for nearly 34 years. I retired in 2005. At that time, I believe I was the longest serving non-supervisory Field Examiner in the history of the Detroit Region, the Agency's largest and

busiest office. I was involved in the processing of thousands of petitions and unfair labor practice charges. On a daily basis, I was involved in every phase of representation cases. I believe I was in an excellent position to evaluate the Board's procedures. I observed things that I thought could have been or should have been done differently. I am here today because I care deeply about the enforcement of the National Labor Relations Act. If I was not here today, I would be golfing. But I had a decision to make, and I decided it was more important to be here.

I believe the most important change that should be made by the Board involves speeding up the election process. Very careful reading of Section 1 and Section 7 of the Act establishes that the Board has an obligation to see to it that employees are guaranteed the right to have fair and prompt elections. The Act does not establish that employers have the right to run seemingly endless anti-union election campaigns. I recall one case where a management consultant spent every working minute of every workday at the employer's facility for an entire four weeks prior to the election. Was that really necessary under the Act?

The proposed changes will not mean that employers cannot campaign. They may have a somewhat shorter time period to campaign after a petition is filed. But most employer

campaigns begin well before petitions are filed. Currently, employers hold mass meetings of employees. They hold frequent one-on-one meetings, sometimes on a daily basis. Employees are frequently required to view anti-union videos. Employees are flooded with fliers, letters, or e-mails from their employer. In that regard, I once heard an employee waiting in line to vote say to a coworker, "At least there won't be any more letters."

After changes to the Board's procedures, employers will continue to be able to use all of the tactics that I've just mentioned in election campaigns. I know that some will say that if the election process is speeded up, employers will be taken by ambush. My experience tells me that this will not be the case. Two facts lead me to that conclusion. First, whenever a petition was filed by a union, I always tried to call the employer the day it was filed. In almost every case, the employer already knew about the organizing and had already contacted a labor attorney or consultant.

Second, during investigations, I frequently had to determine how and when the employer became aware of the organizing activities of the employees. I almost always found that the employer became aware very shortly after the organizing began. I recall one case where I was investigating the discharge of an employee. After I had completed my interview of the owner, she commented that she

noticed that I had spent quite a bit of time going over when the employer became aware of the union activities of the employee. She said to me, "You know, we always know."

You might ask why do I believe that it is so important for elections to be conducted more promptly? Under current Board procedures, employees can hammer away at employees on a daily basis for several weeks. In many cases, employees eventually cave in and drop their support of the union. During my investigations, it was frequently necessary to find out what employer officials said to employees during campaign meetings. I did so hundreds of times. In almost every single case, one or more of the employees would initially give me a version that, if accurate, would constitute a violation of the Act or would be evidence of objectionable conduct. However, when I carefully questioned the employee to find out precisely what was said, it often turned out that the employer had said something slightly different which artfully skirted the law.

I believe the employees had heard so many times that a strike was possible if the union was voted in that they naturally came to believe that a strike was inevitable. And the employees had heard so many times that they would be replaced if there was a strike that they naturally came to believe that they would be fired if they went on strike. I am not suggesting that employers should not have the right to

campaign. I am saying, however, that after a reasonable period of time, employees should be allowed to freely decide whether or not they want a union. Employees should not be browbeaten into submission by excessively long election campaigns. Now, as to whether or not some employers would be taken by surprise, my experience was that if an employer did not already have an attorney or a consultant when a petition was filed, in almost every case they had an advocate within a day or so. On a daily basis, consultants check the public filings of RC petitions in the Regional offices to solicit business. The campaigns waged by employers are extremely well known. Management attorneys and consultants have used the same arguments for decades. Their scripts are ready and waiting on computers. Forty years ago I had a case where the employer's campaign speech was prepared by a management attorney who later became a Board member. The exact arguments used in that speech are still used today by employers.

It was an honor to be here today. It is my hope that the Board will adopt the proposed changes to its procedures to make the NLRB as efficient and effective as possible. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you, Mr. Pearson.

Questions?

I appreciate your coming in to share your thoughts.

And on behalf of myself and all of my colleagues, we are very grateful to all of you who spoke today. Obviously, we've had a range of differing views, competing views, very strongly held views, and we appreciate the candid airing of positions and beliefs. We've had a wide perspective of different kinds of organizations, and that also has, I think, been very useful. So, with that we will recess for today and begin tomorrow morning at 9:00 a.m. with another full round of speakers, morning and afternoon. I hope you'll come back and join us tomorrow.

Meanwhile, have a good evening, and we're in recess now.

(Whereupon, at 3:50 p.m., the public hearing in the above-entitled matter was adjourned, to reconvene the next day, Tuesday, July 19, 2011, at 9:00 a.m.)

CERTIFICATION

This is to certify that the attached proceedings before

the National Labor Relations Board (NLRB) in the matter of the **PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES** at Washington, D.C. on July 18, 2011, were held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing.

_____

Timothy J. Atkinson, Jr.

Official Reporter

Free State Reporting, Inc.
1378 Cape St. Claire Road
Annapolis, MD 21409
(410) 974-0947

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:
PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES

The above-entitled matter came on for public meeting pursuant to notice at the **National Labor Relations Board, 1099 14th Street, N.W., Margaret A. Browning Hearing Room #11000, Washington DC 20570,** on **Tuesday, July 19, 2011,** at **9:00 a.m.**

A P P E A R A N C E S

National Labor Relations Board:

WILMA B. LIEBMAN, Chairman
CRAIG BECKER, Board Member
BRIAN E. HAYES, Board Member
MARK GASTON PEARCE, Board Member

LES HELTZER, Executive Secretary
GARY SHINNERS, Deputy Executive Secretary

Morning Session Speakers:

PHIL ORNOT, United Steelworkers
FAITH CLARK
G. ROGER KING, Jones Day o/b/o Society for Human Resource Management
PROF. PAUL F. CLARK, Department of Labor Studies and Employment Relations, Penn State University
ELIZABETH MILITO, National Federation of Independent Business, Small Business Legal Center
JOHN RAUDABAUGH, Nixon Peabody o/b/o National Federation of Independent Business
CHRISTOPHER N. Grant, Schuchat, Cook & Werner
PATRICK J. O'NEILL, United Food and Commercial Workers International Union
MAURICE BASKIN, Associated Builders and Contractors, Inc.
BRIAN BRENNAN, IBEW
HAROLD R. WEINRICH, Jackson Lewis LLP, o/b/o Atlantic Legal Foundation
ELIZABETH BUNN, AFL-CIO
KIMBERLY FREEMAN BROWN, American Rights at Work
FRANCIS T. "TOM" COLEMAN, Printing Industries of America
SARITA GUPTA, Jobs with Justice
C. STEPHEN JONES, JR., Chandler Concrete Co., Inc.
PROF. DORIAN WARREN, Columbia University

APPEARANCES

Afternoon Session Speakers:

LEXER QUAMIE, The Leadership Conference on Civil and Human Rights
STEVE MARITAS, International Union, Security, Police and Fire Professionals of America (SPFPA)
WILLIAM MESSENGER, National Right to Work Legal Defense Foundation
JOSEPH L. PALLER, JR., Gilbert & Sackman
RUSS BROWN, Labor Relations Institute
DR. DEAN BAKER, Center for Economic and Policy Research
YONA ROZEN, Gillespie, Rozen & Watsky PC
R. BRIAN BIXBY/KARLA KOZAK, TWU International
JAY P. KRUPIN, Epstein Becker Green o/b/o National Grocers Association
DAVID MADLAND, Center for American Progress Action Fund
MICHAEL E. AVAKIAN, The Center on National Labor Policy, Inc.
PETER J. LEFF, Graphic Communications Conference of the International Brotherhood of Teamsters
DAVID KADELA, Littler Mendelson
PROF. KATE BRONFENBRENNER, Cornell School of Industrial and Labor Relations

I N D E X

P R O C E E D I N G S

(Time Noted: 8:56 a.m.)

CHAIRMAN LIEBMAN: Good morning, everyone, and welcome to the second day of our open meeting of the National Labor Relations Board.

My name is Wilma Liebman, and I am the Chairman of the National Labor Relations Board. To my right are Board Members Craig Becker and Brian Hayes, and to my left is Board Member Mark Pearce.

This meeting concerns the Notice of Proposed Rulemaking published in the Federal Register on June 22, which proposes amendments to the Board's Rules and Regulations governing the filing and processing of petitions relating to the representation of employees for the purposes of collective bargaining with their employer.

The Notice of Proposed Rulemaking set out a procedure for filing written comments on the proposal, which are due by August 22, 2011.

Yesterday and today at this open meeting, the Board is providing another opportunity for interested persons to provide their views on this important matter.

We had an excellent session yesterday hearing from a very diverse group of speakers including practitioners, workers, academics, and public policy advocates.

Today we have a similarly impressive line up of

speakers, and we are truly grateful for the showing of interest and for the efforts of all the speakers to study the proposal, to reflect on it and to share their reactions and suggestions with us.

We know that this proposal has generated some controversy, and we welcome the chance to have an airing of views on this important subject.

We take this meeting very seriously, and we look forward to hearing your thoughts about the proposals, how they would work, what might work better, and I assure you that our minds are open.

Now, I've been asked to cover a few housekeeping matters, and for those of you who sat here yesterday, please indulge me as I run through them again.

When you checked in, you were given a badge and a number. Please keep those with you at all times. If you leave the room, please take them with you. Speakers don't need a number to attend the session during which you will speak, but if you wish to stay for the afternoon, and we hope you will, you must have a badge and a number.

Most important, when you leave the building for the day, remember to return your badge and number so you can retrieve your ID.

Please note also there are two exits from the room. The main door is to my left through which you entered, and the

door to my right. No food or beverages are allowed in this room.

Bathrooms are located outside the hearing room, both to the right and to the left. We have staff in the hallway to escort you either to the restrooms or down to the first floor in the elevators. We ask that you not wander around the building and other areas.

Today's meeting will be divided into two sessions, a morning and afternoon. In addition to a lunch break that will begin at about noon, we will take a midmorning and a midafternoon break. Please limit your walking around the room as much as possible, but if you have to leave during the session, please move quietly to the nearest exit.

If you are a speaker, you are welcome to remain in the room to listen to other speakers. If you prefer to leave, you may obviously do so.

Now, let me quickly review the guidelines for our speakers. We are going to follow the order of speakers that's set out on the list that was handed to you as you entered the room. It's been suggested that we might have a surprise appearance from a large balloon at some point, but every person making an oral presentation will be given five minutes to present his or her remarks. The Board Members will then have the opportunity to pose questions after which the speaker will be excused.

Each speaker should be ready to proceed in turn and should move promptly to the podium when called. We ask that you introduce yourself and indicate who you are representing, if anyone. If you have someone with you, you may also introduce that person. Your five minutes will begin after your introductions.

Our Deputy Executive Secretary Gary Shinners, who is seated below me to my right, will be our timekeeper. There are lights on the podium to assist you. Your five minutes, as I said, will start after the introductions, and the green light will turn on. The yellow light will indicate you have one minute remaining, and the red light indicates that your time has expired. We ask that you observe the lights so we can try to remain on schedule today.

If you have a written statement that you wish to put in the record, please give it to our Executive Secretary Les Heltzer, who is in the anteroom to my left, before you leave for the day.

If my colleagues have additional questions for you based on your written statements, we will endeavor to have those provided to you within the week, and you will have until August 22nd to provide your written answers.

Please note that the meeting is limited to issues related to the proposed amendments to the Board's Rules governing representation case procedures.

No other issues will be considered at this meeting. I want to particularly alert our speakers that they should not discuss matters which are now pending before the Board because there are important rules governing ex parte contact that we do not want you to run afoul of.

So at this point, I would ask you to make sure that your cell phones or other devices are turned off, and unless my colleagues have something they wish to say, we can begin with our first speakers, Faith Clark and Phil Ornot of the United Steelworkers, and our next speaker will be Roger King.

So, Ms. Clark, Mr. Ornot, welcome. Good morning.

MR. ORNOT: Good morning. My name is Phil Ornot, and I'm an organizer for the United Steelworkers, and with me today I brought Faith Clark, who was an employee of a campaign that I had ran in DuBois, Pennsylvania, Rescar.

This campaign was no different than any other campaign, and I believe it really ties into the Board's, you know, proposed rules that you're looking at. One of them was, was this particular campaign, the employer refused to reach a stipulated election agreement, said that they wanted to exercise their opportunity and their right to take it to a hearing. A hearing was set within seven days of filing the petition. Naturally the employer then asked for an extension. The extension was automatically granted. In most cases, a week to 10 days, sometimes even longer. That

hearing date was set.

After that hearing date was set, the employer then tried again to get another postponement for the hearing. The issues that were raised at that hearing by the employer we believe were frivolous. Out of a unit of 87, we were looking at a disagreement of only 3 people out of 87. One was that Faith Clark was a supervisor and should not be eligible to vote. The other two were that two members of management were in the office and should be eligible but worked in the office. This was a typical campaign, multiple days of -- we had one day of hearing. The employer was not available again for another 11 days. After that hearing there, our testimony only took roughly two hours to present to the Board.

A decision was rendered down from the Board, you know, and an election, you know, was subsequently directed.

This is no different than the typical campaigns that we face. You know, these modest changes are welcomed by the Board and I think are very important to the workers for a fair process to their vote without the built-in delays. Many of times, not just this issue here, but many of times in elections, employees end up making decisions to include some people that the management tries to throw in to thwart their efforts. Most of the time employers try to throw in managers or people that are, you know, covered under Section 2(11).

So when that happens, the employees then are faced with

pretty much a double-edged sword.

What do we do here? Do we take all the delays of going through a RC hearing, or do we end up eating those people, agreeing to those people, reach a stipulated election agreement and hope that we can, you know, hold everything together afterwards.

So with that, I would like, you know, to turn it over to Faith Clark.

MS. CLARK: Good morning. I started with Rescar as a secretary in 1997. I had worked for 12 years with them, working all different types of jobs as an administrative assistant, quality assurance manager, outbound inspector. The last job was inventory control and receiving.

In October of 2007, my fellow employees called the Steelworkers to see about getting the union. I became involved with the effort in the spring of 2008, at the time that I was told that I was denied my right to vote stating that I was a supervisor.

Because of delays of having the hearing, the company brought in union busters. They threatened that they would take away our 401(k), that we would lose our pay, we would have to work for minimum wage. We could lose our medical benefits and vacation benefits. They showed us videos of how people who were on strike could lose their jobs and the difficulties with strikes and that the union could force us

to strike.

Initially we had 60 percent cards signed with the union. With all the scare tactics and stall tactics, people became unsure of whether they wanted to bring the union in or not.

We won all our points with the NLRB, and that made the company very angry. The company took people in groups to listen to one of the company presidents explain and tell people why the union was bad for the company. They required us to watch a four-part video series and asked if we had any questions of which they never answered or gave us explanations.

We filed charges against Rescar based on the fact that they gave more onerous work, and they also made other threats to the company. We won all of our issues, and the company had to post a 60-day posting of their things. They, of course, explained that they didn't agree with the posting but they just wanted to get it over with. That's why they signed it.

We lost the vote. On April 14, 2009, six months after the vote, I was called into the office and told that my job was eliminated. I was terminated and wasn't given any other explanations. The day that I was fired, I called the NLRB and the United Steelworkers, and we filed charges.

After nine months of waiting to resolve my issues, I finally signed an agreement with the company, a settlement

agreement as my coworkers were afraid to testify with us.

I think that if we had had a vote in a timely manner without delays, that we would not have had to have all the union busting and scare tactics and we wouldn't have lost the support for the union.

I've lost my job, and it's a financial strain on my family.

CHAIRMAN LIEBMAN: Thank you for your testimony here today.

MS. CLARK: Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER BECKER: Maybe I missed it. What was the nature of the workplace? What did you do?

MS. CLARK: It's a railcar facility. They paint, repair, and clean railcars.

MEMBER BECKER: And there were 87 employees in the unit, and how many employees all together at that particular location?

MS. CLARK: It varied at that time. We had had a fire at our facility. So we had employees who were laid off, although we included them in the collective bargaining and with the votes. So it could have varied anywhere from the 87, probably office people and personnel, would have been about 105 I would think.

MEMBER BECKER: Thank you.

MEMBER PEARCE: Do you know how many days it took from the time the petition was filed until the actual election?

MR. ORNOT: The petition was filed in February. I believe it was the 14th or something like that. The election took place in October of that same year.

MEMBER PEARCE: I see. Were there unfair labor practices filed prior to the vote?

MR. ORNOT: Yes.

MS. CLARK: Yes.

MEMBER PEARCE: Was there a request to proceed or were there blocking charges?

MR. ORNOT: No, there were blocking charges.

MEMBER PEARCE: Thank you.

CHAIRMAN LIEBMAN: Thank you for coming here today. We appreciate your contributing to this meeting.

MS. CLARK: Thank you.

MR. ORNOT: Thank you.

CHAIRMAN LIEBMAN: Our next up will be Mr. Roger King, and after that will be Paul Clark. Good morning, Mr. King.

MR. KING: Good morning, Chair Liebman, Members of the Board. Thank you for providing an opportunity for the Society for Human Resource Management to share their thoughts and views this morning regarding this important process.

With me this morning is Mr. Layman, Mike Layman of SHRM, my associate Scott Medsker, and a legal intern, Chair

Liebman, that now has a significant interest in the National Labor Relations Act, and we thought it would be helpful if he came this morning. His name is Josh Hammer.

I'm sure as this Board is well aware, the Society for Human Resource Management is the largest human resource group in the world. With over 250,000 members, SHRM has constant contact with employers of all sizes and many diversities.

We submit the comments today, reserving our right to file written comments on or before August 22nd. We do have a written statement, Chair Liebman, that we would like to enter into the record today with your permission.

CHAIRMAN LIEBMAN: Yes, absolutely.

MR. KING: Thank you. We fully understand that the job that all of you have is difficult. Balancing the rights of employees, employers, and unions is a challenge. We fully appreciate in case law adjudication you constantly are looking at complicated factual records and having to balance the rights of the stakeholders.

We submit, however, rulemaking takes on a particular importance. In essence, this is only the third time that this Board, or the Board as a whole, has undertaken rulemaking. That is a very significant responsibility. I know you are well aware of that.

What you do in this process has lasting implications with respect to unions, employees, employers, and all

stakeholders, and I know you will not undertake that process lightly.

A summary of our position is as follows. First, we do not believe there's been a predicate established at all for the proposed rules. This Agency is one of the most effective, most efficient agencies in the United States Government. You have had great success in processing petitions, C cases, unfair labor practice charge cases. There's simply not a record for the proposed rules.

Second, we believe you're proceeding in a procedural manner that is flawed. I had the opportunity, perhaps the only speaker that you will hear from these two days, to fully participate in the healthcare rulemaking process, a process that went on for a period of time. I'm not submitting that you need two years to engage in this type of rulemaking, but it was much more carefully done, much more scholarly, much more thorough. I will submit that you should reconsider the very expeditious nature, i.e., 74 days of proceeding as you are at present.

SHRM and other trade associations filed a request for you to reconsider the manner in which you are proceeding. We'd like you to again look at that motion.

Next, the proposed rules will have a significant adverse impact we believe on small business particularly. Members of the bar, like myself and others, who I believe are well

acquainted with your rules and regulations, frankly are having a difficult time understanding how all the proposed rules fit together. For a small business entity, and you'll hear more about that later, I believe that's a particular challenge, but also for large employers, and diverse and large units, your rules cause significant due process and procedural questions.

Further, as a matter of policy, I think the Board really is looking at this incorrectly. I would submit you ought to be looking at certainty prior to an election, for the rights of employees, unions, and everyone else that's involved in this process, employers particularly from our perspective perhaps.

We ought to have certainty of who's voting, and I'll get back to that in a moment.

Let me go into some of the specifics. I'm not going to share with you the stellar record this Board and other Boards have had with the General Counsel's Office in processing petitions. That's well established.

I would submit that the so-called study that recently surfaced from Professors Bronfenbrenner and Warren is not a sufficient justification for the proposed rules. Time does not permit me to go into the deficiencies of such study, but certainly that will be address in our written statement.

Next, I don't believe the Board is proceeding in

compliance with President Obama's Executive Order 13563. Frankly, there should have been comments requested from this Board, as Member Hayes suggested yesterday, I believe in one of his questions. What's wrong with having all stakeholders come forth, whether it be the American Bar Association and others, and have a meaningful, thoughtful exchange, a scholarly exchange, in this process? It simply wasn't done here.

Next, with respect to the healthcare rulemaking, yes, we understand your point that here you believe you have special expertise because it's your own rules but then you have not, from our perspective, examined your own data. We have an information request and we have -- others for you to do so. We're hopeful that that will be expeditiously responded to on or before certainly August 22nd.

With respect to the substance of the rules, obviously time does not permit us to get into meaningful dialogue. I really am quite concerned about not having an opportunity frankly. I thought the dialogue yesterday, Member Becker, that you had with Brian Caufield was excellent.

There are all kinds of procedural problems with the statement of position. It's not in conformity with the Federal Rules of Civil Procedure. Whoever drafted your comments for the majority simply is not well acquainted with the Federal Rules of Civil Procedure.

What these rules will require is a Hearing Officer who may not even be an attorney, to make a decision perhaps sua sponte on what is the genuine issue of representation. In the federal court, we get at least three briefs and we get oral argument. That's not available here. And there are many other procedural aspects that are troubling.

Last point, we should have certainty prior to the election, particularly supervisory issues, if we don't know who the supervisor is, the employer's at risk because those individuals may or may not be our legal agent. It's not about campaigning. It's about unfair labor practice charges perhaps, election objections, and also, of course, under the Harborside line of cases, the union may be at risk also. But it's even more fundamental than that. Once that election occurs, if the labor organization is successful, the employer, as you know, cannot make unilateral changes in terms and conditions of employment if, in fact, the employees have selected lawfully and correctly a labor organization. Anything the employer does is at risk there.

So I really would emphasize that point. Very important. Let's get certainty prior to an election.

In summary, Chair Liebman and Members of the Board, we're concerned not only about these proposed rules but what I would consider frankly, and many of my colleagues, a regulatory tsunami. We have at least nine initiatives, and

we have these in our written materials laid out for you, and you're well acquainted with them. What this Board has undertaken in the last few months, that is a very significant burden in such a short period of time for anyone to digest. We really ask you to reconsider the speed with which you are proceeding and give much more thought and consideration to what you are doing.

Frankly, I submit, and I think many of my colleagues would say the same thing, that the institutional credibility, neutrality of this Agency frankly is at issue here, and how you proceed not only here but in these nine other areas or these eight other areas is extremely important.

Thank you for your time and attention.

CHAIRMAN LIEBMAN: Thank you, Mr. King, for your comments. Do my colleagues have questions?

MEMBER BECKER: If I could, I have two questions. One, in terms of certainty, I'm trying to understand the difference that you perceive between the proposal and the current system because the current system, as I understand it, guarantees a right to present evidence if the parties so wish, say on a supervisor question. It does not guarantee a decision even at the Regional level. If it's a contested question, if there's a request for review which is granted, we almost never reach a decision before the election. The election goes forward. The ballots are impounded. Moreover,

we're powerless to produce certainty because of the possibility of judicial review. So I'm trying to understand the difference that you see between the proposal in respect to that aspect, certainty, say as to a supervisor and the current system.

MR. KING: Certainly, Member Becker. First, the statement of position procedure articulated in the rules is extremely broad, for not only small employers but large employers. As we read that particular provision, the employer must articulate any and all positions it may have, the most relevant or similar unit which I think is a -- burden in and of itself to put on the employer, each individual unit placement issue. I've been involved in elections, and I actually practice day in and day out. It's a challenge sometimes to get through this process but to work through with the union, who's eligible to vote. If we don't do that in a written, very complete manner, under the statement of position, as the rule is written, we waive, we are precluded from proceeding. That's a kind of certainty. You're taking that certainty away, and if I may, then the Hearing Officer is permitted, as I understand the rule, to perhaps permit some additional statement by the employer that may have been missed, but there's no standard for that, and these are individuals that may not even be lawyers, and you're applying a Rule 56, Federal Rules of Civil Procedure,

burden at that stage.

So that's one element of lack of certainty, that we're never going to have absolute certainty. I can see that, but look at the Fourth Circuit's decision in the Beverly case. There the Court of Appeals held the Board to task for not having a fuller explanation as to who was permitted to vote.

We would articulate -- frankly, I think you have it backwards. You ought to be pushing more issues to pre-election so all stakeholders know who's eligible to vote, who is a supervisor. In a multisite unit, as Mr. Kramer mentioned the other day, particularly complicated. Why wouldn't we want to know how many stores or how many factories are in the unit?

I fail to see why we are having such a rush to judgment here. This Agency is so good at what it does and you have very good people. You can figure these things out. We don't have delay here. We hear all about this delay. The record doesn't support delay. If we have delay, it's because of blocking charge procedures, and pardon the footnote, I do commend the Board, SHRM commends the Board for at least putting that issue up for consideration. Of course, there are no proposed rules. I think again had you gone back and done it differently, you would have had a much more receptive bar.

Anyway, I hope I have at least responded in part to your

question.

MEMBER BECKER: Well, if I could follow up. You understand that the proposal provides for no preclusion on eligibility questions such as supervisory status. That is, if the employer or any party fails to raise in its statement of position or at the hearing an eligibility question such as supervisory status, it can be raised without preclusion through a challenge, and the proposal provides that there must be a finding of an appropriate unit. So the question, for example, of a multisite versus a single site must be decided under the proposal at the hearing.

MR. KING: I don't read the rule the way you read it. The preclusion, the rule -- now the comment, it's a bit broader, but if you go back and look at the rule, I think the rule is quite clear that the employer's precluded if it has not raised its position in the statement of position absent some extraordinary showing to a Hearing Officer that's not well equipped to make that decision.

I believe with all due deference, Member Becker, that the employer is precluded, and its due process rights I think are significant impeded here. I frankly don't think this is going to stand a court challenge. If you're up in front of a Federal District Court Judge or Court of Appeals Judge, and he's trying to understand this procedure, this is not the waiver procedure that you're articulating here that's

provided for in the Federal Rules of Civil Procedure. If the Board by the way is going to down to the Federal Rules of Civil Procedure path, they ought to look at the C case procedure where we could have some discovery, but at any rate, these rules do preclude, I submit, the employer from articulating at any point post that statement of position its articulated reason for challenging or not agreeing. Yes, you can have challenges, but we're back to the point, why don't we have some certainty with respect to the pre-election process.

MEMBER BECKER: Thank you.

MEMBER HAYES: If I could, just to follow up, in the instance of when a question regarding the scope or composition of the unit is raised under the proposed rules and a Hearing Officer on hearing an offer of proof orally from an employer determines that no hearing is necessary, what happens if there's a subsequent technical refusal to bargain? What's the record that the Appellate Court is going to rely on? Or what's the record that the General Counsel is going to rely on in trying to enforce our order?

MR. KING: Member Hayes, there is no record. You're going to have that case sent right back here to the Board, and you're going to start all over again. It's probably going to go back to the Regional Office frankly.

I would submit, and this came up in Mr. Kirschner's

statement yesterday, you're going to have more litigation. I know exactly what my advice is going to be on the statement of position that Member Becker and I were just talking about. We're going to articulate every possible unit configuration and every possible position like we do in an answer today in Federal District Court to preserve our client's rights.

Back to your question, Member Hayes, I don't see any record at all. The Court of Appeals probably won't even consider that pleading. It's going to send it right back. Having great familiarity with the Court of Appeals system in this country, there is no record. There will be no way for that matter to proceed.

So what you're attempting to accomplish, or certainly some are, is much more rapid processing of paper, and it's frankly going to be just the opposite. We don't understand it. We really don't understand it, but again that's why we should have had some dialogue about this at the beginning. Certainly I know SHRM, I know the Chamber, I know others would come forth. I know the labor community would be happy to sit and talk with you, but this is not the right way to go. Excellent question.

CHAIRMAN LIEBMAN: Thank you, Mr. King, for your thoughtful comments. They're very helpful.

MR. KING: Thank you very much.

CHAIRMAN LIEBMAN: Thank you for being here.

Our next speaker up today will be Paul Clark, and after him will be Elizabeth Milito and John Raudabaugh.

Good morning.

PROF. CLARK: Good morning. Thank you for the opportunity. I am Professor and Head of Labor Studies in Employment Relations at Penn State University, and I also have had experience in a nonacademic setting both as a union member and as a manager.

As a university faculty member, I have observed, studied, and taught about the American system of employment relations for many years, and so my comments will take a broader focus, look at the broader picture, in terms of the issues we're talking about here today.

For the majority of American employees, the legal framework for the system of employment relations in the U.S. is spelled out in the National Labor Relations Act.

Each time I introduce a new set of students to the Act, I begin by having them read Section 1. This section provides the rationale for the Act's passage. Central to that rationale is the concern that "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent depressions by

depressing wage rates and purchasing power of wage earners."

It seems clear that in writing this legislation, Congress recognized that when employers held all of the power in the employer/employee relationship, when they made all the decisions unilaterally, not only did individual employees suffer but so did society at large.

The danger of concentrating power in any one institution is something that the architects of our political system clearly recognized, and it's the basis of the system of checks and balances that have been part of the foundations of American democracy.

The architects of our system of employment relations recognizes danger as well. The opportunity to organize a union and bargain collectively, that the National Labor Relations Act extended to American workers, represents a check on the absolute power of employers in the workplace, and it serves as a mechanism for balancing the interest of employers and employees.

Senate Majority Leader Harry Reid recently referred to the principle of checks and balances in a statement of support for the changes the Board majority has proposed.

Let me just state here that I believe I'm making a slightly different point than the Speaker made. My point is that the right to organize and bargain collectively is itself a check on unilateral power in the workplace. If employees

believe that an employer is exercising that power, the power they have responsibly by employing good human resource practices, providing reasonable pay and benefits and using their right to employ at will judiciously, those employees will likely forego the right to organize a union.

However, if the employer does not exercise its power in a responsible way, does not employ good HR practices, doesn't pay reasonable pay and benefits, or abuses its right to employ at will, its workers have a legally protected way to do something about it. They can organize a union and try to impact the employer's practices for the better.

One of the aphorisms about employment relations that I first heard when I was a student and have heard many times since is that an employer who gets a union probably deserves one. We've all heard that, the idea being that employees in almost every case organize a union because in their view, the employer has not lived up to its responsibility. I think that was actually or is actually a pretty insightful aphorism that applied for probably the first 40 years or so of the Act's existence. For much of that period, unionism grew to the point that up to a third of eligible workers exercised their right to organize and bargain.

And for the two-thirds of employers without a union, the threat that their workers might follow suit provided a great incentive to provide good pay and benefits and otherwise

engage in good HR practices.

Regrettably, the thoughtful system of employment relations that the Act created and that served this nation well for several decades no longer functions as intended, and that's to the detriment of our employment relations system.

In my opinion, this is because the check and balance the Act offered to employees, the opportunity to form a union and engage in collective bargaining, is now unattainable for many American workers. It is sometimes unattainable because the process for exercising that right has become a minefield and a marathon, and many employees who might want to organize a union simply chose not to because the price is too high.

This assertion is backed by research conducted by Rogers and Freeman that indicates that 50 percent of the American workforce would like to be represented but will not attempt to organize. The minefield they face consists of many sophisticated elements of the modern anti-union campaign, skillfully designed by attorneys, psychologists, and communication specialists.

And the marathon aspect of the process, of course, is caused by the endless delays that have become part and parcel of the process, a phenomenon identified in a number of studies including a recent one at the University of California.

The fact that the employment relation system created by

the Act does not function as intended serves the interest of employers, but it does not serve the interest of employees or of our larger society.

I believe the changes proposed by the Board majority are a small but important first step to restoring the opportunity for employees to choose union representation and collective bargaining. Thank you.

CHAIRMAN LIEBMAN: Thank you very much, Professor Clark.

Do my colleagues have any questions?

Thank you for joining us here today and providing your perspective.

Our next speaker will be Elizabeth Milito, and up after her will be Christopher Grant.

MS. MILITO: Good morning. My name is Elizabeth Milito, and I'm an attorney with the National Federation of Independent Business, Small Business Legal Center. I'm going to provide an introduction here, and then I'm going to turn it over to John Raudabaugh, who is representing NFIB in this matter. John will share two key concerns that NFIB has with the Board's proposal.

NFIB is the nation's leading small business advocacy organization, with a national membership of about 350,000 independently owned and operated businesses. While there is no standard definition of small business, the typical NFIB member employs 10 people and reports gross sales of about

$500,000 a year. NFIB's membership is a reflection of American small business, and I am here today on their behalf to share a small business perspective.

Currently small businesses in this country employ just over half of all private sector employees. Small businesses pay 44 percent of total U.S. private payroll. Small businesses have generated 64 percent of net new jobs over the past 15 years.

In 2008, there were just over 29.5 million businesses in the United States. Businesses with fewer than 500 employees comprised 99.9 percent of those 29.5 million businesses.

Small businesses are America's largest private employer. For this reason, it's critically important that the Board understand small firms' unique business structure and the exceptional problems that the Board's proposed amendments to NLRB election rules could place on the smallest, but arguably most important employers in this country.

Despite small businesses' impressive employment statistics, only 12 percent of small employers have at least 1 employee dedicated to personnel or human resources matters. And 57 percent of small business owners have no experience in personnel or human resources before owning their current business. It's no wonder that small businesses struggle to decipher the mysteries of overlapping and sometimes even conflicting federal, state, and local labor

and employment laws.

In these companies, most employment concerns including issues related to labor matters are made by the owners of the business who upon receipt of an election petition wouldn't have a clue what to do, and would not only need to consult with an outside advisor, they would first need to find such an advisor with whom they could consult.

I will close by saying that small businesses face unique challenges that make compliance with the NLRA and all employment laws exceedingly difficult for even the most determined business owner. I hope that the Board in considering this proposal understands and appreciates how detrimental the proposed amendments could be for America's small businesses. Thank you. I'll turn it over to John.

CHAIRMAN LIEBMAN: Thank you for your comments.

Mr. Raudabaugh. Good morning.

MR. RAUDABAUGH: Thank you, Elizabeth. Good morning, Chairman Liebman and Members Becker, Pearce, and Hayes. Thank you for this opening meeting. I'm an attorney with the law firm Nixon Peabody. I speak today on behalf of the National Federation of Independent Business.

Our nation's labor law was conceived for the purpose of protecting the free flow of commerce by encouraging collective bargaining to avoid disruptions. Under the 76-year-old law, bargaining employees' terms and conditions of

employment can only occur between employers and labor organizations chosen by employees to be their representatives. The same law was later amended, one, to allow employees to refrain from third party representation recognizing that labor organizations, too, can obstruct commerce and a collective voice may not be desired; two, to encourage the expression and dissemination of views, arguments and opinion; and, three, to direct the Board to investigate representation petitions and provide an appropriate hearing upon due notice whenever a question of representation exists.

The starting point for representation is employee choice. Choice is the act of selecting freely following consideration of options. Section 8(c) encourages free debate on issues dividing labor and management. For an employer to engage, it must first become aware. As Canadian experience proves, covert union campaigning results in significantly higher rates of union representation over an open exchange of views by both the union and the employer, to inform employees and respond to issues raised.

The Board's proposed rule would significantly undermine an employer's opportunity to learn of and respond to union organizing by reducing the so-called critical period from petition filing to election, from the current median of 38 days to as few as 10 to 21 days.

To ensure due process in representation case matters, Congress amended Section 9 requiring the Board investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. The Board's proposed rule would restrict the presentation of evidence enabling fair deliberation of unit appropriateness issues by creating a 20 percent voter eligibility unit placement review threshold, imposing a claim it or waive it rule regarding unit scope and related evidentiary issues and requiring production of detailed employee lists and identifiers.

Should the Board proceed with its proposed rule, NFIB believes that employee informed choice and due process, notice and hearing required by Section 9, may be compromised particularly for small employers lacking labor relations expertise and in-house legal departments.

Respect for the rule of law is critical when administrations change and case precedent is reversed. When as in fiscal year 2009 unions won 74.1 percent of RC elections for units of 10 or fewer employees and 63.8 percent over all. When Executive Branch agencies coordinate actions with independent agencies to assist organized labor, when decades of Board and General Counsel reports -- successes and meeting time targets, it would be inadvisable for the Board to take actions that compromise substantive statutory rights of speech and due process, all viscerally understood by

fellow citizens.

Finally, the NFIB requests that you consider small businesses' lack of experience, knowledge, and resources to defend their interests regarding labor law, process, and procedures.

We respectfully suggest that the Board redirect their investigation to identifying the statistically relevant independent variables explaining deviation from the desired median. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Raudabaugh, Ms. Milito.

MR. RAUDABAUGH: Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER BECKER: I've got a question for both of you really focused on your expertise in working with small businesses. One thing that the proposal attempts to do is both make the process more transparent and provide compliance assistance in the form of a much more detailed description which will be mandatory for the union to serve with its petition and somewhat duplicatively for the Region to serve as well, so that the types of businesses you work with will have a blueprint of what to expect if there is a hearing, and then also in the statement of position, a written document such that they will know exactly what they'll be expected to or at least what they'll have the option of taking a position

on at the hearing.

My question is, is that helpful? Are there other things that we could do in that respect in terms of making the process more transparent and accessible for your clients?

MS. MILITO: I mean I certainly commend the Board for the offer to provide additional compliance assistance, and certainly NFIB, that's one thing that we always ask for, and it's very helpful for small businesses. That said, when it comes to preparing the document, the statement of position, and pulling together all the documents that are going to be needed at the hearing, the small business is going to need an outside adviser, and that's where they're going to need to look for help, and with all due respect to, you know, the fabulous labor attorneys in this room here, our members don't have folks like that, that they can pick up the phone and call. It's going to be, you know, a process where, you know, my goodness, what will I do with this? Who do I call? They call the person they identify as their attorney. Their attorney doesn't do labor issues. I haven't a clue, you know, call John Smith down the street. He might be able to help you.

So even though it's fabulous, it will spell out more and make it more transparent to provide a blueprint, I think they're still going to need outside legal help when it comes to preparing for the petition.

MR. RAUDABAUGH: I would second what you just said. I do think that is a good idea. I think help and bringing someone through the process would be a step forward.

I would just like to go back again to that last comment. It's been decades since I finished my graduate degree in econometrics. So I don't remember the term, but when you do the distribution and you get a median of 38 days, what I was trying to suggest was that if we take whatever that term is for the right side, anyway, where it gets strung out, what is it, beyond one standard deviation of the desired median, I think that -- I honestly believe that if we took say a fiscal year and then mapped out each case that was beyond your median target, and then map characteristics that we would define as identifying variables of size of employer perhaps, even geographic region, if you look at distribution of labor attorneys, there aren't a whole lot of them in certain states, but if you could map through that, I honestly, truly believe it would yield some results. It would help us all decide what it is that causes these longer delays and litigation related issues, and then perhaps you could zero in on those and target those types of employers or industries with particularized assistance of the kind you were suggesting.

CHAIRMAN LIEBMAN: I have a question. Is there any standard practice within the members of your Federation for

what to do when an election petition is filed in terms of, the employer's right to get its views out? Is there standard advice that you give, or is there a standard practice that your members follow? And how long in your view does it take for one of these small employers to communicate its views with what's going to be a pretty small workforce?

MS. MILITO: As I pointed out in my remarks, in most of the businesses, most NFIB members, 90 percent of NFIB members employ less than 10, 20 employees. So in those instances, there was not even an employee dedicated to handling human resource matters. So we do not have -- our members do not necessarily have somebody on their staff who is a member of say SHRM. So when it comes to labor and employment matters, it oftentimes is the owner of the business or his or her spouse or the bookkeeper who is also, you know, kind of the administrative person who will open the mail and get the petition. So you can probably picture how this would go, you know. Opening the mail and you kind of, oh, this is a legal document, what am I going to do with this?

So it's going to take some time. You know, the owner's going to have to look at it. As far as pulling together what's required before the hearing and the position, I don't believe there is a standard practice. I mean it's going to be, you know, the owner picking up the phone, trying to get help from their attorney who is going to pass them on

probably, try to find a labor expert who can help them out and figure out what to do, but I don't believe that there is a standardized practice just because this is not something that they're confronted with very often. You know, they don't have, you know, standard operating procedure because this is not something that comes up in their business.

CHAIRMAN LIEBMAN: I understand. Thank you for your comments today and for being with us.

Our next speaker is Christopher Grant, and up next will be Patrick O'Neill. Good morning.

MR. GRANT: Good morning. Thank you, Members of the Board, for inviting me here today. My name is Chris Grant. I'm a partner at Schuchat, Cook and Werner in St. Louis, Missouri. I represent labor unions and members and workers. I've represented unions in numerous representation proceedings and unfair labor practice cases involving union elections.

In addition, prior to becoming a lawyer, I helped organize a union in my workplace and then helped workers at other stores in the same retail chain to do the same.

The Board's proposed rules do much in my mind to eliminate unnecessary and wasteful litigation from the representation process and to focus on the primary goal, which is to allow employees to promptly exercise their right to choose whether they want union representation.

The need for prompt elections is critical. The Supreme Court, over 40 years ago, in Boire v. Greyhound Corporation, noted that the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment in strength and attrition and delay.

More recently in a slightly different circumstance in Fall River Dyeing, the Court emphasized "the significant interest of employees in being represented as soon as possible."

One proposal I think is particularly important here, and that is the requirement that the employer provide a statement of issues and information on unit position such as job titles. This proposal will remove the gamesmanship in R cases that commonly delay elections. In my experience, some employers refuse to provide its position and information, not because they do not know, but to gain an advantage in litigation, and this inhibits the development of the record at the R hearing and proper resolution of those legal issues.

I also want to speak to a broader problem. As a participant in R case process as an employee in the past, as an organizer and as an attorney, what strikes me is how stressful that process can be to employees. Delay only makes that process more stressful. Employees wonder when they'll get to vote, will the employer let them vote, and when a decision will be made. Employees also fear retaliation

during this time, and when the effect of delay is to make the process more stressful, then employees are increasingly likely not to base their decision on careful consideration of the facts, but to respond emotionally to stop that stress, and that is I think contrary to the purpose of the Act.

There have been some arguments about employers needing more time to voice their opinion, and that employees cannot meaningfully exercise their right to vote without knowing the unit with complete finality.

Now, in my experience, the employer almost always knows of the union activity pre-petition. For example, in a recent case I handled, ADB Utility Contractors, the employer's general manager told employees that he knew the employees were meeting with the union, and he fired several lead employee organizers before the petition was filed. Not surprisingly in that case, the employer also abused the R case process. It refused to provide a statement as to the issues prior to the start of the hearing, and it made frivolous arguments about supervisors accounting for less than 20 percent of the unit, and this created a delay during which the employer threatened, coerced, and fired more employees.

I also want to say the obvious I think is the employer controls the workplace and is free to give its opinion on unionization at any time, and to say that unions benefit from

months of supposed covert organizing, while the employer cannot voice its opinion or view, I think ignores the imbalance and power between the employer and employee.

Finally, defining the bargaining unit is not rocket science. For the most part, we're talking about relatively simple issues. It's the mechanic in the unit. There are two plant clericals. Are they out? Should we combine phlebotomists and lab technicians? Are crew leaders supervisors?

The 20 percent rule draws an appropriate line. If fewer individuals are at issue, the complaint that I hear from employees is not I can't meaningfully exercise my right to vote because I don't know if the mechanic is in the unit. Rather the complaint is why is there a delay? What is happening?

The presumption is that the Board is not controlling the process. The proposed rules in my view simply empower the Regions and the Hearing Officers to properly manage and control the process and provide for prompt elections. Thank you.

CHAIRMAN LIEBMAN: Thank you for your comments. Any questions?

MEMBER HAYES: Do you have any views with respect to the portion of the proposed rule relating to blocking charges?

MR. GRANT: Do I? I did not prepare any comments on

that, and I'm not quite sure. I know the Board proposed. I didn't really offer any opinion on that. You know, in certain cases where there are significant unfair labor practices that hinder the ability to have a free and fair election, I think you have to allow for a blocking charge.

CHAIRMAN LIEBMAN: Would it make sense to have the election proceed and then have all the issues litigated after the election is held to avoid the delay?

MR. GRANT: I think the union should be able to exercise its right whether to go forward or not, based upon its view of the unfair labor practices, and this is subject to the Regional Director's consideration, too, but whether those unfair labor practices inhibit the ability for employees to exercise their free choice. When there's significant unfair labor practices in my experience involving the discharge of employee organizers, threats to close the facility, threats to subcontract out work, that makes a free election impossible. If you have to litigate that post-election, and then perhaps have the problem of a rerun election, there are multiple studies showing that the delay from the initial election to the rerun election costs unions, that it's very difficult, and the more time there is between the initial and the rerun election, the more likely the union is to lose.

MEMBER HAYES: I just had one other question. You indicated under our present system, when the parties -- it's

been my experience anyway, that our Hearing Officers and attorneys in the Region are extraordinarily good at being able to solicit the position of the petitioner and of the employer with respect to the unit ahead of time. Do I understand you to say that you don't believe that to be the case, that the parties don't know at the time of the hearing what the issues are?

MR. GRANT: That is correct. There are multiple occasions where I've participated in representation proceedings where the employer has flat out refused to provide what its statements would be prior to the start of the election.

Typically how it works in Region 14, where I am, is that the Hearing Officer will attempt to solicit the views of the employer, whether there's a supervisory issue, what's the composition of the unit. There are unfortunately employers who will not provide that information prior to the start of the hearing. So you don't know as the union who to subpoena, you don't know what the issues are to be to properly prepare them, and so as a result, you go in there and you suddenly learn on the first day of the hearing that the employer's contesting that so and so is a supervisor. You don't have the ability to get them there. You don't have the ability to properly argue based upon the facts, and then as a result, you have a really bad record, and that makes it very

difficult for the Region in my view, and the Hearing Officer and Regional Director to make a good decision.

MEMBER HAYES: So let me understand. How would that be changed under the rules which don't require the statement of position until the day of the hearing in most instances because of the relatively short timeframe between the filing and the hearing?

MR. GRANT: My understanding is that the statement would be, as now, would be attempted to be provided or attempted to be solicited prior to the start of the hearing, days before. I suppose if the employer is absolutely refusing to provide it, I guess you don't have the statement of position until the day of the hearing, but at least you aren't caught midway through the hearing where the employer is raising a new issue.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything further?

Thank you for coming here to share your thoughts with us.

Mr. Patrick O'Neill, and after that we'll have Mr. Baskin.

Good morning.

MR. O'NEILL: Good morning. My name is Pat O'Neill, and I'm the Organizing Director of the United Food and Commercial Workers International Union. The UFCW represents over one

million men and women who work in our nation's retail, food, food processing, and other industries. We welcome this opportunity to speak in support of the proposed election rule changes.

American workers are struggling to make ends meet during the worst economic downturn since the Great Depression. Workers in the grocery, retail, meat packing, and food processing industries are no exception. Union contracts offer the best opportunity for stable, middle class jobs. While the National Labor Relations Act gives workers the fundamental right to join a union and achieve the benefits of collective bargaining, the NLRB's current rules are seriously outdated, needlessly complex, and foster frivolous litigation.

The current process creates barriers to workers exercising their fundamental right to form a union.

It's time to return the process to its original intent, which is to give workers the clear path to make a choice when they want collective bargaining.

We view the proposed election rule changes as a modest but important first step toward modernizing and streamlining an outmoded process that encourages unnecessary, time-consuming, and wasteful litigation.

The proposal to defer resolution on most voter eligibility issues until after the election, including all

bargaining unit disputes affecting less than 20 percent of the unit, would make the current process more efficient and worker-friendly.

Just ask the employees at Home Market Foods in Norwood, Massachusetts who sought representation by the UFCW Local 1445. Workers petitioned for an election in a unit of all production, maintenance, shipping, receiving and housekeeping employees, including 11 quality assurance technicians, but excluding 9 quality assurance technologists who the technicians considered their supervisors. However, the company argued that none of the quality assurance workers should be in the unit, or if they were included, that the technologists were not supervisors and should vote in the election.

By disputing the quality assurance workers' status, the company delayed the election until 79 days after the petition was filed, and during this delay, management used the time to further threaten workers with job loss and plant closure if they won in the election.

The workers lost the election 104 to 114. If the quality assurance employees' eligibility to vote had been deferred until after the election, the election would have taken place before the employer's scare tactics had their intended effect. In that case, the workers would have won the election by a big enough margin that their votes would

not have affected the outcome.

Now -- say that I think you're almost guaranteed the first proposal out of the company if the union had prevailed would have been to remove the supervisors from the unit. That's usually what we see, they force people into a bargaining unit that don't want to be into it, and then if the union wins, the first proposal we see in bargaining is to remove those people from the unit.

This is exactly why the proposed changes are needed. Workers go to work to earn a living, not to get engaged in a protected, lawyer driver tug of war with their employer. When workers want to organize a union, they want to do it immediately.

The proposed rule changes will not interfere with the employer's free speech rights. Workers know the employer's views on unionization, and if workers are unclear of their employer's position, it doesn't take long for them to find out.

Not only will this rule change not lead to ambush elections as claimed by employer funded lawyers, almost all union election campaigns are well underway and well known to employers long before an election petition is filed. In virtually all instances, employers have ample time to communicate with their workers.

This fact is supported by a recent study by Professor

Kate Bronfenbrenner of Cornell and Dorian Warren of Columbia, both of whom will address this panel later today. Their research shows that 31 percent of serious unfair labor practice violations occurred 30 days before the petition was filed, and 47 percent of all serious allegations occurred before the petition was filed. The data supports their conclusion that employer opposition starts long before the filing of the petition. UFCW organizers have known and experienced this firsthand many times.

The UFCW is optimistic that the proposed rule changes will begin to restore the NLRB election process back to what it was intended to do, give workers a clear process to organize in a union.

We are, however, concerned about the possible elimination of the blocking charge policy. Strong employer opposition to union organizing campaigns is the rule rather than the exception. Workers and their unions would be faced with serious employer unfair labor practices during a critical period, may need temporary postponement of the election to try to counter the employer's illegal conduct. The blocking charge policy is needed to help attempt to prevent that from happening.

The UFCW will make a more detailed response to the Board's Notice of Proposed Rulemaking in written comments it plans to file. Again, thank you for this opportunity to

speak in support of this rule change.

CHAIRMAN LIEBMAN: Thank you, Mr. O'Neill. Do my colleagues have questions?

I'll throw out a question for you. Is there anything in this rule that you see as problematic or anything that you would propose that would be an improvement?

MR. O'NEILL: I can make a lot of suggestions for other improvements, but not in this particular --

CHAIRMAN LIEBMAN: Pick one.

MR. O'NEILL: Access.

CHAIRMAN LIEBMAN: Access. You mean union access to the property?

MR. O'NEILL: Yes, to the workers.

CHAIRMAN LIEBMAN: Okay. Thank you for being with us here today and sharing your thoughts.

MR. O'NEILL: All right. Thank you.

CHAIRMAN LIEBMAN: We appreciate it.

Mr. Baskin, and after Mr. Baskin will be Mr. Brian Brennan.

Good morning.

MR. BASKIN: Good morning. My name is Maurice Baskin. I'm a partner in the Washington, D.C. office of the Venable Law Firm, and I'm appearing before you today on behalf of Associated Builders and Contractors, the national construction industry trade association for merit shop

contractors representing 23,000 contractors around the country employing an estimated 2 million workers. With me today is Karen Livingston, Director of Federal Policy for ABC.

ABC is strongly opposed to the Board's proposed amendments to the election rules, both as they impact the unique labor relations of the construction industry and also as they impact on small businesses generally because small businesses comprise the majority of ABC's members.

But from listening to the testimony you've heard so far, I'm not sure that you've been given a full appreciation of the sense of outrage in the business community, particularly small businesses we're hearing from, that in the midst of this terrible economy, the NLRB is proposing new and burdensome regulations that appear to have no purpose other than to promote union organizing. There's outrage over the haste with which you are moving ahead with these sweeping and radical proposals, hardly modest proposals; radical proposals, particularly without a full board of confirmed members, and with no credible showing of a need for changes in the Board's election rules in the first place.

Unions in the construction industry last year won 81 percent of their NLRB elections in a median time of a little over a month. It appears to many in the business community that the unions and the Board won't be satisfied until that

number hits 100 percent, and it looks to small businesses like the proposed amendments are simply an end run by the Board to achieve what the unions failed to get through Congress last year.

Regardless of the Board's motivations, the proposed amendments are unlawful on their face because they're based on two false premises: first, that faster elections are necessarily fairer elections, and second, that employers' rights to due process and free speech during the union election campaigns are somehow subordinate to the rights of unions to organize the employer's workplace.

I'm afraid we don't nearly have enough time today for us to cover everything that's wrong with the proposed amendments, but I want to try to focus on those parts that threaten particular harm to the construction industry who we're representing here today along with the small businesses generally.

We start with the proposed shortening of the period between filing of the union petition and then NLRB hearing. It's particularly offensive to small businesses in the construction industry. The new seven-day time limit, not enough time for most small construction contractors or other small businesses to get lawyers, as you've already heard, or learn what the NLRB election is or what the NLRB is frankly, let alone produce this new legally binding prehearing

statement of position on what the issues are. I should add that the Board's proposal is as different from the Federal Rules of Civil Procedure as night and day. It takes months to reach the point of disclosures and binding statements and definitions of hearings and what's permissible and what's not, what the Board is trying to achieve in seven days. It's just completely different. We'll give you chapter and verse on that in our written comments as I'm sure many others will, but really it was shocking to see that statement in the proposed rule discussion.

The Board's appropriate unit rules, just take those for the construction industry, they are particularly convoluted. I've yet to meet a contractor faced with their first union election who has any idea what those rules are or how they work, and I appreciate the nod to the concept, well, if the Board could just put out a little advance statement, that that would help.

Are you going to put out a treatise this thick? And just imagine if you're a small business employer and you get an envelope in the mail that says not only are your employees mad at you and they brought a union in, but here's this homework assignment. Go study up and get ready to go to law school to learn all the appropriate unit rules in the construction industry and, of course, for other industries, small businesses face the same problem.

It's crazy that they would be bound within seven days to figure out while they're trying to find lawyers, while they're trying to figure out who's actually in their group of employees, so they can produce this prehearing statement, to figure out the rules of disappearing units, of multi-craft versus single craft units, of single employer versus joint employers, of 8(f), not to mention in the construction industry which is unique, and 9(a) separation. These are just a few of the issues that arise in the construction industry that need to be addressed up front with sufficient time to get the facts and the law straight.

Not to mention that the Board has created a special rule of eligibility in the construction industry, the Daniel/Steiny formula, and we haven't had much talk about the Excelsior list change, knocking it down to two days. How construction employers are supposed to put that together, finding laid off employees, that's the Daniel/Steiny rule, unusual to construction. So it's not just a matter of pulling out your latest payroll and submitting that. No, you've got to go back and find the people who were laid off who worked a sufficient period of time to perform, to be included on the eligibility list. We submit that that's impossible. Frankly it's impractical for other industries as well and no justification for that shortened timetable.

Construction companies employ an unusually large number

of working foremen, and we've heard talk about the difficulties of trying to figure out whether lead men and foremen are supervisors or not, in the impact of the election. So I won't repeat that here, except to say that the construction industry faces that problem more than most other industries.

So these are just a few of the issues raised by the proposed amendments that are likely to have negative impacts. We're going to prove more details in our written comments, but we again implore you to slow down. We renew our request for additional time for all interested parties to file their written comments, and we urge you to rethink the wisdom of attempting to implement this radical new agenda that violates the Act.

Thanks for listening. I'm happy to answer any questions.

CHAIRMAN LIEBMAN: Thank you, Mr. Baskin. Are there questions?

MEMBER BECKER: I have a question about your view of the terminology that we adopted in establishing all the timeframes that have been proposed, not only the seven days, but the two days, both of which you mentioned specifically because we specifically asked for comments on the words that we have used to describe those timeframes, none of which are rigid because I'm sure you know in 2002, the Board, which

none of us were on, in Croft Metals, held the following, and I'll quote, "By providing parties with at least five working days' notice, that is between petition and hearing, we make certain that party representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all."

So however many years ago, nine years ago, the Board held that that period of time was the minimum period necessary.

What the proposal suggests is that period should be the standard but not rigidly, and we've suggested in all the timeframes, special circumstances or various language to accommodate the kinds of concerns you've described. If you have to go back and figure out who was working over periods of time, that may justify a longer period of time.

So my question is do you have any specific suggestions as to that terminology, that is if we're going to establish a norm, maybe it's 7 days, maybe it's 10 days, but terminology which would allow the kinds of special circumstances you've described as to those timeframes?

MR. BASKIN: First, there's been no need to make the change in the first place. So your established practices are working well, and you should continue them, and not change the norm which is going to invite litigation over every aspect of these rules including that one.

Second, what you describe as language that is not rigid seems inconsistent with the Board's own facts, statements, and summaries of the rules. When one looks at the chart that appears on your website, it doesn't emphasize the nonrigid nature. It says there's going to be this new rule, and it's going to be a shorter period of time.

But we'll take your question to heart, and we'll provide comments in our written statement as to whether there is any way that you could change the rules with a more open period, but frankly, we doubt it and we don't see why you need to do it.

CHAIRMAN LIEBMAN: Mr. Baskin, you mentioned the question of employer free speech, and I would ask you the question I asked just a little while ago. I assume most of the members are pretty small employers.

MR. BASKIN: Yes.

CHAIRMAN LIEBMAN: And I wonder if there is a standard practice that is employed in situations where unions file a petition, and what do employers routinely do to try to exercise their free speech and get their views across and how long does that take?

MR. BASKIN: Well, I'm very glad you asked that because there's been this myth created that employers are some monolithic group out there with this game plan in place to stop unions and to communicate. In fact, most employers,

especially smaller ones, don't give the slightest thought to this issue. Even though seminars are out there being given, they're not all that well attended until the employer has the union at the door. Then they wake up and they realize they should do something about this, only they don't have the slightest idea what to do, and there are various recommendations on what they should do. They have to get time to consider those possibilities.

There's also a language barrier in many construction workplaces because of the sizable representation of minorities. So they have to figure out how they're even going to communicate. It's one thing to say go here, put this together with people who already know how to do it. It's another thing to get into this very complicated subject of union rights and benefits and benefits of staying nonunion.

So there really is not a single standard. Many employers are not even members of the associations that try to educate, among the better educated ones are the ones who are members of ABC and similar groups, but to many others, they just are completely at sea when they get this and frankly they're more likely to commit violations because of the time pressures and the short -- the lack of education on what they should do in this situation.

CHAIRMAN LIEBMAN: I would assume that one of the

advantages of membership in the ABC is that you do provide some guidance and probably have model plans for how the employer gets it across. I'm just curious really what the timeframe is for a model campaign that the ABC would recommend --

MR. BASKIN: I think --

CHAIRMAN LIEBMAN: -- especially with a small --

MR. BASKIN: There is no standard recommendation because every workplace is different. The issues are different, but I would say that the median that the Board is currently at is about right. In fact, it's about the minimum because below that, it is not likely that the employer is going to be able to communicate.

CHAIRMAN LIEBMAN: Thank you. Thank you for being here with us today and for your contribution.

MR. BASKIN: Thank you.

CHAIRMAN LIEBMAN: Our next speaker will be Brian Brennan, and next up after that will be Mr. Harold Weinrich.

Good morning.

MR. BRENNAN: Good morning. I'm very honored to appear in front of the Board. Thank you for this opportunity.

My name is Brian Brennan. I'm employed by the International Brotherhood of Electrical Workers as an international representative. Part of my duties as an employee of the IBEW is to assist workers who want to form a

union at the workplace.

From 2004 through 2006, I assisted employees of the Exelon Nuclear Corporation in their efforts to obtain union representation at two nuclear power plants in Philadelphia, the Limerick and Peach Bottom Plants. Unfortunately, Exelon Nuclear was able to use the Board's current rules on representation cases to delay the election vote for five months, and Exelon used these five months to commit unfair labor practices and engage in other conduct that rendered a free and fair election impossible as the Board ruled later.

When the Exelon Nuclear employees filed their petition in November 2004, they turned in authorization cards from 65 percent of the employees in the proposed bargaining unit. Five months later, the 655 employees who voted rejected union representation by two votes. The full scope of the employer's misconduct in those five months is set forth in the Board's decision ordering a rerun election at 347 NLRB 815, but I just want to mention a few examples here.

First, Exelon threatened employees for attending the hearings under subpoena from the union. Second, Exelon threatened at least one union supporter with the loss of his job, and third, the company used the services of one of yesterday's witnesses, the so-called impartial consultant, Oliver Bell, to tell employees they would not get a favorable contract even if they chose union representation.

The Board-ordered rerun election did not occur until two years after the election petition was filed. By that time, delay had done even further damage, and the gap widened to 43 votes.

So this is how Exelon Nuclear delayed the initial election of five months. Exelon got the initial hearing postponed to accommodate its attorney. Then the company showed up at the rescheduled hearing on December 8th without fixed positions on who was in or out of the proposed unit.

In the end, only two issues were litigated, the supervisory status of its control room operators and lead plant technicians, and the total number of employees at these issues, these two issues of classification was far less than 20 percent of the proposed unit.

No testimony was actually taken until January 3, 2005, a full six weeks after the election petition was filed. The hearing took only six actual days but was spread out on nonconsecutive days and did not end until January 18, 2005. Both parties filed briefs. The Regional Director issued her decision on March 31, 2005, and the election was held on May 5, 2005.

Under the Board's proposed rules, I believe the election would have been far more timely because, number one, the employer would have been held to stating its position at the opening of the hearing in early December. Number two, the

hearing, if it occurred at all, would have been run on six consecutive business days and, number three, the parties could have argued their positions on the last hearing date, and a decision would have been rendered more quickly.

In the alternative, because less than 20 percent of the unit was involved, the employees could have had their first election that argued about the supervisory issues afterwards.

In closing, I would like to say that in 25 years of trying to help employees exercise their right organize, it has been my experience that employers who don't want their employees to unionize always manipulate the Board's R case procedures to delay the vote. Then employers use the delay time to threaten employees and weaken support for union representation. Employers are not afraid of being found in violation of the law for election misconduct because they know that the only penalty is a rerun election which will not take place until many months or even years later.

Finally, the statistics on rerun election as borne out by this case are against the employees who want union representation. The proposed rule will result in a more free and fair election system. Thank you very much for your time.

CHAIRMAN LIEBMAN: Thank you for being here with us today. Are there any questions?

Thank you very much. It's been suggested that we take a break right now. So if you would all be back here in 15

minutes, we'll start promptly. Don't forget to take your badge and number with you, and we will see you back in 15 minutes.

(Off the record.)

CHAIRMAN LIEBMAN: We can go back on the record.

We'll begin with Mr. Harold Weinrich, and next up will be Elizabeth Bunn.

MR. WEINRICH: May it please the Board, by way of introduction, I am Harold Weinrich. I am a member of the firm of Jackson Lewis. We represent employers nationwide in labor and all aspects of workplace law. I began my career in Region 29. I learned labor law at the knee and too often over the knee of a labor law icon, Regional Director Sam Kaynard.

I appear for the Atlantic Legal Foundation, a nonprofit, nonpartisan public interest law firm. The Foundation's mission is to advance the rule of the law before courts and agencies advocating limited and efficient government, free enterprise, individual liberty, and the safeguarding of constitutional protections. ALF is concerned that the Board's proposed rules threaten to undermine these core values.

The Board's rulemaking authority is strictly circumscribed. The Board may only make such rules as may be necessary to carry out the provisions of the Act. The Board

may only adopt rules to implement the will of Congress, not as a means to further their own agenda. The Board exceeds its authority when it seeks to refashion the Act.

Here, the timing of the Board's proposed rules coming after Congress rejected statutory revisions, now encompassed by the proposed rules, underscores the fact that the Board may not seek to carry out the Act's provisions but may rather intend to enact the changes that Congress rejected.

The Board's proposed rules do not respect the constraints Section 6 places on the Board's rulemaking authority and therefore the Board is exceeding that authority.

Today, I address some areas where the Board deviates from its proper rulemaking authority.

First, the proposed rule disregards the language of Section 9. The rules preclude the holding of any pre-election hearing, no less an appropriate hearing, with respect to many disputed and material eligibility and unit inclusion issues. These issues may not be heard or decided until after employees vote and possibly will remain undecided. Ignoring Section 9's guarantee of an appropriate pre-election hearing does not carry out the provisions of the Act.

It also ignores Section 7. Employees when they vote are entitled to know who is to be the collective in any

collective bargaining. When individual or classification eligibility or unit inclusion issues relating to disputed supervisors remain undecided, not only is Section 7 and 9 ignored, but the employer cannot identify who is to communicate on its behalf and thus its Section 8(c) rights are abridged.

The Board does not carry out Section 7 by rushing to the ballot box. Employees are guaranteed the right to have the information necessary to make an informed choice. The fact that making an informed choice may take time is a necessary feature of a democratic process. It is a core Section 7 right. Free and robust debate is an essential element of employee free choice and a rule that infringes on that right is not sanctioned by Section 6.

The Board also does not carry out Section 8(c) by the proposed rules. That section gives employers the right to communicate with employees, non-coercibly, concerning the exercise of their Section 7 rights. Unless an employer has an adequate opportunity to fully utilize its free speech rights between the time a petition is filed and an election is held, employees' rights are destroyed, and the employer's free speech rights become meaningless. The Supreme Court in the recent Brown decision acknowledged this. An essential source of information and opinion, specifically protected by Section 8(c) since 1947, that is necessary to an informed

employee electorate must not be neutered by a rule or rules radically limiting the pre-election period.

The Board should not alter the statutory scheme by enacting this proposed rule. In order to safeguard employee free choice, to continue to provide a meaningful opportunity for the Agency to determine appropriate units, the Board is urged to withdraw its proposed rule.

Section 6 is not optional language. It is a demand. Its purpose is evident. It was intended to prevent the NLRB from changing the will of Congress.

Further, it is untimely for a Board majority, which will soon be composed of only two members, one whom sits by recess appointment, to propose and consider any rule, especially such a far-reaching rule that substantially and fundamentally changes the provisions of the Act. I quote the Chairman, "Recess appointments should be hesitant to overrule precedent because it could be seen as a rush to judgment and undermine public confidence. Recessed Boards should be caretakers and keep the railroad running and not make policy decisions."

The proposed rules, if made final, will be precisely the very rush to judgment that the Chairman predicted and will undermine public confidence in the Board. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Weinrich. Of course, my colleagues on the Board at that time who were recess appointments disagreed with me and made a lot of changes in

precedents. Isn't that correct?

MR. WEINRICH: Unfortunately, Ms. Chairman, it is, and I think they should have agreed with you. I do.

CHAIRMAN LIEBMAN: Are there other questions?

MR. WEINRICH: Thank you.

CHAIRMAN LIEBMAN: I want to ask you one other question. You talked about the legislation that didn't get through Congress and how many of those provisions of the legislation are encompassed by these proposed rules. Well, my understanding of the proposed legislation was that it had three major elements, improve remedies for certain unfair labor practices, mandatory remediation and binding arbitration of first contract disputes that didn't get settled, and provisions for certification upon proof of majority through card check.

I don't see any of those in these proposed rules. Do you?

MR. WEINRICH: No. However, Ms. Chairman, if we look at the legislation, if we look at the debate, if we look at the compromises offered and considered, the essence of the proposed legislation was to make sure that the election process moved forward more quickly and that the employer did not have sufficient time to speak, and that is certainly encompassed within the rule that this Board proposes.

CHAIRMAN LIEBMAN: Well, actually I think the

legislation was about providing for another alternative to the election process, and the outcry about the legislation was that it was superseding the secret ballot election process. It seems to me the essence of these proposed rules are to make the secret ballot election process work better. Wouldn't you agree?

MR. WEINRICH: The secret ballot election process can only work better if there is an informed electorate, and these rules take the time period which has been the same for decades, approximately give or take 40 days, and cuts that as Member Pearce suggested down to 10 or 14, and that abridges the rights of employees and the rights of employers. The union, as we might know, has no direct right under the Act with respect to communication. It only has a derivative right which makes me wonder how you suggest that they who do not have a right can waive the Excelsior list. Thank you.

CHAIRMAN LIEBMAN: That's another point. Thank you. Any other questions?

Thank you, Mr. Weinrich.

MR. WEINRICH: Thank you.

CHAIRMAN LIEBMAN: Good morning.

MS. BUNN: Good morning. Chairperson Liebman and Members of the Board, good morning again.

My name is Elizabeth Bunn, and I'm the Organizing Director of the AFL-CIO. I speak today on behalf of

President Richard Trumka, Secretary-Treasurer Liz Shuler, and Executive Vice President Arlene Holt Baker, as well as our 55 affiliates who represent over 12 million workers throughout the United States.

Prior to this position, my background includes working after law school in the Enforcement Litigation Division of the Board and for 25 years working as a staff person and then officer of the UAW. While there, I oversaw the union's organizing activities in non-manufacturing.

The AFL-CIO urges adoption of the Board's proposed rule. It will make a positive, albeit modest, difference in the workability and efficiency of the NLRB's election process.

The Act's purpose is to encourage collective bargaining and to protect workers' rights of full freedom of association. This is our national policy. It is also a right enshrined in the United Nations Universal Declaration of Human Rights. It is a metric that determines whether a political system falls on the side of democracy or tyranny.

There are benefits to fostering this statutory purpose. For one, as was said yesterday, individual workers, employers, and neighborhoods prosper. Let's not forget the road to the middle class was paved by strong unions.

Additionally, while we all have an economic stake, we are also stakeholders in upholding the principles of fairness and democracy.

Under the current rules, the Board is hamstrung from fulfilling its mission of protecting workers who seek an election to form a union, to exercise their full freedom of association. The truth is that employers are able to exercise too much control over the timing of the election.

One clear example is bargaining unit challenges. In his book, Confessions of a Union Buster, Martin Levitt states, and I quote, "The beauty of such legal tactics is that they are effective and damaging the union effort no matter which side prevails." He goes on to cite a challenge on unit size which was "filed two weeks into the campaign and the case took at least three weeks to resolve. That kind of delay steals momentum from a union organizing drive."

Being able to influence timing and delay, all too often the employer is able to implement its own campaign timetable. All too often employers illegally discipline workers, hire unscrupulous consultants, force employees to attend group and one-on-one meetings, and sometimes even threaten to close the plant. The goal is not to inform. The goal is to harass, delay, confuse, and intimidate.

The toll taken on individuals is immeasurable. You've heard workers' stories during this hearing. There are thousands of others. Here is one more.

One of the workers in a drive among table games dealers at an Atlantic City casino was an immigrant from China. He

became disillusioned by the Communist Party, in part because it had denied him permission to marry the girl he loved. Courageously he left the country and emigrated to the United States. He fell in love with our hopes, our ideals, and most importantly, our commitment to liberty and democracy.

When he and a majority of his coworkers decided to file for a union election, he was confident that his government would protect his right to vote through a fair process. Instead, he and his colleagues suffered through delays, frivolous litigation, countless mandatory meetings. The workers showed amazing resilience voting 2 to 1 in favor of the union. Workers won, but it should not have been so hard.

He expresses disappointment and sadness by the unfairness of the process. He feels that his government, our government, failed him, and it did. When the government holds out the promise of a fair election, it should deliver on that promise.

We know the Board's proposed rule is not going to fix all the problems and abuses faced by workers in the representation process, but the proposed rule does take a small step in addressing some of them. It puts a check on unproductive litigation, thereby making the process more efficient. It enhances the ability of workers and their unions to communicate timely with one another through the means modern technology has created, fostering the democratic

tradition of robust debate.

It modernizes the way we do business. It creates greater certainty and uniformity in the election process, better enabling the Board to prevent gamesmanship. It enfranchises voters by removing the Hobson's choice unions current face in stipulating to elections.

Under the status quo, the employer is able to hang a sword of delay over the union. The employer can insist on a bargaining unit to its liking, in my experience defined as one in which it thinks it can win, union supporters must stipulate to that unit or face delays. When unions choose to stipulate against their legal judgment, workers are included who should be excluded and vice versa. Appropriate voters are disenfranchised.

Under the proposed rule, at least some eligibility questions are deferred until after the election, just as in political elections by the way. Other disputes are resolved more efficiently. May I have a minute?

CHAIRMAN LIEBMAN: Yes, please.

MS. BUNN: Consequently, that Hobson's choice is avoided.

The AFL-CIO and our members will continue to press for more holistic and comprehensive solutions to the problems that plague the NLRA. Today, we support the Board's proposed rule and urge prompt adoption of these modest reforms. Thank

you.

CHAIRMAN LIEBMAN: Thank you for being here with us today. Anyone have questions? I have a question for you.

As the prior speaker, Mr. Weinrich mentioned, unions are treated under the law as having only the derivative rights, not the direct rights that employees have. So therefore unions don't have a right of access to the employer's property. What is the way that you typically communicate with workers, and would the provision for adding e-mail addresses or telephone numbers help, or what is the way that you find most useful for communicating with workers, and does that vary according to the type of industry or the type of worker?

MS. BUNN: Right. It obviously varies to some extent depending on the access to the employer's property, but the imbalance between the ability to communicate by union supporters with one another and by employers to their employees is one of the great imbalances of the process and one that the Board specifically does not address by its rules. But the way in which workers wanting a union overcome this is to talk with one another off work time, off work property typically, and the problem with that was discussed yesterday to some extent, that means driving to workers' homes, trying to get people to come to a coffee house or what have you, and all of that information about addresses is just

compiled from one worker to another worker.

Allowing for e-mail addresses and phone numbers obviously brings the Board into the 21st century because that is the way in which people communicate more and more, as you know, but it also provides an ability for union supporters to communicate with one another more easily.

CHAIRMAN LIEBMAN: I don't know if you heard some of the complaints yesterday about providing e-mail addresses that would raise privacy concerns; that some employees say that they're unaware of the fact that their names and addresses could be given out to the union and would be upset to learn that their e-mail addresses or phone numbers were given out; and that maybe there should be some consent procedure. What do you find or what is your view about that argument?

MS. BUNN: Yeah, that's not been my experience doing a lot of organizing drives over the years. Typically we find that workers actually prefer to talk to union supporters and their union representatives off work because it's in an environment where the fear at least is taken out of the communication. So we've not experienced that anger and irateness that was discussed yesterday. To the extent that workers feel anger, I think they feel much more so about being hauled into captive audience meetings and one-on-one meetings where their voices are silent and where they're not allowed even to state an opinion on threat of discharge.

CHAIRMAN LIEBMAN: Yes, Member Pearce.

MEMBER PEARCE: There have been statistics mentioned by several during the presentations yesterday regarding -- well, 90 percent stipulations on petitions and over 60 percent win rate with respect to cases that have gone to election. Have you experienced the negotiation of stipulations and, if so, what kind of considerations do you find have to be made?

MS. BUNN: In my own personal experience, that mirrors the experience that John Brady talked about yesterday with respect to the Backus Hospital which is that the employer comes in and sits on a certain bargaining unit, one in which it believes it can win, and literally holds the sword of delay over the union's head and threatens to litigate up to and including the Supreme Court is generally the phrase, and so unions are again faced with this Hobson's choice of stipulating or face lengthy delays and oftentimes unions choose to accordingly stipulate even if the unit really does not in its opinion meet the test of appropriateness, and I think one of the beauties of the rule, and I probably didn't say this very well, so let me try again, I think one of the beauties of the rule is by delaying some voter eligibility questions to after the election where those workers will vote under challenge, but also making it to the extent that there are issues that need to have a hearing pre-election making that process more efficient, I think puts a much better face

for both parties on whether to stipulate or not.

CHAIRMAN LIEBMAN: Can I ask one more question? You probably heard a number of people express concern that these rules might decrease the number of stipulated elections because the employers wouldn't have time to figure out their legal position and would then just put all the issues down and litigate much more. Do you have any reaction to that? Do you have any thoughts? Do you have any fears that that would happen?

MS. BUNN: I don't have any fears it would happen. It is sadly accurate, I think, to believe that there will be anti-union consultants who will attempt to manipulate the new process, but the beauty of the new process is that it keeps control over the process much more in the hands of the Board's decision makers.

CHAIRMAN LIEBMAN: Any other concerns about the rules that might have unintended consequences?

MS. BUNN: I just, you know, I didn't answer Member Pearce's second part of his question about elections. Those statistics about win rates, and I've heard different numbers throughout the last day and a half, but those are petitions that go to election. There are a number of petitions that are withdrawn prior to the election because of the abuses in the current system that have been discussed through the last day and a half. So I don't think that just looking at that

one slice of the data pie gives a full picture.

MEMBER PEARCE: Thank you.

MEMBER HAYES: I just have one question, and that is of the options with respect to blocking charges that are suggested in the notice, are there any of those options which you believe to be preferable?

MS. BUNN: I'm not familiar with the precise options, but let me say more generally, and we will be submitting by the way written comments.

With respect generally to blocking charges, I think one of the earlier spokespeople said it best. We're trying to effect here a fair election, and by definition, blocking charges suggest that there cannot be a fair election. So the idea that they would not be permitted and you'd have an election, where the laboratory conditions had been by definition destroyed, doesn't make any sense to us.

MEMBER HAYES: That, of course, presumes that the charge itself had merit?

MS. BUNN: That's true.

CHAIRMAN LIEBMAN: Thank you.

MS. BUNN: We don't file non-meritorious charges, sir.

CHAIRMAN LIEBMAN: Thank you, Ms. Bunn, for being here with us today and sharing your thoughts.

MS. BUNN: Thank you.

CHAIRMAN LIEBMAN: Our next speaker will be Kimberly

Brown, and then next up will be Tom Coleman.

Good morning.

MS. BROWN: Good morning, Members of the Board. My name is Kimberly Freeman Brown, and I'm Executive Director of American Rights at Work. American Rights at Work is a national advocacy organization dedicated to promoting the rights of workers to form unions and bargain collectively for decent pay, safe working conditions, and fair treatment on the job. Since its creation, we have monitored and publicized decisions and actions of the Board and the impact of its actions on workers' abilities to form unions and address serious issues in their workplaces.

As an advocate for the rights of working people, I can attest that the issue addressed by this hearing is not solely a concern of unions or employers. And sharing a fair process to form a union is in the interest of broader civil society.

When workers have a voice on the job and are treated fairly, the goods we buy are better made and safer, the services we utilize and rely upon are better rendered, and our economy is stimulated by workers with families sustaining jobs.

It is for these reasons that I stand in support of the current proposed rule as an important step towards fixing an antiquated system that leaves workers without a fair chance to freely decide whether or not to form a union.

Without doubt, there is a problem here that needs to be fixed. Just ask Tricia Mayher from Nazareth, Pennsylvania. In 2007, Tricia and her coworkers at HCR Manor care were hopeful that with a voice on the job through a union, they could provide better service to their patients and a better life for their families, but the company took advantage of the endless opportunities for delay in the current union election process, and four years later, Tricia and her coworkers still haven't had a chance to vote. Unfortunately Tricia's story is not one of a kind.

Currently, when employees ask for an election on whether to form a union, they encounter significant obstacles in the form of needless bureaucratic delays and costly taxpayer funded litigation. It can take months and even years before they cast a vote. Some never get to vote at all.

Meanwhile, the process rewards unscrupulous employers who game the system by pursuing claims that are often irrelevant or found to be without merit in order to stall the election date. These tactics work.

According to a University of California at Berkeley study, when employers pursue litigation, elections occur an average of 124 days after the petition was filed. The longer the election is delayed, the more likely employers are to be charged with illegal misconduct. These unnecessary and drawn-out legal maneuverings damage employment relations,

hurt productivity, impair safety, and disrupt commerce.

The proposed rule is a step in the right direction. By cutting back on needless bureaucracy and delays, the proposed rule modernizes the union election process so workers can vote on whether to form a union if they want to, while still giving employers ample opportunity to make their case. Providing a clear, fair election process and reducing needless litigation will also improve stability and reduce conflict in the workplace so that everyone can get back to business. That's good for workers. That's good for employers, and it's good for the economy.

As responsible employers can attest, when workers do choose to form a union, it can make the workplace safer and more productive. Unions lift productivity on average by 19 percent to 24 percent in manufacturing, 16 percent in hospitals, and up to 38 percent in the construction sector.

At a time when millions of everyday Americans are struggling just to get by, any measure that helps give workers a real chance to protect their safety and economic interest, and have a voice in how best to perform their jobs, can't come soon enough.

In conclusion, at the very heart of this matter, this proposed rule is about one thing. When employees want to vote, they should have a fair chance to do so. As the countless workers who have seen their hopes for a better life

deferred again and again know all too well, justice delayed is truly justice denied. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you very much for your comments. Questions?

I wonder if you could respond to a number of the speakers who have said that because we are in an economic crisis, this is the wrong time to change our rules.

MS. BROWN: I couldn't disagree more, Madam Chairman. I think in a time like this, workers need to be able to have whatever they so choose to really be able to protect their economic interest, and when they choose to form a union, they should have the right to do so freely and fairly.

CHAIRMAN LIEBMAN: Do you think that changing the Board's representation case rules is going to be destructive to the economy?

MS. BROWN: I think it will do just the opposite. I think workers will have the opportunity to voice their interest, and oftentimes workers want to do the best job that they can and know often as much as their employer about how to do that efficiently and effectively. And a rule such as this would give them the opportunity to form a union and be able to bargain over the terms and conditions of their workplace, which would enable them to be better employees and work harder and ultimately to share in the rewards of the labor that they produce.

CHAIRMAN LIEBMAN: Thank you for your comments and for being here with us today.

MS. BROWN: Thank you so much.

CHAIRMAN LIEBMAN: Our next speaker is Tom Coleman, and next up after that will be Sarita Gupta.

Good morning, Mr. Coleman.

MR. COLEMAN: Good morning. Thank you for allowing me to speak here this morning.

CHAIRMAN LIEBMAN: A pleasure to have you.

MR. COLEMAN: I am a labor and employment attorney of many years standing and have represented management clients over the years and been involved in any number of NLRB elections.

I'm here this morning representing the Printing Industries of America, and with me is Jim Kyger, their VP for HR. The Printing Industries is the largest trade association representing commercial printers in the United States, and over 80 percent of these are directly involved in commercial printing. The rest of the membership is involved in ancillary responsibilities in the printing industry.

The point I'd like to emphasize is that the great majority of the members of PIA are small employers, and that's what I'm going to focus my remarks on this morning.

And before I get started, I would like to endorse the comments of my former colleague, Maury Baskin, who was here

earlier this morning. I agree wholeheartedly with his remarks.

But as I mentioned earlier, I'm going to confine my remarks to the election timeframes which have been referred to as the quickie election timeframes, and indeed Senator Enzi referred to it as election by ambush, and I think that's a pretty accurate description as I will comment on a little later.

In this regard, there was a witness who testified before the House Committee just recently, John Carew, a small businessman from Appleton, Wisconsin, and I think his remarks are apropos here, and I'd like to endorse them. Basically he said in discussing the impact of the NLRB proposal would have on small business employers, he said, "Already unions have the advantage of subtly influencing workers behind the scenes for months without an employer's knowledge to persuade employees to unionize. It is only fair that the employer be allowed the current timeframe to accurately communicate with employees. Employers are already at a disadvantage and under the new rule would be disadvantaged even further."

I think Mr. Carew was really speaking for the printing industry when he made those remarks. I don't think it's any secret, and I know other speakers have addressed this issue yesterday and today and undoubtedly this afternoon. The union's technique in organizing, particularly small

employers, is what I refer to as the run silent, run deep technique. They develop in-plant organizers, union supporters, and their advice is make sure that your manager or supervisor doesn't know what we're up to. Let's keep this a secret so we can surprise the employer, that when they get the petition, they're going to be knocked completely off guard. That is their strategy, and under these new rules, it will be even more effective.

Madam Chairman, you asked this morning, what does an employer do when they receive a petition? Well, first of all, when they recover, assuming they weren't aware of the union activity beforehand, when they recover in the printing industry, in many cases, they'll call Mr. Kyger and try and say, what do we do? Who do we contact? Is there a lawyer that can help us? And to try and do that in seven days before this pre-election hearing, that's almost impossible, certainly difficult but almost impossible to locate a busy attorney or consultant to get some advice as to what they can and cannot do, what the issues are, how they're going to defend themselves, how they're going to get their message across. All of those myriad things, that advice, that employers need, it's going to be almost impossible for them to do that in seven days.

The other thing is that I'm at a loss quite honestly to understand why these major changes are being made in the

election procedures.

My experience over the years, frequently I'll say the one good thing the NLRB does is run elections. They run them well. They know how to do them. The median timeframe by your own statistics for an election is 38 days, and over 95 percent of the elections have occurred within 56 or 58 days. This is not an unreasonable period of time in which to conduct an election. I'm not sure why we need these changes.

Let me just conclude by saying I think the Board should give some thought to the maxim, if it ain't broke, don't fix it.

We've got a good procedure now. Let's stick with it. The new rules are going to particularly penalize small employers and make it even more difficult for them to effectively communicate with their employees. Thank you.

CHAIRMAN LIEBMAN: Thank you. Questions?

MEMBER BECKER: I've got one question relating to the small employers that you work with. I assume that one serious consideration in participating in representation case proceedings is just the cost of the litigation. Is that accurate for a small employer say in the printing business?

MR. COLEMAN: That's certainly a factor, yes, that is a factor.

MEMBER BECKER: And then because one aspect of the rule is an attempt to limit those expenses. So, for example, you

have a concern about the scope of the unit, you litigate it before the Regional Director, and it comes out in a way that you're not happy with. You're the small employer. Currently if you don't file a request for review pre-election, you're out of luck. Under the proposal, you don't have to file that request for review. You can wait, and if the union loses the election, you've saved the expense of having to do that, or you can combine it, even if the union wins the election, and you have objections or challenges, you combine it with that. Isn't that efficiency a good thing for small employers?

MR. COLEMAN: I don't think so. I'm sure other speakers have addressed that very issue. I think employers like to have some certainty when they go into an election as to who is going to be eligible to vote rather than sweeping these issues under the rug and down the road. They're going to have to pay, these small employers and employers, generally either sooner or later, but the cost is still going to be there.

And let me just add one other comment here. During an election campaign, there are many, I don't have to tell the Board this, there are many complex rules as to what employers can do or can't do, and if they break those rules, there could be a rerun election or a bargaining order. So there's very significant consequences for violating the rules.

Employers, particularly small employers, who do not have

a lawyer on their staff, who do not have legal counsel or labor counsel available to them, need to get this guidance, and the Board is saying we're going to have a pre-election conference in 5 days or 7 days rather and an election possibly in 10, 12, 2 weeks. The employer is going to need all the help and assistance he or she can get, and it's going to be, as I said earlier, difficult, if not impossible, to obtain that kind of advice within the timeframe these new rules are seeking to establish.

MEMBER PEARCE: Does the printing industry that you're representing give seminars or training with respect to NLRB processes?

MR. COLEMAN: They do, but it is fairly limited because again the printing industry, like so many other industries, has been hurt by these difficult economic times, and Mr. Kyger that I mentioned earlier is like a one man band. He has to handle all sorts of labor relations and employment relations issues, doesn't have the resources or the time to go around the country putting on seminars to educate its members, particularly smaller members, and the smaller members don't have time to attend such programs. So if they're caught completely off guard as these new rules would allow, they're really at a loss and they're behind the eight ball. They don't have access to good sound advice and counsel as to how to live within the rules, and they don't

have an opportunity to get guidance on how they can communicate with their employees.

So I think it's extremely unfair to employers generally, but particularly the small employers.

CHAIRMAN LIEBMAN: Thank you very much for being with us today --

MR. COLEMAN: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts. We appreciate it.

Our next speaker will be Sarita Gupta, and next up will be Mr. Stephen Jones. Good morning.

MS. GUPTA: Good morning. Thank you to the Board. My name is Sarita Gupta, and I'm the Executive Director of Jobs With Justice. Jobs With Justice is a national campaign for workers' rights. We mobilize workers and allies in the faith community and communities across the country on campaigns to win justice in workplaces and in communities where working families live. We work with 47 coalitions in 26 states across the United States.

For many years now, we've worked to ensure that workers have a fair chance to vote whether to form a union if they want to. In 2010, Jobs With Justice local affiliates worked on over 137 workplace justice campaigns affecting 197,000 workers. In many of these campaigns, we've witnessed the negative impact of an outdated and broken process that stalls

and stymies workers' choices through delays, bureaucracy, and wasteful litigation.

I'm offering testimony this morning in favor of the procedural changes to the NLRB representation process. These proposed changes remove some of the unfair obstacles that we've witnessed in union elections.

Under the current process, workers encounter delays of months and even years. Some never get to vote at all. During these delays, employers run anti-union campaigns that prevent the workers from having a fair election process. These delays are often unnecessary, over extraneous or secondary issues that shouldn't prevent workers from getting a vote. An extra couple of weeks or three or four may not seem like much to a casual observer, but for a worker who is going through the daily captive audience meetings, one-on-ones and other anti-union tactics, it's really intense and serves to intimidate workers from exercising their right to vote on whether to form a union if they want to.

I'd like to just share a few examples. In Missouri, 18 employees at ESI Express Scripts petitioned for an election. In fact, within one hour, 80 percent of authorization cards were signed. As a result of unnecessary delays, the workers were subjected to weekly anti-union luncheons and daily one-on-ones to determine weaknesses in the unit. A number of employees quit because of the intense pressure to vote no

daily.

This is simply unacceptable. Workers should not experience such fear and intimidation that they choose to leave their jobs versus exercise their right to vote.

Excessive delays subject workers to intense anti-union campaigns waged by employers. We see this in all types of workplaces.

At MEMC Electronics in St. Peters, Missouri, the production unit filed for an election. During this campaign, the company hired two attorneys, took every issue they could think of to a hearing, was found guilty of 17 ULP charges the union filed against the company and appealed every decision made by Region 14 of the NLRB. After two years of stalling tactics, the union won almost every charge filed against the company as well as all hearings and appeals, but in the end, the union lost the election by a narrow margin, again due to the delays and the company's tactics.

And, finally, as a final example, at Sisters of Jesus Crucified in Brockton, which is nursing home in Massachusetts, the workers filed for an election. It took 70 days for the election to take place. During that time, the company intimidated workers to the point of fear to be seen with fellow union supporters. The last round of intimidation included leaflets that said, that workers would be going against the church if they voted. As a result, 80 percent of

workers signed cards; yet, only a small percentage actually voted. That is serious intimidation, and no worker should be subjected to that.

All of these examples demonstrate that the current system does not ensure that workers have the freedom to exercise their basic right to vote.

The proposed rules would provide stability and a level playing field for workers. These are modest changes, but much needed ones.

In closing, communities are really suffering right now as millions of Americans are out of work and struggling to get by. Wall Street reaps record profits while our neighbors are losing their jobs and their homes. Now more than ever workers need good jobs that can support a family. We believe that giving workers a chance to vote is essential to bringing stability to communities and to rebuilding our middle class.

Any bit of help for workers in this economy is a good thing. A voice on the job is critical to restoring balance in our economy. These proposed rule changes are a step towards helping us to restore this much-needed balance.

Thank you for the opportunity to testify.

CHAIRMAN LIEBMAN: Thank you very much for being here and providing your perspective. Any questions?

MEMBER PEARCE: You've heard the statistic about over 60 percent win rate for petitions that are filed. Has that been

your experience?

MS. GUPTA: Well, again I think I'll go back to the answer that one of the former testifiers offered which is that's a very small slice of cases to look at. I've actually experienced more of workers file a petition, and then the petitions are withdrawn because of the delay tactics and the intimidation and fear that workers are experiencing. When it does finally get to an election process, from my perspective, the work we have to do in the community to engage faith leaders, community leaders, to let workers know that there's support for them in the community, that they have support to exercise their right to vote is critical. We've become a critical part of communities helping to educate workers about their right to vote.

So I have mixed experiences with this, but will just offer that I think the proposed rule changes are important. They're modest steps. They certainly don't fix the problem overall that we see from our perspective, but I again want to affirm that I think it's an important step forward.

MEMBER PEARCE: Do you have the sense of the percentage of petitions that get withdrawn versus those that have gone to election?

MS. GUPTA: I don't have the numbers off the top of my head. I'd be happy to submit them as part of written comments for sure. I mean from our experience, we do track

the campaigns we work on and what we experience, I'd be happy to enclose that in written comments.

CHAIRMAN LIEBMAN: I wanted to ask the question I asked Elizabeth Bunn a little earlier about how you communicate with workers during these campaigns. Is it by visiting their homes, by phone or e-mail, or what means do you use?

MS. GUPTA: Well, in our case, you know, we're not a union, right, so for us the way that we communicate with workers is in their churches or temples or synagogues. Often we have a church leader who will say to us, you know, I have workers who came and said that they're trying to figure out how to form a union at their worksite, and they need a safe haven, a safe place to really talk to one another, their peers, and they open up their doors to make that possible.

Often we -- it's really through meetings like creating community spaces where people can come and share their perspectives and talk about the issues in their worksites, and what they need in order to have better working conditions to be able to support themselves and their families, and really be able to participate in the community in the way that they want to.

CHAIRMAN LIEBMAN: Thank you for your comments today.

MS. GUPTA: Thank you.

CHAIRMAN LIEBMAN: We appreciate it. Our next speaker is Stephen Jones, and then our last speaker for the morning

will be Professor Warren. Good morning.

MR. JONES: Good morning. Good morning, Madam Chair and Board Members. I just want to say it's a privilege and an honor to address the Board.

As an introduction, my name is Steve Jones, and I'm the Director of Human Resources for Chandler Concrete Company in Burlington, North Carolina, which by definition is a small business. Unlike most of the speakers that have been up here before you today and yesterday, I'm not here as a designated or official representative of any specific or particular group. I'm not an expert. I'm not an attorney. I guess you could say my interest and purpose is to offer the perspective of the impact of the proposed changes on the individuals who will be most affected, the employees.

I'm just a regular human resources practitioner who is in the trenches every day. I've worked as a HR professional for almost 30 years as an employee advocate, and I've supported employees at every level of an organization from entry level to the most highly skilled to include manufacturing plants, distribution centers, healthcare facilities and office environments. They've included union and union free workplaces.

I've spoken to my colleagues and have felt strongly to come before the Board.

Let me begin by saying that regardless of the company or

environment where I've worked, the day-to-day focus of the employees in these organizations has been on producing the product or service to meet the needs of their customers. The time is not spent on discussing the pros and cons or impact of collective bargaining or the legal aspects of an organizing campaign.

Similarly, the focus of the management teams in every company where I've worked has been on ensuring that the business remains competitive with the products and services it provides to its customers, both short and long term.

The time is not spent discussing how to define bargaining units or discussing behavioral or verbal nuances that might constitute unfair labor practices.

That being said, based on my experience and in conversation with many of my HR colleagues, the Board's proposed rule to accelerate the representation process will, in fact, create an undue hardship on both employees and employers similarly and should not be adopted in its recommended form.

In this age of technology, there's a propensity to try to do things quicker and faster, but we all know that quicker and faster does not always mean better. Unnecessarily rushing or accelerating the process will create a significant disadvantage for the employees who will be affected by the ultimate outcome. It may result in a loss of information, to

make the informed and educated decision about the work future and also would increase the likelihood and probability of error by employers, both of which would be bad for employees.

While there might be some opportunity for administrative changes to reflect the use and availability of technology, expediting the initial hearing and ultimately the secret ballot election will be disservice and disadvantage for every employee who might be affected by the outcome.

This does not mean that there's not other ways to do it. It just appears that there's no compelling data to support the proposed changes.

The organizing of the representation process has significant implications for very party involved, be it labor, employer, or the affected employees. All of these stakeholders should have a reasonable amount of time to gather, present, assess, and analyze information. The current process and timeframe seem to provide that level of reasonability, and there does not seem to be any data or outcomes that suggest the current timeframes are not working.

I've heard repeated concerns and accusations that the current timeframe allows for intimidation of employees which would be reduced or eliminated. This type of illegal behavior is already addressed through ULP sanctions. If that's the case, address the penalties, address the bad actors, and consider increasing the sanctions for those

offenses. Deal with the bad apples. Don't replace or go in and replant the orchard.

My concerns with the proposed changes are not because of a pro or con anti-labor or company sentiment. My concerns are more importantly focused on the detrimental impact it will likely have on employees who are involved in making a decision on collective bargaining.

Regardless of the size of the company that I've worked for, from a Fortune 100 to family owned and operated, the day-to-day focus has always been on making or producing the product or service the company offers to the market. This has become increasingly more so in the past years as the challenges of a difficult economy have required companies and employees to be efficient and effective as ever to remain competitive and viable. There's little extra time to spend on issues or topics that are not time current or value added for the customer, including the subject of collective bargaining or the representation process.

Given that over 90 percent of the private sector workforce is not covered by a collective bargaining agreement, it's reasonable to conclude that the average employee is unfamiliar not only with the representation process, but also with the pros and cons of a work environment where a collective bargaining agreement exists.

Reducing the amount of time to provide this information

to employees is a disservice to them and puts them at a disadvantage when they make their decision whether or not to support the idea of collective bargaining. They should be entitled to make an informed decision that includes giving consideration to all parties, labor as well as the company.

It's reasonable to conclude that the employees have been given a plethora of information regarding the pros of collective bargaining from the labor organization prior to the filing of the petition with Board. This sharing of information is not subject to any similar time restriction prior to the filing of the petition.

I think the notion or the belief that employees are regularly being given information by companies about the pros and cons of collective bargaining as a standard course of doing business is unfounded assumption. The typical small company employee's wearing a number of hats on any given day and is, as I stated earlier, focused on doing his or her job to their best of their ability to help to keep the competitive and viable.

Ongoing training and education on the representation process and the accompanying legalities is not one of those regular activities.

The typical response by an employer upon receipt of a petition includes developing a schedule in the plant to meet with employees to begin the education process.

In my world, the production and distribution of ready mix concrete, the logistics of this can be daunting given the nature of our business, the geographic distribution of our facilities and the lean staffing that we have. Condensing the timeframe to get this done is not only fair to each employee, it would most certainly disrupt the business such that customer service will be adversely affected which will lead to lost contracts, lost revenue, and possibly lost jobs. None of these is in the best interest of employees.

This lack of information also extends to the average employer. Many large corporations have ready or convenient access to labor attorneys or experienced HR professionals either on staff or retainer, the average small business owner is not afforded this same luxury. The receipt of a petition for representation will set in motion an immediate search for an available and experienced resource and labor lawyer to help understand the requirements of the petition and to adequately prepare for the hearing.

Likewise, most do not have an experienced HR professional as an additional resource. As a result, when they receive the petition, the availability of a labor attorney to assist them in the process may take several days or longer to secure.

May I have more time?

CHAIRMAN LIEBMAN: Yes.

MR. JONES: Meanwhile, with the clock ticking, perfect timing, and the legal wrangling that goes into high gear, the affected employees are not given adequate or sufficient information or attention as the focus is on responding to the petition and preparing a response for the hearing, and as a HR professional, I can tell you that the focus on responding to the petition also reduces the amount of quality time and focus that a company gives to educating and training its managers on their legal responsibilities during the representation process.

This alone can and in most cases likely will result in increased unfair labor practice charges which will ultimately end up taking more time on the part of the Board, and the ultimate impact of these will be on the employees of the company, the stakeholders who should benefit from the proposed changes.

The current representation process enables all stakeholders to provide information, review, assess, and analyze this information before a final decision is made through a secret ballot election by employees. It supports giving employees the opportunity to make an informed decision, not one that is rushed or hurried. I think all of us agree that we need time to gather and evaluate information when we make significant decisions that will affect and impact our lives such as getting married, buying a home, as

well as anything that has to do with our jobs and our careers.

Why should we rush the representation process when there seems to be no basis either in fact or reality that such change will ultimately benefit the overwhelming majority of employees who might be affected by the outcome of a representation election?

In closing, I encourage the Board to give serious consideration to who specifically will ultimately benefit from the proposed changes. It's my strong belief that none of the proposed changes will result in a more positive process for the employees affected.

Based on this, and this alone, I encourage the Board not to pursue the proposed changes as they will ultimately affect those it is intended to help, the employees affected in this process. At the end of the day, we should all want a fair process, not just a fast one. Thank you for your time and attention.

CHAIRMAN LIEBMAN: Thank you very much for your comments. Are there questions?

MEMBER BECKER: How many employees does Chandler Concrete have now?

MR. JONES: 425.

MEMBER BECKER: And are they currently organized, unorganized? What's their status?

MR. JONES: We're not organized, no, sir.

MEMBER BECKER: And have there been petitions in the recent past since --

MR. JONES: We have not had any, not since I've been working there, no, sir.

MEMBER BECKER: Thank you.

MEMBER PEARCE: Does Chandler Concrete have an employee handbook that talks about unions?

MR. JONES: Do we have a handbook that talks about unions?

MEMBER PEARCE: Yeah.

MR. JONES: We have a handbook, and we have a simple statement that we believe in direct contact with our employees.

MEMBER PEARCE: Okay. And organizing or unions are not mentioned in the handbook?

MR. JONES: It's a union-free statement.

MEMBER PEARCE: I see.

CHAIRMAN LIEBMAN: I'm curious. Based on your experience doing this work, for sometime I guess?

MR. JONES: Yes, ma'am.

CHAIRMAN LIEBMAN: I some years ago once asked an attorney representing management what he thought was a fair time for an employer to conduct a campaign. What do you need? He said, well, to be frank, I need a week. He said

that there's sort of a standard routine campaign that's four weeks - one week to talk about this, second week to talk about this, third week this, fourth week, but he said I can communicate it in one week.

I've heard union people, union organizers say that even from their own campaigns, that the longer it goes on, there comes to be a point after which it becomes maybe counterproductive. That's not the right word, but it's kind of meaningless. It doesn't add that much to informing people, and I've heard management people say the same thing.

I'm curious from your perspective, what it fairly takes for an employer, and let's take the median size bargaining unit which is, what, 24. Your place of business right now is larger, but what do you think it would take to be able to inform your employees fairly of your views on unionization?

MR. JONES: I think the current timeframe is sufficient to a point. I think the, you know, the comments that were made earlier by one of the speakers in a small business, a truly small business, a 24-employee type operation, I think that there's a tremendous burden that's put on probably one or two or three individuals that are wearing so many different hats that in order for that person to digest and understand the implications of the process, I think that the current timeframe is at a minimum at best in terms of communicating.

I think there can be too short a period because, again, we have to remember that we're trying to run businesses and we're trying to service customers, and in today's economy, I will tell you, that once the attention is taken off of making or producing whatever it is that you do, and it is taken away from that customer, you have somebody standing right behind you that's ready to take those customers away from you, and anything that serves as a distraction and a shortened timeframe is going to create an even greater "distraction," if you would, time not spent on the reason that everyone is there.

So I don't know if I answered your question directly. I can't give you a certain time. I think again, 30 days, 45 days probably is on the short side. Even in a small organization because that person has so many different hats to wear.

CHAIRMAN LIEBMAN: Even in an organization that is having captive audience meetings once a week or talking to its employees one-on-one even in short periods of time? You need to do this week after week after week?

MR. JONES: Well, and again, very hypothetically speaking, I can't imagine many employers taking a tremendous amount of time away again from their day-to-day business, spending, you know, eight hours in a meeting or two hours in a meeting day after day or week after week, because staffing

is so lean now and the focus right now is on servicing customers. I guess I haven't seen that. I don't know anyone in my world of contact that would be able to do, you know, kind of what you're saying. That's why I think that that 30 to 45 day window is probably a minimum.

CHAIRMAN LIEBMAN: Thank you for your comments. Anything else?

MEMBER PEARCE: As a HR director, part of your responsibility would be to orient your managers into labor relations issues.

MR. JONES: Yes, sir.

MEMBER PEARCE: So that would include organizing drives and how to respond to them and so forth. Wouldn't that be the case?

MR. JONES: We don't get to that level of detail. We do have obviously, you know, some conversation and training about basic fundamental communications. If, in fact, you know, talking about the dos and don'ts I guess, the TIPS, et cetera, that's the basic training that we provide because anything beyond that is so hypothetical and speculative, and they have so many things on their plate that the chances of that kind of sticking so to speak is really not very bright, and we do not go to that level of detail.

MEMBER PEARCE: Thank you.

MR. JONES: Does that answer your question?

MEMBER PEARCE: Yeah.

CHAIRMAN LIEBMAN: Thank you very much --

MR. JONES: Thank you.

CHAIRMAN LIEBMAN: -- for being with us today and sharing your thoughts.

Our last speaker for the morning will be Professor Dorian Warren. Good morning.

PROF. WARREN: Good morning. Chairman Liebman, Members of the Board, thank you for allowing me the opportunity to present my research findings to you this morning.

My name is Dorian Warren, and I'm an Assistant Professor of Political Science and Public Affairs at Columbia University where for five years my research and teaching has focused on labor politics, labor policy, and social science methodology. Before my present employ, I taught for two years at the University of Chicago, and I completed my doctoral work in political science at Yale University.

Now, several weeks ago, Columbia University released the study I coauthored with Professor Kate Bronfenbrenner of Cornell University entitled, "The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence."

Our research is directly relevant to the proposed rule changes to streamlining representation election procedures. Simply put, our findings, using a unique dataset of unfair

labor practices and representation elections, indicate the need for streamlining and modernizing the NLRB certification process. Our data shows that employer opposition or what's been called communication on these hearings begins much earlier than expected and continues every day all the way through to the election.

Let me first briefly explain our research methodology because I think it's important and interpreting our findings, and then second, I want to share just some of the most significant findings from our research, and again, these findings have direct relevance to the proposed rule changes and they also refute many of the arguments presented yesterday and this morning.

So first on methodology, the data for analysis originate from a thorough review of primary NLRB documents, starting from a random sample of 1,000 NLRB elections that took place between 1999 and 2003. Using the Freedom of Information Act process, we requested all unfair labor practice documents for every case in our sample from the Board with a response rate of 99 percent.

Our method of measurement for this study is the time between the date of occurrence of serious unfair labor practice allegations, the date of the petition filed, as well as the date the election was actually held. We read through the entire ULP document files, including employer responses,

settlement agreements, complaints, dismissals, withdrawals, testimony, affidavits, and Board and Court decisions until we located the specific date for each serious violation and the charge that was found. Now, this was time-consuming data to collect, and for this reason, the data I'm presenting today is only for the last year of our sample of 2003.

Now, by the standards of rigorous social science research, not simply a few select unrepresentative cases, we have systematic and not anecdotal evidence about when the employer campaign begins and from this evidence, we can make valid and generalizable claims about the NLRB election process.

So to the findings, we have heard hyperbolic claims from those opposing the proposed rule changes that employers do not have the opportunity to express their views to workers. They're ambushed suddenly when workers file a petition for an election, and that the proposed rule changes would eviscerate workers' ability to make an informed choice. And, in fact, one witness even claimed yesterday that employers do not know about a union campaign until petitioners present their cards. All of these claims are empirically false.

Our ULP documents show that some of the most egregious employer opposition starts long before employees have even filed a petition. So some numbers, 47 percent of serious allegations are filed before the petition, and 86 percent are

filed before the election. Sixty-seven percent of all serious allegations are filed within two weeks after the petition is filed. Forty-seven percent of all serious allegations won by employees, through Board or court decisions or settlements, occurred before the petition was filed. And 89 percent are won before the election. Sixty percent of allegations of interrogation and harassment are filed before the petition. Fifty-four percent of allegations of coercive statements and threats are filed before the petition. And finally 39 percent of allegations for discharges for union activity are filed before the petition, while 76 percent of these are filed before the election.

The punch line is this. Contrary to previous witnesses who claim that employers have little or no ability to communicate effectively with employees, the voicing of employer opposition to union representation begins from the moment employees begin talking about the union and continues day after day, week after week, leading up to the election.

Our study reveals the pervasiveness, consistency, and intensity of employer opposition to workers' exercising their rights to union representation, and we'll submit the full study as part of our written testimony.

CHAIRMAN LIEBMAN: Thank you for your comments. Questions?

MEMBER BECKER: I've got a question about the data and

how you categorize it. So you said, I think I heard, that 47 percent in this sample, particularly in the year 2003, in election cases that occurred, within that year, that 47 percent of the charges that were filed relating to employer conduct, employers who are involved in those elections, occurred prior to petitions. How did you determine or did you determine the nature of the conduct? That is, how do we know that that was campaign-related conduct which led to the charge?

PROF. WARREN: This is, they're reading one by one every bit of evidence in the file. So the testimony, the affidavits, the decisions by the Board itself, complaints, settlement agreements, withdrawals. So we went through every single file and determined based on the evidence in those files that these were campaign-related serious allegations.

MEMBER BECKER: And campaign-related in the sense that the charge resulted from active employer conduct, that is, for example, we see charges where organizing begins and in the course of organizing, the union reviews the employer's handbook and finds rule and files a charge based on the rules. So that seems to be different than a charge which results from active employer campaigning. Did you sort in that respect?

PROF. WARREN: Yes, we have charts that are very explicit in terms of which charges we identify as serious

campaign-related unfair labor practices versus non-serious allegations. So that's very clear in our report, in our tables.

MEMBER BECKER: Well, this is not so much a question of serious versus non-serious, but whether the conduct which formed the basis of the charge is properly categorized as campaign conduct. Do you feel like your sifting is sensitive to that question?

PROF. WARREN: Yes, and we also, of course, in the peer review process as well as invite others to follow our tracks in terms of also doing this kind of analysis. It's all public information, but we're very competent in our typology of the description of the charges as being campaign-related.

MEMBER BECKER: And you indicated that a preliminary version has been published, and what's the plan for the rest of the study?

PROF. WARREN: So because it's so labor and time intensive, we were only able to do that one year in our sample. We're continuing to do the analysis for the other four years in our sample. At that point, we'll submit variations of this to peer review journals.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Questions?

Thank you very much.

PROF. WARREN: Thank you.

CHAIRMAN LIEBMAN: We appreciate your being here with us today. We thank all the witnesses from this morning for your comments and for being with us. I hope you will join us for the afternoon session.

We're going to break now. We will resume promptly at 1:00 p.m. I will remind you once again to take your badges and numbers with you, and we have escorts to take you down to the lobby.

And we stand in recess. Thanks very much.

(Whereupon, at 11:55 a.m., a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

(Time Noted: 1:00 p.m.)

CHAIRMAN LIEBMAN: Welcome everyone back to our afternoon session. And we're going to get started. Our first witness this afternoon will be Lexer Quamie, and after that will be Steve Maritas.

So, good afternoon.

MS. QUAMIE: Good afternoon, Chairman Liebman and Members of the Board. I'm Lexer Quamie, counsel with the Leadership Conference on Civil and Human Rights. The Leadership Conference is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Through advocacy and outreach to targeted constituencies, the Leadership Conference works toward the goal of a more open and just society and America as good as its ideals.

The Leadership was formed largely by civil rights and labor organizations under the able and visionary leadership of labor and civil rights giants, A. Philip Randolph, founder of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council.

In the 61 years since its founding, the Leadership Conference has worked closely with members and partners in the labor movement to fight for equal opportunity and social justice. Together, we have worked to pass civil rights laws banning discrimination in employment, voting, and housing; to outlaw job discrimination; to win employment and other rights for people with disabilities; and to extend family and medical leave protections to millions of American workers.

To the Leadership Conference, workers' rights, including the right to organize unions and engage in collective bargaining, have always been civil and human rights. As a civil rights organization, we are deeply troubled by the systemic problems workers face in the exercise of these rights. It is some of these problems, including the delays in the election process, that the Board is seeking to address in its proposed rule changes.

Currently, if employees petition to have an election on whether to form a union, they encounter significant uncertainty and obstacles that render the process unfair. Because of litigation and other delays, it can take months or even years before workers get to cast a vote. Some never get to vote at all. But by eliminating unnecessary delays and modernizing an outdated system, the proposed rule changes would remove unfair hurdles to workers choosing whether to form a union. It helps ensure a clear, standardized process that both employers and workers deserve.

The Leadership Conference supports the proposed rule changes as a modest step forward in removing roadblocks for workers who wish to decide for themselves whether or not to form a union at their workplace to bargain with employers. The ability of workers to have fair representation in elections is important to allow them full participation in the workplace.

As a civil rights organization, one of our core missions is to protect the right to vote and ensure a fair elections process. Full participation in elections is part of the democratic process. In the workplace context, the proposed rule changes by the NLRB would help to ensure that workers have a right that is central to our democracy, a fair chance to vote.

We share the belief that employees should be afforded a free and fair process by which to choose workplace representation. As such, we urge adoption of the proposed rule changes. Thank you for the opportunity to share comments on behalf of the Leadership Conference on Civil and Human Rights with you today. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your comments.

Are there any questions?

Thank you for being here.

Mr. Steve Maritas, did I get it right?

MR. MARITAS: Maritas, yes. Good afternoon, Chairman Liebman.

CHAIRMAN LIEBMAN: Good afternoon. Welcome.

MR. MARITAS: Members of the Board, my name is Steve Maritas, and I am the organizing director of the International Union, Security, Police and Fire Professionals of America, SPFPA, the largest, oldest, and fastest growing

9(b)(3) security police union in the country today. I bring greetings from our International president, David L. Hickey, and our executive board. I thank you for allowing me the opportunity to speak, not only on behalf of the SPFPA, but on behalf of the organized labor and workers everywhere who wish to join a union.

To give you a little background about myself, for over 30 years I've been at the forefront of the labor movement as well as a union organizer working with many unions in various industries and issues, including Employee Free Choice Act. I've learned all about the benefits of belonging to a union at a very young age, whereby my father, Teddy Maritas, former president of the New York District Council of Carpenters back in the late '70s, taught me the importance of belonging to a union. Unionization was in my blood, and I was determined to become a union organizer walking in my father's footsteps. This was evident by the fact that my mother told me my first words out of my mouth was not mommy or daddy but union.

On September 11th all of our lives changed. For me, these change of events brought me to Michigan. Over the last 10 years, as organizing director of the SPFPA, our union has filed hundreds of representation petitions, averaging about 100 campaign elections per year. Statistically, our union has been listed by BNA year after year as one of the top 15 most active organizing unions in the United States today.

BNA has also recognized us as being one of the top five unions in the country in regards to the number of campaigns run and the number of workers successfully organized, averaging about 3,000 to 4,000 members per year.

In addition to these achievements, the SPFPA organizing department, which consists of three full-time organizers, Mr. Joseph McCray, Dwayne Phillips, and myself, have the highest win rate amongst all unions, a 78 percent win rate, a record I am proud of.

As I stand here today, I continue to fight for the rights of workers everywhere. And in doing so, I'm in support of the proposal that streamlines the process and limits the union-busting tactics used by employers in these union campaigns. Over the last two days, you've heard over and over again by high-priced union-busting attorneys and consultants that they are concerned about workers' rights and the effects it would have if this proposal was enacted. This is a lie.

You have heard that the average election takes place within 36 days of filing a petition. This is a lie. It's 42 days or longer, and that's if you get an election. You've heard that management first becomes aware of union organizing drives only after a petition is filed. This is a lie. The truth of the matter is management is not concerned about workers' rights, but, in turn, they're more concerned with

keeping 100 percent control of their business to do whatever they want whenever they want at all cost.

Martin J. Levitt, author of Confessions of a Union Buster, defines union busting as a practice that is undertaken by an employer or their agents to prevent employees from joining a union or to disempower, subvert, or destroy unions that already exist. Union busting is a field populated by bullies and built on deceit. A campaign against a union is an assault on individuals and a war on the truth. As such, it is a war without honor. The only way to bust a union is to lie, distort, manipulate, threaten, and always, always attack.

While the National Labor Relations Act under Section 7 writes or states that employees shall have the right to self-organization to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid and protection or to refrain from such, the truth is this can only happen if workers trying to form a union can withstand the psychological warfare that they're going to experience by management and their anti-union busting attorneys, consultants, and persuaders over the next 42 days preceding their union election.

Psychological warfare is defined as the planned use of

propaganda and other psychological actions having the primary purpose of influencing opinions, emotions, attitudes, and behavior of hostile foreign groups which are union supporters in such a way as to support the achievement of national objective, which is the company. This is what management calls free speech.

Over the last 70 years, labor law has always been a friend to the employer and an enemy to the worker. As this Board sets the course to make history, I commend all of you for taking the initiative and making the right decision. However, there are two parts to this problem.

The first is being addressed today before this Board. The second part which needs to be addressed is to establish a time table that shortens the election process from 42 days to 21 days, making it illegal to hold mandatory union-busting meetings without allowing equal access so that both sides can be heard. This will allow employees to ask questions without fear, without coercion, without intimidation. Authorizing civil penalties up to $20,000 per violation on an NLRB finding of willful and repeated violation of employees' statutory rights by an employer or union during a union campaign. Authorizing the NLRB to order back pay without reduction for mitigation when an employee is unlawfully fired. Requiring both the union and management to begin negotiations within 21 days after a union is certified. If

there is no agreement after 120 days from the first meeting, either party may call for mediation by the Federal Mediation and Consolidation Service and binding arbitration thereafter if need be. On finding that a party is not negotiating in good faith, an order may be issued establishing a schedule for negotiation and imposing costs and attorney fees. Broaden the provisions for injunctive relief with reasonable attorney fees on a finding that either party is not acting in good faith. The list goes on and on, and I will put it in writing for you.

In conclusion, I want to thank Chairman Liebman and the Board for this opportunity to present my views and to leave you with this final thought. Unions don't organize workers; management does it for us. Thank you.

CHAIRMAN LIEBMAN: Thank you for your comments today.

Anybody have questions?

MEMBER PEARCE: You say you've got a 78 percent win rate. What accounts for that?

MR. MARITAS: Counting on how we do it?

MEMBER PEARCE: Yeah, what accounts for it?

MR. MARITAS: Knowing what they're going to do before they do it. It's education. Union busting is an art. One thing that management does with these consultants is that they have a handwritten book that they just do over and over and over again. So, when you pretty much, if you know what

they're going to do, you educate the employees prior to a union-busting campaign exactly what's going to happen. So, as soon as management goes in and handles a union-busting meeting or starts telling them some of the propaganda, we have a checklist. And all of a sudden, they start checking off one by one by one, and they say oh, I must be the smartest guy in the world because I told them this is exactly what's going to happen. So, primarily it's education.

MEMBER PEARCE: Now, there's been testimony about management not knowing about the union campaign until the petition is filed, and you said that that's inaccurate. What's been your experience?

MR. MARITAS: Well, my experience is, first of all, if management doesn't know what's going on with their business, they've got a problem. So, I mean, when you start organizing, workers are disgruntled. First-line supervisors that are there, there's got to be a communication gap within. One of the speakers prior to me testified that with the unfair labor charges that took place prior to an election even being filed. They're aware of it.

They know who the key people are. My experience is when our key guy goes in, a number of things happen. Number one, we identify who the lead organizers are. And the reason why we do that is for their protection, because we have a documentation showing exactly that they are the organizer.

And if they should be fired in the interim, that they would be protected. We would have a backup document. And I tell you, my experience by doing that has protected them from being fired in most of my campaigns. Whereas you don't identify the particular organizer, you know, and then all of the sudden they're fired for one reason or another, and then you have to prove that it was because of the union activity.

MEMBER PEARCE: So, these organizers are identified before the petition is even filed?

MR. MARITAS: That's correct. Once we get started, we will send a letter to management identifying the organizing committee, letting them know what their rights are as an employee, and not to retaliate against them. And if they do, then we'll take the appropriate action.

MEMBER PEARCE: Do you do all the representation procedures yourself, or do you hire attorneys?

MR. MARITAS: Well, we have an attorney, but I work very closely with my attorney, and we both strategize if we have a hearing and so forth, so depending on the issues.

MEMBER PEARCE: Thank you.

MR. MARITAS: Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your testimony here today.

Next is William Messenger, and up next will be Joseph Paller.

Good afternoon.

MR. MESSENGER: Thank you, Chairman, Board Members for the opportunity to speak before you today. My name is William Messenger, and I'm with the National Right to Work Legal Defense Foundation. And also with me today is our legal director, Ray LaJeunesse.

Now, the Foundation is somewhat unique in that we don't represent employers or unions. But rather, since 1968, we've been providing free legal representation solely to individual employees, and this includes in decertification and organizing campaigns. And, of course, the very purpose of the National Labor Relations Act is to effectuate and protect the rights of employees and not to effectuate the self-interests of unions or employers. And the Foundation largely opposes the proposed rules today because they invert the Act's purposes by putting a union's interest in obtaining certification before the interest of employees in learning about the pros and cons of unionization before being required to vote on it and before their interests in privacy.

Now, foremost, the Supreme Court in Chamber v. Brown recently recognized that employees enjoy an implicit right to receive information opposing unionization. The proposal to shorten the timeframe for elections will impair the ability of employees who may not even have an opinion on unionization to learn about the pros and cons before being required to

vote on it. And, moreover, it will also impair the ability of employees who are opposed to unionization to exercise their Section 7 rights to engage in concerted activity in opposition to the union. Obviously, a union will be fully prepared to campaign before an election occurs, as the union controls when a representation election will happen. By contrast, employees could be caught flatfooted and unable to organize themselves before the vote actually occurs. And for this reason, the shortened timeframe tilts the playing field against employees and in favor of unions.

And, second, the proposed rules contemplate a serious invasion of employees' personal privacy, namely, of course, the disclosure of their personal phone numbers, e-mail addresses, and work times to unions and thus to union supporters. The 93 percent of private sector workers who have chosen not to associate with the union, or the tens of millions of people who sign up for the FTC's no-call solicitation list would likely be appalled to learn that a government agency is contemplating handing out their personal information to a third-party special interest group without their consent, or even potentially over their objection.

And perhaps even worse, the contemplated disclosures place employees in danger from what union supporters may do with the information. Unions will inevitably share the personal information they've been given about employees with

their supporters, to include some of the employees' own coworkers for the purposes of supporting their campaign. And, in fact, that's the very purpose for the disclosures.

Once this information is given to a union supporter, it is quite foreseeable that union supporters can and will misuse this information in a variety of manners, including potentially without the knowledge of the union. For example, a union supporter could use the information not only to harass an individual who opposes the union, such as by late night phone calls or signing them up for spam, but it could also do the same to someone against whom they have a personal grudge.

The information could be used by an individual to make unwanted contact and sexual advances on coworkers. I believe that many women in the workplace would not be comfortable with knowing that any of their coworkers who happen to support the union campaign could potentially learn her e-mail address, her phone number, where she lives, and what time she gets off work.

The disclosure of the information will naturally facilitate identity theft. A recent and prime example is that of Patricia Pelletier, whom CWA supporters signed up for hundreds of unwanted magazine subscriptions and other advertisements in retaliation for her leading a decertification campaign against the union after obtaining

her personal information.

And, finally, disclosures could even lead to home burglary and theft of property because they reveal exactly when people work. If someone knows when you're at work, they obviously know when you're not at home. And the problem is there's no rule or restriction this Board can impose upon a union to alleviate these harms or fully protect against them rather because they're the inevitable consequence of unions sharing this information with their supporters. And once a union or anyone else shares information with someone, it can't fully control how it will be used. It can't fully control who they may share that information with, and it can never actually retrieve that information back, as it can obviously be easily copied. The cat is out of the proverbial bag. And for this reason, to protect employees' privacy and to protect them from threats of harm by union supporters, I urge the Board to not enact the contemplated disclosure rule. Thank you.

CHAIRMAN LIEBMAN: Thank you for being here and sharing your thoughts.

Are there questions?

MEMBER PEARCE: You recited one example of an employee who was subjected to unwanted subscriptions because she led a decertification campaign. Do you have any kind of statistics on how prevalent union abuse of employees through information

is?

MR. MESSENGER: No, Your Honor. I'm sorry, force of habit. No, Board Member. I do not at least at my fingertips. The Foundation will be submitting much more detail and written comments before the August 22nd cutoff, and so those might have more details. But again here, one of the bigger fears isn't necessarily what the union does with it, but once it gets out.

MEMBER PEARCE: I see. Now, I've got another question. You realize that those petitioners who file decertification petitions would be privy to this same information under the proposed rule. So, an individual filing a decertification petition who wants access to information regarding the other employees would be entitled to get phone numbers and addresses and e-mails as well.

MR. MESSENGER: Yes.

MEMBER PEARCE: Would you have an objection to that?

MR. MESSENGER: Yes, the same objection. Once that information is given, and here it's just to an individual. What rule or restriction can be imposed upon an individual employee who does a decertification election to safeguard that information? If that employee gives it to some of his supporters who also want decertification, the information can spread. And eventually, that information can find its way into the hands of someone who will misuse it. For example,

one of the supporters of the campaign may be a fine man, but his son might not be. And all of a sudden, he has a list of everyone's phone numbers, e-mail addresses, when they're not at home. There's a lot of damage that can be done with that.

MEMBER PEARCE: Now, there's been prior testimony with regard to the insufficiency of certain Excelsior list information that petitioners have experienced, you know, outdated addresses, inability to contact people just by virtue of what is currently supplied in the Excelsior requirements. Do you think that those are valid considerations?

MR. MESSENGER: Only representing employees, I can't necessarily say of how accurate Excelsior list information is based on my own experience. Obviously, if there is outdated information on the Excelsior list, requiring more information won't solve that. Arguably, you'll just get more invalid e-mail addresses. People change them all the time. Cellular phone numbers are also changed with probably more frequency than a home address. So, as far as Excelsior lists being inadequate because they're inaccurate or outdated, the contemplated additional disclosures don't solve that.

MEMBER PEARCE: But you would agree that all parties, all the stakeholders should have equal access to each other relative to an election campaign, wouldn't you?

MR. MESSENGER: Not necessarily. I believe that

employees' personal privacy should trump over the ability of a union to contact them.

MEMBER PEARCE: Okay, now, employees usually have to supply this personal information to the employer. Wouldn't that give the employer the decided advantage in terms of communication?

MR. MESSENGER: Well, not necessarily because, first, how can the employer actually use it? For example, it's my understanding employers cannot conduct home visits. So, having their personal address isn't an advantage there. How much can they actually use employees' personal e-mail addresses to do things, even if it was allowed? But even more importantly, the interest of the Act is not balancing the rights of employers against the rights of unions. It's all about what is best for the rights and interests of employees, and I believe the threat to employees' personal privacy outweighs any kind of attempt to balance the electoral campaign between unions and employers.

MEMBER PEARCE: So, in that regard, you would -- it would be your position that unions should not have access to employee e-mail addresses?

MR. MESSENGER: Yes.

MEMBER PEARCE: And by the same token, you would not want employers to have access to employees' e-mail addresses as well?

MR. MESSENGER: No, I didn't -- for an employer, as I said, they may already have it. They can use that realm of communication. And the fact that an employer can use certain communications or have certain information the union doesn't strike me as being particularly problematic.

MEMBER PEARCE: I see. Thank you.

MEMBER BECKER: Just following up, if the Board were to conclude, for some of the reasons that Member Pearce was describing, that it's important to have equal access to voters for purposes of communication, we invited comments on exactly the concern that you have, that is what would be an appropriate sanction. The proposed rules bar the misuse you describe. That is, they require that the information only be used for the representation case proceeding, and we invited comments on what might be an appropriate sanction. Do you have any thoughts about that?

MR. MESSENGER: My concern is that since the purpose of the information is to allow union supporters to contact their coworkers, or in the case of non-coworkers, people in the bargaining unit, and the problem is once the information is given out, what kind of control can the union have? So, even if you have a union that intends to do nothing wrong, once the information is given, it's out there. And then, therefore, it can be misused.

Now, of course, one could restrict the union so tightly

on how it could use the information, but then that defeats the purpose. If the union has to keep it in lock and key in the union president's office, there's no point in the disclosures anyways. The only point of the disclosure, at least under the contemplated rules, is for the union to give it to their supporters to contact others. Once they do that, the union doesn't control it. It's out there.

MEMBER BECKER: Well, one could imagine a range of potential sanctions which would at least create an incentive to impose controls which would address your concerns. For example, if there was such a misuse, you could bar disclosure in a subsequent petition.

MR. MESSENGER: But even with that, let's say the union in that example though didn't do anything wrong. Say the union, you know, if there's four campaign supporters that said we want to volunteer to help, and the union hands them the list, and then without the union's knowledge, one of them misuses it, or their son uses it or whatever happens. It's out there. And once it's out there, you can't control the spread, and that's the problem. I don't see an appropriate sanction to alleviate that problem, other than not allowing the union to give it out to anybody. But in that case, it's useless.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: I'm curious, just sitting here

listening. This is not part of this proposal, but I guess our last speaker ran off a list of proposals that he thought we should be considering, and one of them was equal access into the workplace. I mean, as I said, it's not part of this proposal, but I listened to you, and you seem to be interested in employees hearing both sides. Is that a way of avoiding these problems of giving out employees' phone numbers and e-mail addresses and raising privacy concerns, to have a forum in the workplace where the employer and the union both can talk to employees? Is that a better solution?

MR. MESSENGER: It potentially could be, but, of course, it would require an amendment of the Act under Lechmere due to employer, you know, property rights. And it also creates the problem of the impression created of an employer conducting a meeting, you know, with the union. You know, is this an employer sanction? How do you -- how does the Board even run such a thing, even if it was given statutory authority. It would be very troublesome.

CHAIRMAN LIEBMAN: Thank you for your comments.

MR. MESSENGER: Thank you.

CHAIRMAN LIEBMAN: Next speaker is Joseph Paller, and after that will be Mr. Russ Brown.

MR. PALLER: Thank you, Chairman Liebman, and thank you members of the committee. My name is Joe Paller. I work for Gilbert & Sackman in Los Angeles where I represent labor

unions and employees. I'm not here representing any particular group. I came because of the opportunity to participate in what I see as a historic and great process, the first open public meeting of this kind I can remember. I see it as a real advance in the rulemaking process because it gives everyone who has an interest an opportunity to meet and interact with the Members of the Board and to share their views and see the rulemaking process in action. So, thank you for giving me the opportunity to be here.

I came here today to talk about two somewhat technical aspects of the rules that are proposed, and I think they're important. One was just addressed by the last speaker, and that has to do with the proposed revisions of the Excelsior list rules. The second I wanted to talk about if I have time is the proposed revisions to Section 102.66(d), which would entitle a hearing officer to close a representation hearing if fewer than 20 percent of the members are involved in an eligibility issue. And the idea is you would conduct the election and then later on, if necessary, you would have the hearing to determine whether or not someone should be excluded or included within the unit as a supervisor or as a bargaining unit member.

Well, turning to the first issue, the Excelsior list issue, as the last speaker alluded to, for decades the Board policy has required employers, after a direction of election,

to give the union a list of the names and addresses of all the employees in the proposed unit or in the unit that's been ordered for the election. And the purpose is to give the union and the union adherents an opportunity to interact with their coworkers and to discuss the merits of unionization.

That kind of list omits the important information that people need in order to communicate. It gives people home addresses, but it doesn't give e-mail addresses or telephone numbers. And so, it puts the union in the uncomfortable position sometimes of having to go to people's homes. Now, most people find that in this day and age a little bit annoying. They would much rather be contacted by phone or by e-mail. And in areas like Southern California, it becomes almost impossible to reach all of the parties by just planning on visiting them at their homes or even visiting them at the workplace.

And let me give you a real world example. This is a representation case that took place in January of 2011. It was a fair and square election all the way. Everything was done right. There were no unfair labor practice charges filed, no petitions for review. But the union lost the election. Now, this was a clinic that employed nurse practitioners in a large drugstore chain in Southern California and employed a small unit of about 30 people in Southern California area. Well, they were scattered. This

is Southern California. Some people lived in Diamond Bar. Some people lived in Ventura. Some people lived in Long Beach. Some people lived in San Dimas. You had an area that was a 100-mile radius where these employees worked. Under those circumstances, it really became truly impossible for the union to visit everyone at their home. Making matters worse, the nurse practitioners would go from store to store, sometimes three or four different stores in a day, and the union could not show up at a particular work location and expect the employees to be there. So, what happened was the union was in a situation where they never were able to effectively communicate the message. And this is what unionization and the whole process is about, giving people the opportunity to communicate, to speak with people about the merits of unionization, and that was lacking. And for that reason, I believe the union lost the election.

So, I think if giving people the opportunity to communicate with e-mail and by telephone is a much better procedure, and I think it will be welcomed more by the employees and certainly by the unions.

The second thing I wanted to talk about is the 20 percent rule that's proposed under Section 102.66(d). I think this rule should go a long way toward ending a long-standing practice that hasn't been much publicized, a long-standing practice in RC cases. Unions and employees don't

like long hearings. Everyone knows that. For that reason, they often propose a stipulated election agreement very early in the process. They get with the employer, and they try and determine whether they can come up with an agreed-upon list of employees who are eligible to vote and who may be in the unit and who may be excluded from the unit because they're supervisors or managerial employees and they just don't belong.

Now, the problem under the current rule is that the employers and unions both are tempted to do something which goes against the purposes of the Act in my view. And that is they may try to horse trade, to include certain people in the unit or certain people out of the unit for all purposes. And the union, in an attempt to get an election agreement, may be tempted to simply say that certain people are supervisors, because the employer is willing to give the election agreement if that is done.

This can work the other way around. Employees who are true, genuine employees can be excluded for one reason, just because there's one or two, and maybe you just don't want to hold up the election. Well, the proposed revision to Rule 102.66(d) will solve this problem. If there are fewer than 20 percent of the unit that are in issue as far as their eligibility to vote, you can get the election done with. You don't have to make this kind of a devil's bargain, either for

the employer or the union in order to get the election over with. And then I think once the election is over with, it will conserve the time and resources of the agency because most of these issues are likely to fall away once the election has taken place and the employer and the union have an opportunity to sit down and talk.

Well, that's all I have. I'd like to thank you for the opportunity to be here today. I think this is a historic occasion, and I'm so glad to be able to be here the first time you've done it, and I hope you do it again.

CHAIRMAN LIEBMAN: Thank you for being here and sharing your thoughts with us.

Other questions?

MR. PALLER: Well, thank you.

CHAIRMAN LIEBMAN: Well, I have a question related to the 20 percent rule. You've probably heard some of the speakers say that they thought it was problematic that employers would not have certainty about who was a supervisor before the election was held, and the risk of certain people committing unfair labor practices or even the flip side, that Harborside problem for unions. Could you comment on that?

MR. PALLER: You know, I think this is worth a try. I think this worth trying to do and just seeing how it operates. One of the beauties of the rulemaking process is that by, you know, putting a rule like this in place, you can

look at it. You can examine it and see how it works. I personally think it's going to cut out a lot of the problems that exist, and it's going to save time and money for the agency and the parties as well. Many times I've gone through lengthy, lengthy hearings over supervisory status when it's been absolutely clear to everyone in the room what the status of a particular individual was. That's not true in all cases, but it's true in the majority of cases.

The Board law on supervisory status is pretty well settled at this point. So, oftentimes I think that the issue is used as a delaying tactic, I'm sorry to say, by some employers, certainly not all employers. But some employers have used it as an opportunity to delay the election and to up the cost for the parties, and that's what I think needs to be avoided. The other problem, of course, is that it becomes kind of an -- it can create desire, as I said, on the part of the parties to try and cut things short. And so, the union and the employer can try and make deals to include certain people and exclude certain people from the unit.

You know what, the fair way to do it is conduct the election. If the votes of the purported supervisors are not outcome-determinative in any way, then just certify the results. And if there's a real dispute later on, then you can litigate it. But why waste the time and money of the parties and the agency going through this process, which is

often a charade, when it's not really necessary. That's my view.

CHAIRMAN LIEBMAN: Thank you. I appreciate you being here.

MR. PALLER: Thank you.

MEMBER HAYES: If I could, I just had one question relating to actually the previous speaker. I was just thinking in terms of the privacy considerations with respect to the expanded Excelsior material, should we think about whether there is some way to empower individual employees to indicate whether and to what extent they wish material to be given over to any third parties with respect to their e-mail addresses or their personal telephone numbers. You know, we do have things like a do not call list. Is there some kind of mechanism that we might want to consider that would balance the interests of individuals' privacy?

MR. PALLER: Well, certainly, giving people e-mail addresses and phone numbers is not a huge invasion of privacy anymore. Let's face it, most people know how to use a spam filter and put something in their spam filter. If they don't want an e-mail, if they see who it's from, they can delete the e-mail. They can answer the phone and say that they're just not interested in talking about it.

Look, as far as I'm concerned, the most effective union member is the one who actually talks one on one with their

coworkers during break time or at the worksite when that's possible. That's the most effective way of going. And by the way, most employees have one on one relationships with all the people in the bargaining unit if it's a single location. So, honestly, I don't believe that there's really a justification for the fear that giving e-mail addresses and phone information is going to create some kind of invasions of privacy. I don't see it happening. But you know what, you can put the rule in place, and if it turns out, it turns out that there's a problem with it, you can fix it later on.

MEMBER HAYES: I guess just one last thing, I was wondering if you had any views with respect to the different alternatives that were proposed in the rule with respect to blocking charges?

MR. PALLER: No, I don't have a view on that. I'm not prepared to speak on that today.

MEMBER HAYES: Okay, thank you. Thank you very much.

CHAIRMAN LIEBMAN: Thanks very much for being here.

And our next speaker is Mr. Russ Brown, and next up will be Dr. Dean Baker.

Good afternoon.

MR. BROWN: Madam Chairwoman, Members of the Board, my name is Russ Brown. I'm with the Labor Relations Institute, and I truly appreciate the opportunity to contribute our views to this proposed rule.

Before getting to the substance of the proposed rule, I think it's important to address the need for it. Historically, the Board election process has been very efficient. In 2010, more than 95 percent of the elections were closed within 56 days, well above your current target. Compare this to the Board's experience with resolving unfair labor practices, where in 2010 the Board resolved these cases nearly 14 percent slower than in 2009. It is also important to point out that the Board processes over 7,000 unfair labor practice charges per year while handling less then 2,000 election cases.

While we agree that seeking efficiency is a worthy goal, it is curious that the Board would start with the election process. Focusing on efficiently resolving unfair labor practices has nearly four times more leverage and is where the Board's own data shows that it is moving in the wrong direction. Instead, the Board is focusing its limited agency resources on the election process where the targets are being met and exceeded.

The proposed rule seeks special comments on electronic signatures and blocking charges. Allowing electronic signatures is a terrible idea. There are plenty of examples and situations where employees were tricked into signing physical authorization cards by being told they were something else. The likelihood of confusion and even abuse

is much greater with electronic signatures. Checking a box on a website is done as an afterthought today. Ask yourself when was the last time you actually read the software license before you updated Microsoft Word?

Reforming the process around blocking charges is an excellent idea. The current process is abused and frustrates and disenfranchises voters. In 2010, less than five percent of elections required the Board resolutions of objections. Casting the ballots, even if they are impounded, is far superior than delaying elections on the off chance that the charges might have enough merit to warrant other actions. Fast tracking investigations and resolutions of the blocking charges is also a great idea. As discussed above, this should be the focus of the Board's rulemaking if the true goal is to improve efficiency of the process.

Next, I'd like to address the aggressive time targets and the proposed rulemaking. The Board's proposal wants all pre-election unit issues resolved within five business days or else hold a hearing to resolve them. Let me relate a story about my own personal experience to help you understand the tremendous burden you are putting on employers. Several years ago, I was the head of a small transportation company. My business was spread across 16 western states, and I did not have a true HR department or a labor lawyer.

At one point, I had an extended trip planned away from

the office. After spending an entire day in transit, I found out that the TWU had filed a petition to represent the workers in one remote location. My travel plans were well known, and I don't think it is a coincidence that the petition was filed on the day I left. I had no idea what this petition meant, and I had no choice but to cut my trip short. It took me four business days to just get home and hire a lawyer. It would have been impossible for me to present the evidence at a hearing about an appropriate unit the next day. Our unit issues were complex. The proposed time targets are so aggressive that they will lead to mistakes, poor judgments, and are likely to complicate rather than simplify unit issues.

The requirements to furnish the list of voters, including phone numbers and e-mail addresses, in two days after the direction of election is simply not enough time. Just consider my personal experience. We did not have a centralized human resource system, and we were spread out among many states. We had questions about who was in and who was out of the unit. Whether talking about small organizations or even a big company, it can often take more than a day just to get a list to review. Getting this list right is too important to rush. If it is wrong, it can overturn an election. The current seven days is a good balance between getting the list quick and getting it right.

The Board should provide some type of opt-out process for employees who wish to protect their private contact information from unions and other allied groups. In every campaign I have been involved in, I have had workers express to me that they don't like having their personal information given to unions without their permission. The CAN-SPAM Act and the national Do Not Call list require organizations to provide opportunities for citizens to opt out of solicitations. The NLRB rules should provide a similar opportunity for employees.

The core change in the proposed rulemaking is shifting many of the unit decisions until after the election. This is the cure in search of a disease, since the vast majority of elections today occur around a month after the petition is filed, even deciding all of the unit issues in advance. The proposed rule says that 20 percent of the voters in the unit may be undecided at the time that the ballots are cast. That is like saying that we don't know whether the votes in Texas and California will count in the next presidential election. Some employees may decide not to vote because they don't want to be included with others who may not be in the final unit. Workers have the right to know who will be in their bargaining unit on the day they vote.

Increasing efficiency is a worthy goal, but not for the sole purpose of reducing the time of the election. Pushing

most unit decisions until after the election disenfranchises voters and is counter to the purpose of the Act. Any rule change needs to be about what is best for the workers and not what is best for unions. The Board should not implement these dramatic rule changes.

CHAIRMAN LIEBMAN: Thank you, sir, for your comments.

Questions?

MEMBER BECKER: I've got two diverse questions about your comments, which were helpful. One is you describe your own situation of being out of town when the petition is filed. It seems to me that's special circumstances, and the rule provides that the hearing will ordinarily commence within seven days, except for special circumstances. So, I guess I wonder if you have any thoughts. We specifically invited comments on the question of how we phrase precisely the exceptions to standard practice if we go forward with these proposals. Do you have any thoughts about that? What would be an appropriate way to account for the kind of situation you describe, which is somewhat exceptional and to make sure that you are accommodated in that situation?

MR. BROWN: Well, I'm glad to know that those years ago that you would have thought that that was a special circumstance and given me a break. I'm not sure your Regional Director would say the same though under the way that you've got the proposed rules. And, of course, at the

time that you are looking into what implements a special circumstance, there will be many different reasons for many different organizations. I think that a company like mine that was as spread out as it was and with no true HR department, no centralized department, in my particular case, I had to not only get back from the trip to the home offices to get things together, which took four days, I also had to get to the state that this situation was taking place in. So, you know, as I stated, under the proposed circumstances, I couldn't have made it. It just wouldn't have happened. Seven days seems to be the perfect balance that we currently have in place.

CHAIRMAN LIEBMAN: You had another question?

MEMBER BECKER: Again, a little bit outside the scope of our proposal, but your concern about employees receiving unwanted communications and your suggestion that we adopt kind of a no-call concept, would you extend that to the captive audience context? That is, do you think employees have a similar right not to hear unwanted messages from the employer?

MR. BROWN: And you probably know that I am a persuader at this point in my life, and I go into these meetings a lot. And although you call them captive audience meetings, I've never held an employee in a meeting. The employer has a right, you know, under 8(c) of the Act to have his freedom of

speech. And even at that, his freedom of speech is greatly reduced. And in many cases, the way it is, that is the only place that the employer can have those conversations. By and large, my experience says that unions, and my personal situation says that unions have a stealth campaign taking place long before the companies ever know what's going on. So, they've had their access to employees, and they've got their means as well. And just like in any other election, if somebody comes up to your door, you don't have to let them in unless you want to.

MEMBER BECKER: Thank you.

MEMBER PEARCE: This transportation company that you had that spanned several states, what was your principal way of communicating with your employees?

MR. BROWN: Well, I had several. Of course, my company predates a lot of the technology today, but a lot of things that I did, specific things, I would use safety memos as paycheck stuffers. I would send out written memos via fax, later via the computer, things like that. And I had regular conference calls with managers where I asked them to have meetings with employees and convey employment-related messages.

MEMBER PEARCE: So, when you say later via computer, you're talking about e-mail or intranet?

MR. BROWN: Well, I did not have an intranet, so, yes, I

would e-mail managers, you know, bulletins to put up or something along those lines.

MEMBER PEARCE: Okay, did this transportation company have an employee handbook that discussed --

MR. BROWN: Yes, it did.

MEMBER PEARCE: Did it discuss unions in that handbook?

MR. BROWN: Oh, no, no, there's no discussion of unions in my employee handbook. In fact, my employee handbook was like two pages, so it was very, very lean.

MEMBER PEARCE: Okay, and did you go about training your managers as to labor relations?

MR. BROWN: There was -- we had an ongoing positive labor relations training to where, you know, we trained our managers on how to be good, efficient leaders for their people and to be an advocate for their people and service our customers. As far as labor relations as it pertains to a union campaign, only once I had that petition filed did I give any managers any training in, you know, what they call the TIPS rules and things like that that we do, that you see so much of today.

MEMBER PEARCE: Okay, how many petitions would you say you experienced while you had this company?

MR. BROWN: While I had the transportation company?

MEMBER PEARCE: Yeah.

MR. BROWN: I had the one petition, that's it.

MEMBER PEARCE: Okay, and what happened with that? Was there an election?

MR. BROWN: Yes, there was.

MEMBER PEARCE: How did that come out?

MR. BROWN: The employees voted against unionization.

MEMBER PEARCE: I see. Thank you.

CHAIRMAN LIEBMAN: Could I just ask you one question because I don't think you told us at the beginning. What is the Labor Relations Institute?

MR. BROWN: I'm sorry. The Labor Relations Institute is positive employee relations firm. We actually work both with unionized and non-unionized companies. We're probably best known for our work in union avoidance during campaigns.

CHAIRMAN LIEBMAN: You give advice to companies in how to --

MR. BROWN: We give advice. We have persuaders. We have over 100 former union -- we have 84 former union organizers that will go to a company and say, you know, give the side of the union as well and, you know, how things work. Kind of like Mr. Maritas was stating, he knows the playbook. So do my guys.

CHAIRMAN LIEBMAN: So, you have your playbook?

MR. BROWN: Those guys have a playbook, yes.

CHAIRMAN LIEBMAN: Thank you for your --

Do you have another question?

MEMBER PEARCE: One more question on that. Part of your company's routine or a routine part of your company's business would be to go to the Regional Offices to see what petitions were filed, wouldn't it?

MR. BROWN: Well, you guys have become so good with putting things on the internet, we don't have people that go into the Regional Offices any longer. But, you know, we do get -- in fact, LRI Online is probably one of the leading sources of keeping up with just about every scrap of paper you guys push.

MEMBER PEARCE: Okay, and so, from that, you can solicit business?

MR. BROWN: We have individuals that solicit business from that, yes.

MEMBER PEARCE: Okay, thank you.

CHAIRMAN LIEBMAN: Thank you for being here with us today and sharing your thoughts.

Our next witness will be Dr. Dean Baker, and after that will be Yona Rozen.

Good afternoon and welcome.

DR. BAKER: Good afternoon. Thank you, Chairwoman Liebman and Members of the Board. I appreciate the opportunity to address the Board about these issues. Let me just say I'm Dean Baker. I'm co-director of the Center for Economic and Policy Research, which I'll also point out we do

not get any funding from organized labor. We've been misrepresented that way in many cases. So, just to be clear on that.

What I want to talk about today are the findings from two studies done by my colleague, Dr. John Schmitt, along with research associate Ben Zipper. Dr. Schmitt is currently out of the country, which is the reason why he's not here to talk about these today. I'll do my best to try to explain the findings as clearly as possible.

The two studies involve updates of research that looked at the probability of workers, pro-union workers, being dismissed in the course of an organizing campaign. This line of research dates back to a paper done by Harvard Law School Professor Paul Weiler in 1983 where he looked at the number of workers who had been reinstated by the NLRB and compared that to the number of people who had voted for a union, for union representation in NLRB certified elections. And he came to the conclusion that 1 in 20 workers who supported a union had been fired and subsequently reinstated by the NLRB.

His work was criticized by a 1981 paper by University of Chicago economist Robert LaLonde and law professor Bernard Meltzer who looked over the data and looked at it and assessed that many of the workers that had been reinstated were not, in fact, involved in organizing campaigns. They did their own analysis of the data and came up with the

conclusion that roughly 1 in 60 pro-union workers had been reinstated by the NLRB. So, the probability of being fired if you were a union supporter by their calculation was 1 in 60. I should also point out that this was the same methodology that the Dunlop Commission adopted in looking at this issue back in the early '90s.

Schmitt and Zipper thought to update this, again using the same methodology as LaLonde and Meltzer, the more conservative methodology, and they looked at NLRB data through the year 2005. And what they found was that through the period 1996 to 2000, roughly there was a 1.2 percent probability of someone being fired for being involved in an organizing drive. And for the most recent period, the last period they looked at 2000 to 2005, it was 1.9 percent.

Now, this may have been somewhat of an understatement because it had become increasingly common at that point for unions to use majority sign-up as a route for representation rather than going through an NLRB certified election, so they sought to adjust their data for the number of workers who were involve in organizing campaigns that went through the process of majority sign-up or card check rather than union election, NLRB election. And they calculated based on two different data sources that ratio, the total number of people recognized. Those recognized through NLRB elections was roughly 1.3. So, if they made an adjustment for that and, in

fact, increased the number of people who supported unions by a factor of 1.3, they calculated that roughly one percent of workers involved in -- pro-union workers in the period '96 to 2000 had been fired and reinstated by the NLRB, and 1.4 percent in the period 2000 and 2004.

I'll just quickly mention a couple of issues here that have been raised as to why it might be higher and lower. One is there have been some issues raised that the percentage of workers who were reinstated who were involved in organizing campaigns actually might be somewhat lower than LaLonde and Meltzer had estimated back in the early '90s. Insofar as that's the case, that would mean that they've overstated the probability. There are two reasons why they may have understated the probability. One is simply that many cases may get settled if an employer knows that they're likely to lose a case before the NLRB. They may voluntarily reinstate the worker. That person would not be counted in this data. The second reason, of course, is that many workers may choose voluntarily not to pursue a case to the NLRB because it can be a time-consuming process, and the sanctions are, that the sanctions are that the reward for doing so is relatively small. I mean, I --

(Off the record.)

DR. BAKER: Okay, so I'll pick that up. Okay, so, I was saying two reasons why this might understate the probability

of dismissal is first off that in many cases it may end up being the case that there's a settlement. If the employer knows that they'll likely lose the case, they'll voluntarily reinstate the worker. The second issue is that many workers may choose not to pursue it because they don't care that much about getting their former job back.

So, a question is how do we think about this 1.4 to 1.9 percent probability of workers being wrongfully fired. I would just make the point that may not seem that great, but it's reasonable to assume that employers tend to target union organizers, the most active workers. If we say 1 in 10 workers are union organizers, then we can say that there's roughly a 14 to 19 percent probability of dismissal, which we might think would very importantly influence campaigns.

Just briefly pointing out that in the second paper by Schmitt and Zipper, they did look at the probability of a campaign -- an organizer being fired in the course of a campaign, and they concluded that in roughly 26 percent of organizing campaigns, there was at least one case where a worker was fired and subsequently reinstated by the NLRB. So, I would suggest that the risk of firing is an important factor as it stands now in union elections, union organizing campaigns. Thank you.

CHAIRMAN LIEBMAN: Thank you for being here today.

Any comments?

MEMBER HAYES: I guess just one. Is there any empirical study that correlates the risk of being subject to an unfair labor practice by an employer with the length of the campaign period?

DR. BAKER: None that I know of. If one has taken place, I just have to say I don't know of it.

CHAIRMAN LIEBMAN: Can I ask you a question? You are an economist, am I correct?

DR. BAKER: Yes, yes.

CHAIRMAN LIEBMAN: This may be an unfair question to put upon you, but I don't know if you've heard some of our speakers have cautioned us against engaging in this rulemaking or changing rules as we had proposed at this time of economic crisis. They've cautioned that this is the wrong time to be changing the rules, that it will end up being detrimental to the economy. Do you care to engage in that discussion?

DR. BAKER: Well, I would say it's hard to see directly how it would have a negative impact on the economy. I mean, it's -- you know, you have to see exactly how this was implemented and what the full ramifications would be. But it's important to understand the main reason that we're in this economic downturn is we don't have enough purchasing power. We have a very unbalanced economy. There's been huge upward redistribution income from the bulk of the working

population and those at the top end who tend to spend less of their income. So, insofar as we do measure unionization, it's important for us towards equalizing wages, as this is very well documented. So, insofar as there are measures that result in more income going to those at the middle and bottom of the distribution rather than those at the top, there's no doubt that would be a plus in our current economic situation. So, you know, if you end up with a real mess of an organizing process, and if work places are all tied up, one can imagine a very bad situation. But I'd have to say I don't think that's the likely outcome of this story.

CHAIRMAN LIEBMAN: Thank you.

Any other questions?

Thanks very much for giving us your perspective.

Our next speaker is Yona Rozen, and then I guess we'll take one more, Brian Bixby and Karla Kozak, before our break.

Good afternoon. Welcome.

MS. ROZEN: Good afternoon. Thank you. Chairman Liebman, Board Members, I appreciate the opportunity to be here today to speak to you. My name is Yona Rozen. I am with the law firm of Gillespie, Rozen & Watsky in Dallas, Texas. I have been there since the fall of 1983 representing primarily employees and local unions. Before that, I worked for the National Labor Relations Board for three years in the Buffalo Regional Office and then for two years at

Headquarters in the Division of Advice.

And so, I come to you, obviously, my perspective at this point is representing unions. But my practice, and I think I want to spend a minute saying this, is that I have -- I really believe in the power of unions and the opportunity for employees to find their voice and find a way to address issues at their workplace through unions, and that it's a much more effective way than the other people that I deal with and represent who are individual employees who have legal issues that are addressed through private litigation and through employment arbitration. And I think the employees that I work with, the workers I work with who are represented by unions have much more satisfaction and much more success in dealing with workplace issues with their employers than do individuals who are put to the situation of having to proceed with a lawsuit. And even when they are successful, it's not a very satisfactory process.

So, for that reason, I come to speak in support of anything that can be done that will improve the process for employees to be able to vote to determine whether or not they wish to be represented by a labor organization. I think I've been rather surprised by the reaction to the proposed rules because, frankly, I don't see them as being in most respects tremendously huge changes. I think they're fairly modest suggestions that will be effective in addressing some of the

issues to some extent that are presently presented by the process. And so, I come to speak in support of these rules, although I could also think of other things that might be done further.

But I do want to speak in support of the rules. And I thought in doing that, the most effective way, I thought back over my -- I've probably handled hundreds and hundreds of election petitions over the years in my various positions, and I thought of several that I wanted to focus on today that I think would have been helped by the process that's proposed in these rules.

And when I say they're fairly modest, one of the things that struck me particularly about the proposals is that, in many respects, they are putting forth in more specifics things that are frequently done by the Regions on more of an informal basis although perhaps not across the board because different Regions have different practices. And so, I will address those as I reach them.

The two cases that I wanted to focus on particularly today and how these proposed rules would have assisted in moving the process forward and in saving time and cost, the first one goes back to my very parting days of leaving Region 3 in Buffalo when I was assigned, probably because I was no longer going to be on Tom Seiler's payroll, and so the time would not affect the Region and would be stuck on

advice, but I was assigned to be the hearing officer in a hearing on objections for a 13-person unit that overwhelmingly voted in Detroit to be represented by the Teamsters. The management then filed 113 objections to that election, none of which ultimately were upheld in my Hearing Officer's Report and Recommendation and ultimately by the Regional Director.

The process of -- I think informally a lot of Regions do require some sense of what your objections are, what evidence you have to support your objections, but formalizing that would have greatly assisted in this particular case because the quality of the objections in this case, for example, were there were 10 or 15 objections. There was a single person in this 13 person unit who was deaf. And many of the -- a number of objections related to trying to sort of hop on the back of the failing to translate into Vietnamese or failing to translate into Spanish type objection. The failure to provide someone to translate into sign language the pre-election conference and the ballot. There was absolutely no evidence whatsoever that this individual could not read and understand everything that was presented in writing. And, of course, the directions were presented in writing as well.

So, we had two separate periods of hearing, approximately six days to address this. I'll remember it very well, because it was during the air traffic controllers'

strike. I had to get special permission to take a motor pool car across the border to drive to Detroit. The reason I was assigned from Buffalo for a hearing in Detroit was because there were allegations again, without any support and any substance, of Board agent alleged misconduct. This is a -- when I think back about that case, and the case dragged on forever, I actually eventually lost track of what happened in the case ultimately. But that was a case where having the pre -- the requirement that is proposed where not only are the objections filed, but the evidence and a proffer of proof as to what would be provided in support of those objections would be very helpful. Also, I think the fact that there not be an automatic right to review by the Board would be helpful in that case.

The second case that I wanted to address is a case that I was involved in much more recently, and I think it raises a lot of -- it would have been helped and assisted by a lot of the rules that are being proposed with respect to both pre-election hearings and also post-election. This was an election that occurred back in 2009. The petition was filed. It was for a 220-person unit representing Sears service techs who -- and it's a very large unit. They worked out of several facilities. They covered -- they were in a particular district in the Dallas, Oklahoma, northern Texas region. It was very difficult to communicate with these.

The campaign had gone on for over two years, addressing the issue of whether employers have an opportunity to understand and know that the campaign is going on.

My clients primarily, consistent with what was stated by an earlier speaker, well in advance of filing a petition sent out notification of the organizing drive and notification of who specifically is on the organizing committee. Similarly as to what was stated, to give protection to those who are coming forward and supporting the union. But the other impact of that is that clearly the employer is well aware long before the petition is filed. In this case, the employer knew for two years there was an ongoing campaign and was well aware, as is demonstrated from how they acted during the process, they had plenty of time to talk to their employees long before the petition was filed.

As we come up on the hearing --

CHAIRMAN LIEBMAN: I'm going to ask you to try to start wrapping up.

MS. ROZEN: I will. Thank you. I'm sorry.

CHAIRMAN LIEBMAN: You're about three minutes over already.

MS. ROZEN: Oh, I'm sorry. I didn't realize. I'm very sorry.

CHAIRMAN LIEBMAN: That's okay.

MS. ROZEN: I didn't know what that meant. In any case,

the hearing was -- we were going to agree to add 12 people to the unit, and at the very last minute, the evening before the hearing, the employer added 53 additional people from another location from an entirely different district. Clearly, and we ended up spending two days litigating that. And it was an example where if the employer had been required to put forth what their position was and to put forth the proffer of proof to support that, that could have been addressed. So, thank you very much.

CHAIRMAN LIEBMAN: Thank you.

Any questions?

MEMBER HAYES: Just one quick question about the first example that you mentioned, the objections case. How would the proposed rules change the experience you had in that case? I mean, don't our rules and procedures currently require that objections be filed in a timely fashion and that they be accompanied by sufficient information to enable the Region to determine whether or not a hearing should be held?

MS. ROZEN: In the first case, yes, I think some Regions have that procedure. It's less formal. That was my point in that I think some of these proposed rules are not really major changes but are simply standardizing the process that is followed in some Regions. So, yes, I think -- but I do think the more emphasis on you actually have to make a proffer of proof as to what evidence you're going to present

to support these would be helpful in giving the Region an opportunity to determine whether or not to proceed in that case, and also the fact that there would not be -- under the new rules, there would not be a right of appeal to the Board in every case.

MEMBER PEARCE: In your experience having been involved with campaigns, have you also experienced your clients having to withdraw petitions?

MS. ROZEN: Yes.

MEMBER PEARCE: What circumstances would prompt the withdrawal of petitions in your experience?

MS. ROZEN: Well, a number of circumstances. I mean, I've had circumstances where we had a lot of support initially. The campaign was going well. People get terminated. People get scared. The support is dissipating, and therefore, the union would withdraw the petition.

MEMBER PEARCE: Okay.

MS. ROZEN: And I guess the other thing about that, in the case that I was talking about, my clients -- we had some pretty good objections, I thought, post-election in that case, the Sears case. And my clients asked me not to proceed with those once -- to request review on those. They brought some interesting issues that I would have liked to have proceeded, but they preferred rather than have the delay to just start the time rolling, so that they could go back in in

12 months with another petition.

MEMBER PEARCE: I see.

MS. ROZEN: And they also lost a lot of support in the objections because people were scared.

MEMBER PEARCE: Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your comments and for being here today with us.

MS. ROZEN: Thank you. Thank you for your time.

CHAIRMAN LIEBMAN: We'll take the next -- is it one or two speakers?

MR. BIXBY: One.

CHAIRMAN LIEBMAN: One, Mr. Brian Bixby?

MR. BIXBY: Yes.

CHAIRMAN LIEBMAN: Welcome.

MR. BIXBY: May I get a drink, please? My throat is all dry.

CHAIRMAN LIEBMAN: Good afternoon.

MR. BIXBY: Good afternoon, Madam Chair and Members of the Board. My name is Brian Bixby. On behalf of all of the working class in America, I thank you for giving me this opportunity to share with you my story from the trenches of an organizing campaign. In my job, I've met many famous people, but the four of you hold more power in my life than any of these famous people I've ever met. I'm a casino dealer, table dealer at Caesars Palace in Las Vegas, Nevada.

I've been at Caesars Palace for nearly 25 years. During our organizing campaign, I was a lead in-house organizer. I was a shop steward. I'm a current member of the contract negotiating team for the dealers at Caesars Palace. I was also elected as the inaugural president of TWU Local 721 with nearly 1,200 members.

Leading up to the filing for election at Caesars Palace, we placed fliers and business cards in our break areas in August of 2007. Our supervisors had access to the material as soon as we put it out because we shared similar break rooms. On the business cards, it directed our fellow workers to go to a website that was specific to our campaign to organize with the TWU before we filed for an election. The in-house organizers were identified by the union to the company in October of 2007. The employer acknowledged their awareness of our organizing efforts prior to our petition for an election when they issued "No TWU" buttons for the supervisors to wear. Ironically, those same buttons are the same buttons that we use for longevity, 20 years, 15 years. They replaced the years with "No TWU."

We filed our election in the first week of November with the NLRB. After we filed our election, although there are nearly -- we have nearly 5,000 employees at Caesars Palace in Las Vegas with almost 75 percent of them already being organized, the employer still held captive audience meetings

which began two weeks after we filed for our representation election, although certain in-house organizers weren't allowed to attend these meetings. The dealers had to actually pay to attend these meetings out of their pocket in ways that I can explain later. These meetings were held three times a day, twice a week from the time that we filed to the time that we had our election on December 22nd, 2007.

Letters were sent to the employees' homes criticizing the TWU, along with inaccurate statements and promises made by the company. The employer stated certain issues would never be an issue, but those issues are exactly the elephant in the room in our contract negotiations today. Over three years in contract negotiations with one impasse declared by the employer, only to be recanted in several months by the employer with the claim that a new status quo had been set because of the impasse. With that impasse, I lost my 401(k). I lost 13 days of vacation per year.

The company characterized the TWU as a communist organization during their anti-union campaign. Our immediate supervisors asked dealers in one-on-one conversations while they were at their workstations how they were going to vote in the upcoming elections. Our supervisors continually attempted to get the in-house organizers in heated arguments in the break areas in front of our other employees and our other members.

Many employees from foreign countries, who were at that time legal and/or now legal citizens of the United States, were pulled into a manager's office and told and threatened that if they voted for a union, that they would either lose their green card or be deported from the United States. And management used translators for all the different countries that these people originated from.

The employer had -- before our election, the employer provided financial benefits that were never before provided to us, immediately before our election, just days before the election. The employer threatened the union with charges of copyright infringement whenever we used their name in any fliers, websites. Originally, our election was scheduled for mid-December but was moved to December 22nd, three days before Christmas, even though the union had agreed to every issue that the company brought up to avoid a delay a hearing might cause.

We are quickly approaching four years since the NLRB certified the union, yet we are still without a contract and have no future contract negotiations scheduled to date. I hear about the e-mails as I've been sitting here for two days. The employer has equal opportunity.

May I have 30 seconds?

CHAIRMAN LIEBMAN: Yes, you may.

MR. BIXBY: The employer may have -- has equal

opportunity to -- I've been at Caesars Palace for 25 years. They can inform me -- they've had 25 years to inform me about a union. They don't need the filing of a petition. The small employers, the scattered employers, put up a website. That's how we organized. We put our authorization cards on the website, although you couldn't file them electronically. But what our members would do would be read the authorization card, print it, fill it out, mail it in, just like we handed them an authorization card.

Where I work there's 10,000 cameras. From the time I go onto the property to the time I leave, I'm on camera. So, people didn't want to be seen handing an authorization card or accepting an authorization card. Our organizing campaign was done on the internet. The employer was very aware of it. We had 3,500 hits per week out of 550 employees. So, the employer was hitting it. Our employees were hitting it.

And I just want to thank you for the opportunity, and that's my story.

CHAIRMAN LIEBMAN: Thank you for being here with us today. I hope you brought us good luck.

MR. BIXBY: I hope so.

CHAIRMAN LIEBMAN: Anybody have any questions? Anybody have any questions?

Thank you very much.

MR. BIXBY: Thank you.

CHAIRMAN LIEBMAN: I think now is probably a good opportunity for everyone to stretch their legs. Why don't we be back by 2:30, and we'll start off with Jay Krupin?

(Off the record.)

CHAIRMAN LIEBMAN: I guess we're ready to go back on the record. Everybody accounted for?

We'll start this afternoon with Mr. Jay Krupin, who will be followed by David Madland.

Good afternoon.

MR. KRUPIN: Good afternoon.

CHAIRMAN LIEBMAN: Welcome.

MR. KRUPIN: Thank you very much, Madam Chairwoman and distinguished Members of the Board, for this opportunity to speak on the significant changes that you have proposed and the certain impact it would have on the American workforce and the American businesses throughout the nation. My name is Jay Krupin, and I have practiced traditional labor law for more than 30 years. And I am the chair of Epstein Becker & Green's national labor practice. I also serve as outside labor counsel to the National Grocers Association, which is the national trade group representing more than 1,500 independent retail and wholesale grocers. Most of its membership is comprised of family-owned and employee-owned businesses operating in communities across America. Nearly half of the NGA's members are single-store operators, and

another quarter operate less than five stores, in addition to the large regional multi-store operations and wholesalers.

Grocery stores and wholesalers operate on very tight margins. Many independent grocers' budgets do not allow for human resource specialists, compliance departments, and labor relations professionals. In short, the small business owner and even the large retail operators have no or very limited expertise in the maze of rules and procedures governing the NLRB elections.

Although there are numerous objectionable aspects to the Board's proposals, I will focus here on the dramatic reduction in time that an employer would have to respond to the union's campaign, most of which has been ongoing for months without the employer's knowledge by the time that the union petition is filed. In representing employers in over many campaigns, it is clear that unions do not generally broadcast that an organizing drive is ongoing. Under your proposal, the union -- under your proposal, the current median timeframe under which an election is generally held within 42 days is cut to less than half that time and could be held in as little as 10 to 21 days.

Under such a system, employees will be rushed into making a decision without the benefit of an opportunity to receive and digest information, contemplate the consequences of their ballot, and review and question information. It

cannot be maintained that less information before voting is a laudable goal. Rather, your proposal transparently precludes sufficient time for employees to receive and consider information which dramatically affects their workplace and their lives. It makes the election process for employers to be an away game.

Under Section 7 of the Act, employees have the right to form, join, or assist labor organizations as well as the right to refrain from any and all of such activities. Under Section 8(c) of the Act, it specifically protects an employer's expression and dissemination of views, arguments, and opinions. Your proposal's stringent time limits on a campaign period before an election undercuts the goal underlying these twin pillars that uphold and give full meaning to the secret ballot, namely the free and full exchange of information.

Both provisions assume an employee's right to receive information, to hear and express views of others informing their conclusions regarding whether to join a union. By restricting the employer's statutory right to express and disseminate its opinion, the proposal to the same degree restricts employees' rights to receive and evaluate that same information and to weigh it against competing claims prior to casting a ballot. In striking down a statute which restricted a union organizer's rights to disseminate his

views to employees, the Supreme Court long ago decided that the statutory right protecting an employee's choice of a representative further protects an employee's full and free right to discuss and be informed concerning his choice and to hear the views of others.

A secret ballot does not a fair election make. And the right of free speech is meaningless if there is no time granted to speak. An election is a process. It is a means, not an end. A fair election is not simply the marking of a ballot. The right to vote by secret ballot necessarily assumes the opportunity for the electorate to have freely and fully exchanged information and ideas and to debate and test the veracity of claims made, which itself assumes sufficient time to engage in debate, to receive information, and to review all aspects of the contemplated decision. In short, the secret ballot is a culmination of a process, not the process itself. The Board's proposed rules ignore this reality. It eats out the substance of a secret ballot. There is an inseparable bond between a fair election and the right to be informed. The link between employees and any representative they elect can only be validated if it's forged by free and full participation of the employees. Frankly, the proposal's shotgun time limits tramples on all of the elements that make the election legitimate.

Discussing the Board's proposal, the NLRB website notes

that the proposed amendments are designed to fix flaws in the Board's current procedures that build in unnecessary delays, and that an important result has been to reduce the typical time between the filing of the election petition and the actual election. Only in the mind of a union partisan can the few short weeks between a petition and the election be referred to as an unnecessary delay. The proposed rule leaves no doubt which side it supports, and it is not on the side of a neutral, balanced, and fair approach which protects and holds sacred the employees' right to choose.

Viewed through the lens of the Board's legitimate role as the protector of an employer's First Amendment and statutory right to express and disseminate its opinions and views, and the employees' right to receive such information and cast a fully informed secret ballot, the Board's proposal is exposed for what it is, a process of pure form with the intent to stifle the contemplation of substance and of free speech.

The NGA is hopeful that you will have heard these expressed views, that you will fully consider these remarks and comments, and through your deliberations you can strike an appropriate balance to protect those who are most affected and harmed by your proposal, both the employees of America and America's business owners. Thank you very much.

CHAIRMAN LIEBMAN: Thank you, Mr. Krupin, for your

comments.

Anybody have questions?

MEMBER BECKER: The current system in terms of the value which you so eloquently articulate, and which we take very seriously, and which is embedded in the Act, the ability to communicate freely -- the time period over which that right can be exercised seems to hinge on something, which at least in my view is completely irrelevant, which is the degree of litigation. That is, you may have a very short period, or you may have a very long period under the current system depending on how much the parties litigate, which seems to me to be completely irrelevant to the values which you articulate.

Then if you look at the Board's previous statements concerning what that time period would be, you find, for example, Mod Interiors, 324 NLRB 164, a case decided in 1997, and it's then codified in the Casehandling Manual. And it says that the union must have the Excelsior list for a minimum of 10 days. So, that seems to be a statement of a prior Board that in terms of the union's ability to communicate with the entire workforce, which it doesn't have until it gets the Excelsior list, that 10 days is a sufficient period.

But I guess my question is how do you make that judgment? You certainly have to agree that it can't hinge on

the amount of litigation. That doesn't make any sense. So, how should we make that judgment? Should we look at that case? What should be our criteria?

MR. KRUPIN: I'd rather we be very practical. The union has had an opportunity to speak to employees. We shouldn't be under the misconception that the first time the process began is when a petition is filed. As you well know, they've had to have gotten a showing of interest. At least 30 percent of the employees in the unit or the appropriate unit that they determine should have decided that they wish to be represented by a union for purposes of engaging in bargaining for terms and conditions of employment. Most unions will tell you that they won't even file the petition until they've received cards signed by 70 percent of the employees for the possibility of attrition.

So, let's not start by assuming that the day that the activity occurs with the union is when their petition is filed. Now, I've heard before, and I'll tell you I've had many elections and many campaigns, most employers do not know what's happening. Unions don't broadcast the possibility of telling employers that there's a petition going around or cards going around, that there's a campaign for organizing. So, when the employer now hears about it, they basically are in the third quarter of the game. The union has already gained momentum. And, therefore, the issue of the Excelsior

list is not as important, frankly, as I think this Board is making it. The union knows the employees. They know the people in the unit. They know who signed cards. They're not just becoming unique to this process.

And so, what really happens is if it's going to be a fair process, when the employer now knows about it, and this is irrelevant to whether employers win or lose the election, or whether unions win or lose the election. It's a matter of having a fairness to the process of being able to know the information. The union has been on the field for a while. Now, the employer hears about it. Now, the employer gets on the field. And, frankly, 42 days, which is the present process, sometimes is not enough and sometimes is too much. But the very fact is, it's a reasonable time period for the parties to trade information, and it's not just the employer information. As you well know, there's misstatements of fact. There's issues that have to be reviewed. Look at our system now in our civil elections. We don't just have elections in 10 days. We have back and forth. We have to digest the information. That's why your proposal to reduce it to a 10-day period possibly is abhorrent to what we think is a democratic process.

MEMBER PEARCE: Well, I think your assumption that the reduction will --

MR. KRUPIN: I'm sorry? I couldn't hear.

MEMBER PEARCE: The reduction will be 10 days is speculative, because each case is going to produce different things. Certainly, if a case goes to hearing, an election is not going to be held in 10 days. Now, with regard to the part of the proposal that deals with the elimination of that 25-day period after the Decision and Direction of Election before an election can be held, when statistics and experience show that that period of time is wasted time. The Board does not grant stays of elections before it grants reviews in any more than one percent of the cases. Are you saying that the elimination of that is denying the employer a particular right when that process itself did not contemplate party campaigns at all when it was put into place?

MR. KRUPIN: Yes. I'll tell you why I believe it is an infringement on the right. Because once a Decision and Direction of Election is issued, whether by a Regional Director or through a stipulation to have an election in your 25-day period, that's when the terms of the election are set. That's when you know the rules of the game. That's when you know the field is 100 yards long, and you have 11 players on each side. Before that time, we don't know. The union doesn't know. The employer doesn't know what is the -- what are the rules of the game, the appropriateness of the unit, who can make certain statements during campaigns. Remember, employers do not want to commit unfair labor practices. I've

heard all of this discussion about coercion and intimidation. Employers don't want to commit unfair labor practices. In fact, there are dire consequences if you do.

So, we're talking about less than a month period once the rules are set to be able to go forward and to now determine whether or not this union should or should not represent the employees. Note, my issue here is not a determining factor of being partisan to try to say employers should be always positioned to win elections, or unions should be positioned to lose elections. But we have to have a sense of fairness to the process. And timing is most very important here. We're not saying -- I remember when I first started practicing 30 years ago, there was an election that took three months to happen. And, frankly, everybody, including the employer and the union and the employees, got tired of it. We wanted the process to be over. And but that was another time, another Board, another economy.

We're talking here less than a month. You know, I don't understand the reason for the rush to do this. In our society, it takes a period of time to get a driver's license, to get a marriage license, to basically to change a Verizon account. It takes time to do these things. We're asking for, in the first circumstance, a period of time, 42 days, in order to have an election. Very fair. I think it works well. We don't have to go through the statistics. This is

one of those situations where everything has been said but hasn't been said by everybody, where the numbers are known.

But they have a 25-day period. That gives time once the rules are set for both sides. It doesn't benefit either side. For both sides to now determine and express information to employees and determine whether or not --

MEMBER PEARCE: But where in the current regs is that contemplated? The current regs, when they talk about this 25 days, doesn't say so it gives the parties enough time to play the fourth quarter, to have the opportunity to campaign with full knowledge of how the game is to be played. None of that is in the regs. The regs talk about a process that is set forth for particular reasons, reasons that we submit are not functional any longer. There's no need for that. There is some value to the parties not having to have protracted litigation. Don't you agree?

MR. KRUPIN: I don't think it's a matter of litigation. I think it's a matter of information. See, you and I may be looking at this differently. You may be looking at this as a litigation matter. I'm looking at a fairness matter for dissemination of information and free speech rights. I come from a position, and I represent my clients from a position, that more knowledge is better than less knowledge. Knowledge is fuel. Now, information is important. Information may not always satisfy or to be to my advantage. But yet, let's lay

out the cards. Let's lay out all of the information.

We're going through a presidential election process now. There's debate after debate. You could decide to listen to which side you want, but at least the information is there. Whether you want to listen to MSNBC or FOX or CNN, that's up to you. But the information is there. And to restrict that information is not the way we've built our democracy, the way we've operated under the Board.

And I know you've had the experience, probably as long as I have and maybe longer, 30 years of dealing with these rules. When you mention the issues, there are certain mores of how the process works. If there are things to be changed, and you tweak -- you have to tweak litigation, then let's tweak the litigation issues. Let's tweak the issues about litigation, of how to litigate cases and unfair labor practices. But that's when if an employer violates the law, then let the employer go through the process of dealing with unfair labor practices, but not on the basis of an election. An election an employer has not been -- an election the employees have not chosen, yet can take away the free right of an employee to understand from both sides. And that's what I believe your proposal does.

CHAIRMAN LIEBMAN: Anything further?

Thank you very much for taking the time to talk with us and answer the questions.

MR. KRUPIN: Thank you very much. I appreciate the opportunity.

CHAIRMAN LIEBMAN: Our next speaker will be David Madland and then Michael Avakian.

Good afternoon.

MR. MADLAND: Good afternoon. Thank you very much for your time. I appreciate it.

CHAIRMAN LIEBMAN: Thank you for being here.

MR. MADLAND: I'm David Madland. I'm the director of the American Worker Project at the Center for American Progress Action Fund. The American Worker Project conducts research to increase the wages, benefits, and security of American workers and promote their rights at work. The Center for American Progress Action Fund strongly supports the NLRB's proposed rules to reform an election process that far too often resembles Lucy pulling the football away from Charlie Brown just as he's about ready to kick it, where workers are left flat on their back with scheduled elections frequently delayed or canceled. This common sense proposal would reform an inconsistent election process, and it's a small but important step towards giving workers a fairer way to choose whether or not to join a union. As you all know, the proposed rule doesn't specify a timeline, a specific timeline, but rather recommends a number of changes that are geared towards ending delay tactics and to create a more

level playing field.

In short, the rules' aim, and what we most strongly support, is that when workers petition for an election, they should get an election. As you all know, and there's been numbers sort of bandied about, many elections already occur relatively smoothly, median election, you know, half of all elections occurring within 38 days according to your data in 2010.

But as we also all know, long delays can and do happen in large part because the current process allows for manipulation of the timing of elections, and these delays at their extreme can cause elections to never happen. There's no limit on employers' or unions' ability to demand a pre-election hearing on virtually or most any issue, eligibility of employees to vote, scope of the bargaining unit, et cetera. All of these can be used to delay an election, as we've heard from many, many people here. We've also heard evidence that they do delay. Nearly one in seven elections occurred over 51 days after workers submitted a petition in 2009. Seven percent over 71 days, and three percent occurred after 151 days. This is according to research presented by Dorian Warren and Kate Bronfenbrenner.

Many elections don't have hearings, but when a hearing, a pre-election hearing is demanded, elections are delayed by 124 days on average, according to research from U.C. Berkley.

Now, the previous speaker was just talking about elections and the process and fairness. Imagine if political parties could manipulate the timing of presidential elections the same way that the NLRB process can be manipulated. We would think it's crazy. Part of what makes the American democracy work is that we know we can count on, for example, voting for President, you know, every four years the first Tuesday in November.

And perhaps even more damning of the current system is that, according to a study by John-Paul Ferguson of Stanford Business School, elections frequently don't happen. Thirty-five percent of the time that workers file a petition, the election does not happen, with workers withdrawing their petition, sometimes after very, very long delays when they were trying to set up an election and just get frustrated and give up.

Now, we've also heard that by some people claiming that this standardized process will prevent employers from communicating with their workers. We've also heard, and we're going to hear more evidence that the NLRB election process gives ample opportunity. It's got multiple steps and stages that give both employers and unions an opportunity to communicate. You know, research demonstrates conclusively that employers already communicate with their workers about unions well before elections happen. They're incorporated

into new hire orientations, for example. And even when employers don't start their campaigns directly when they first hire someone, they often start well before the filing of a petition.

Professors Bronfenbrenner and Warren found that much of this communication even crosses the line into illegal activity. You know, half of all serious violations, such as illegal harassment and coercion, occur before the petition is filed. That, I think, indicates just how modest this proposal really is. It doesn't address stiffening penalties or otherwise limit illegal action against workers. It just standardizes the election process and ensures that some of the obstacles that prevent workers from exercising their right to vote are removed. All workers deserve a fair and consistent process that enables them to make their own choice about whether to form a union. The NLRB's proposed rule is a modest but important step to make that election fairer. And for that reason, we strongly support it. Thank you for your consideration. I appreciate it.

CHAIRMAN LIEBMAN: Thank you for coming here and sharing your thoughts with us.

Anybody have any questions?

Thank you very much.

Mr. Avakian, good afternoon.

MR. AVAKIAN: Good afternoon, Chairman Liebman. Members

of the Board, thank you for the opportunity to speak to you today about some very important issues that are before the country now. I represent the Center on National Labor Policy in this proceeding, and it is a national nonprofit legal foundation that is concerned with protecting the individual rights of small employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act from defending employees in litigation, upholding employees' Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interests to the courts and Board.

Through these years, the Center has supported the Board and opposed it. Because it has represented individual employees and small employers, it brings a unique experience that the Board should consider. These points and others will be presented in written comments next month; however, today I would address three different items. One, the impact of an accelerated election procedure, due process, and the need for all parties to understand the ramification of the petition process and the blocking charge rule.

First, within the congressional declaration or policy of the Act, there's nothing in there that specifically says speed and accelerated process is -- to get an election accomplished as soon as possible is a policy of the United

States. Rather, it's one that establishes an appropriate procedure and an opportunity for employees to understand the process before them and make the important choice under Section 7, which is the right to either refrain or engage in collective activities.

As much as the Board and the country is excited about the internet and the access of persons and people and employees and workers to e-mail, it overlooks the fact that many employees, especially smaller ones in this country, still have no access to the internet or use it in their business plan or in their business process. You can take the construction industry for an example, and I'll make a point about that in a moment. But the availability of smart phones, computer programs, even to submit forms and written statements to the Board by electronic process is not something that small employers with two or three people that are electrical contractors and/or plumbers, or you can name the small business, use in their daily business.

In many service and construction industries, employees are prohibited from using e-mail during their working time for both productivity and safety reasons. Productivity reasons for the fact that e-mail is entirely personal in nature and distracts workers from performing their paid duties. Safety because workers can be injured in the distraction by communicating and texting while on the job,

especially in the construction industry. OSHA might even forbid it on certain type of machinery.

And most important, because small employers don't even use or need these programs to communicate with their employees. They see them at the beginning of the day, maybe the end of the day, or on payday, and that's when they're going to see their people, and they're going to talk to them. It's not an instantaneous communication on a daily basis on what it is that they do and their labor or employment policies.

This leads to what I call a due process objection to mandating that a party submit a statement of position on the Board's jurisdiction, unit appropriateness, proposed unit exclusions, and any bars to the election time, date, and place within seven days of the union's filing a petition. Of course, that date on filing a petition is one that's utmost opportunistic for the labor organization or the representative that files that petition.

And then, of course, the failure to submit an objection, which one might have had, within the seven day period precludes a party under the current proposed rule from ever stating it again within litigation. And that suggestion is modeled under Rule 26 of the Federal Rules of Civil Procedure. But, usually, the mandated disclosures that are coming out of a federal court proceeding won't happen any

earlier than 20 days when an answered is required, and usually it's not required for months under the local rules or, I believe, the 26(f) case-management plan that most federal courts utilize. But the Board's procedures don't provide for that pre-hearing type of mechanism.

However, my experience has been that most of these hearings happen within two weeks. Fourteen days is a general time that the Regional Directors establish the hearing upon the filing of a petition. In that period of time, the Board agent or the Field Examiner, whoever may be handling the case for the Region, contacts the employer and the labor organization and asks them for their position on time, date, and place for the election, who might be in, who might be out of the unit, you know, a description of the unit. And that's generally -- that's a non-adversarial procedure. And in my experience, and I've represented small employers and petitioners in elections, those processes usually get to a stipulation in the election, or you're going to have an issue on the appropriateness of the unit or the supervisory status.

My time is getting short. I want to talk about the impact on small employers. Although the Regulatory Flexibility Act statement of the Board says the impact is insubstantial, we do know from the Board's own statistics in the proposed rule that the median number of employees which the Board has had in the elections is about 25 people. So,

we're talking about small employers, and you're accomplishing those elections within approximately mostly in 37 days. So, they're happening actually quickly.

What happens in that timeframe? Once the election positions are established, which is usually through stipulation -- that's what the Board's rules and the statistics show -- the election goes forward. But the employer, especially the small one, is now on his toes and looking at what type of information it has or needs to present its position because it may never have formulated one, never considered an election petition might even come to it, because most employers are not unionized in the country. I've had to represent small employers as far away as San Angelo, Texas from the Washington area who can't find a labor lawyer within 500 miles of their location because there simply aren't -- people don't know the extent of the Act. Now, within 7 or 14 days they can find somebody and make calls, and they'll get representation. So, that's the good -- that's kind of the good news of the ability of the 14 days to allow for somebody to get a representative, especially in the specialized area of labor relations.

The Act, as the Supreme Court describes it in Linn v. Plant Guard Workers, talks about having a robust, even a caustic debate. But that is what the policy of the United States is to give the employees the opportunity to get the

free flow of ideas, full information to make the informed choice, and other speakers today have talked about the need for that happening.

If I could just take a minute, I'll talk about the blocking charge?

CHAIRMAN LIEBMAN: Please.

MR. AVAKIAN: I've had a lot of experience in the blocking charge area, especially what could be when that's really going to come out is representing decertification petitioners. And in that particular case, one can from the get-go know that some sort of blocking charge is going to be thrown at the case or at the employer, just to establish a problem and to hold up the election. I think part of the Board's suggestion that most of this activity which would be considered unfair labor practices or objections to the election should be held in post-election procedures.

There are remedies that the Board has for unfair labor practices, and it can provide those remedies in post-election activities and handle those. In fact, after an election, it may be that the ULP might get withdrawn. If the union prevails, there's no -- all the objection did was probably delay the election by a few days. But if it prevails, it can withdraw the election and the parties move on. Otherwise, the blocking charge does provide a paternalistic type of view of employees in this country which I think is outmoded. And

there's some studies by Mr. Gatman and Saranoff back in the '60s and '70s which talk about the voter in an NLRB election is no different than the voter in a federal election. It is the same type of person, and in their studies they show that in about 80 percent of the cases, and since nobody is moved by any aggressive action in the election process.

Thank you for your time, and I'll be submitting more further comments later.

CHAIRMAN LIEBMAN: Thank you for your comments.

Are there questions?

MEMBER BECKER: I've just got a question about your first point. Just to isolate what you see as a critical differences between what's been proposed and the current practice, so you describe the current practice, that the norm being a hearing begins 14 days after petition, and there's an informal inquiry usually by the hearing officer into what's your position on this; what's your position on that.

The proposal is that there be a norm of seven days, absent special circumstances, but that informal process is formalized right up front, so that as soon as a petition is filed, it's also served. And with it is served a description of the process and a written document which explains exactly what you're going to have to take positions on. So, as opposed to getting called by the hearing officer informally later, you know right away what you may have to take a

position on if you so choose.

What do you see as the nub of the differences, given that seven days is not rigid? Special circumstances can extend that, a variety of special circumstances. What do you see as the nub of the difference between those two?

MR. AVAKIAN: Well, it depends on how broad special circumstances would be. But I would say that that might even swallow the entire rule because the small employer, who I've had the most experience with, doesn't have an HR staff. It doesn't have -- it may have a bookkeeper, but that's about it.

It looks at the pile of papers that comes from the Regional Office. It's going to be a document, come in a letter about 10 or 11 pages, and it's going to have a copy of the petition, a two-page cover letter, who is the Board agent that's going to handle it, a description of the Board's procedures, all single spaced, and they can't make -- they have no experience with the Federal system, with the Board's procedures. And they need to have somebody explain it. One, not only so that they can decide what to do, but secondly, how to do it and not commit unfair labor practices. Because as far as they know, they've been running their companies; they can tell their employees what to do perhaps. Nothing nefarious about that. But there are things in terms of the promises and the prospects of why vote for a union or not

which take time to explain to an individual of a small employer. And if he has any foreman or supervisors, they need to be or have this information communicated to them.

So, there's this built-in -- one is a communication problem that the organization needs to deal with, and then come to a position to provide to the Board on how this election process should go forward. And it's a process that works directly all the way up to the date of the proposed hearing. And with the help of the hearing officer or the specialized agent, these generally can be worked out between the union and the employer to get to that point. But if you fix the employer or both parties at seven days with irretrievable rights, then you have a problem. I mean, they have a problem even to do it.

I'm sure what would happen is somebody will develop a list, a 1,000-page list of objections to the election and just post them, because otherwise, they're going to waive all their rights. It's like the back end of a complaint. When one files an answer, you layer up all of your statutory defenses and whatever you may have, equitable defenses. You're going to have to do that up front. I think that the process of the Board is much more collegial between all the parties if it's done as collegial as possible until you get to the hearing. And then it's -- the hearings, when they do occur, as the speakers and I mentioned are we'll call them

mundane subjects, but they're the subjects that make a difference in election. For a small employer, knowing and thinking that his key supervisor is now a member of the bargaining unit is a big issue for him, and there's going to be disagreements. So, that's why the time is important. It gives the small employer the opportunity to understand what his responsibilities are, get them explained and be able to take a position and work with the Board and union to figure out to do an election. Seven days, and he's locked into a position. I don't think that's a policy of the Board or should be. Thank you.

CHAIRMAN LIEBMAN: Thank you.

Anything further?

Thank you, Mr. Avakian.

Our next speaker will be Peter Leff and then David Kadela.

Welcome. Good afternoon.

MR. LEFF: Good afternoon. My name is Peter Leff of O'Donnell, Schwartz, and Anderson, P.C., general counsel for the Graphic Communications Conference of the International Brotherhood of Teamsters. We represent over 60,000 employees in the printing and publishing industry in America, and we are part of the International Brotherhood of Teamsters which represents 1.4 million hard working men and women across the United States, Canada, and Puerto Rico.

The Graphic Communications Conference of the International Brotherhood of Teamsters commends the members of the National Labor Relations Board for bringing the National Labor Relations Act into the 21st century and for proposing reasonable, predictable, and uniform rules for the conduct of representation elections. It is undeniable that the current system fosters uncertainty and chaos. The parties are left in the dark as to what issues will be raised at a pre-election hearing, when those issues will be resolved, and most importantly, when an election will be held to determine the desires of employees for union representation.

It is in the interest of both unions and employers to know the date of an election as soon as possible. The Board's attempt to take the uncertainty of scheduling a date for a representation election out of the equation is laudable and will provide unions, employers, and employees with much needed guidance and predictability as to what will occur from the filing of a petition for an election to the counting of the ballots.

As recognized by the Board, the biggest roadblock to predictability in the scheduling of a date for a representation election is the unnecessary and often unwarranted pre-election litigation that bogs down the system and prevents the scheduling of an election. Once a petition

has been filed, most if not all eligibility and unit inclusion disputes can be resolved after the unit employees have cast their ballots. The Board's proposed rule deferring the resolution of all disputes concerning the eligibility or inclusion of individuals who constitute less than 20 percent of the proposed unit until after the ballots have been cast is an important step in the right direction to prevent disputes from delaying an election. Nevertheless, the 20 percent rule does not go far enough. Because delaying elections with pre-election litigation injects uncertainty and delay into the process, once a legitimate question concerning representation has been presented, no issues involving eligibility to vote or inclusion in the unit should be litigated before the election, regardless of the percentage of employees involved.

Let me give you an example from my experience. On November 18, 2003, Local 527S of the Graphic Communications International Union filed a petition to represent the 69 employees who bagged and delivered the Atlanta Journal-Constitution newspaper at the employer's Cumming, Georgia facility.

The employer challenged the appropriateness of the single-facility unit, asserting that the only appropriate unit was all 3,800 plus employees in the Atlanta Journal-Constitution circulation department located in 70 facilities,

covering an area of 58,000 square miles. Despite the Board's single-facility presumption and the fact that the Board had never -- has never denied the appropriateness of a single-facility unit in favor of an integrated unit covering so many facilities over such a vast area of land, a six-day hearing was conducted over nonconsecutive days.

On January 23rd, 2004, the Regional Director directed an election at the single-facility Cumming location. And, finally, on February 6th, 2004, a representation election was scheduled for February 17th, 2004, 91 days after the petition had been filed. There was no reason to delay this election while we litigated the appropriateness of the petition for a single-facility unit. There was no compelling reason why the appropriateness of the petition for the unit could not be adjudicated after the election. The ballots at the employer's Cumming, Georgia facility could have been impounded while the parties litigated the appropriateness of the unit. If the employer's challenge was denied, the ballots would have been opened and counted. If the challenge was upheld, the union would have walked away because it has nowhere near the required 30 percent of petition signatures from all 3,800 circulation department employees.

There would have been no harm in deferring resolution of this unit dispute until after the election. However, as a result of pre-election litigation, almost three months of

uncertainty elapsed before the election was scheduled. Thus, the 20 percent rule is a good start but does not go far enough to avoid delay over issues that could be deferred until after the election. I fear that employers will take advantage of the loophole inherent in the 20 percent rule by arguing, legitimately or otherwise, that additional employees that compromise more than 20 percent of the petitioned for unit should be included in the petitioned-for unit. An employer should not be able to delay an election merely by asserting that employees of other facilities and other departments should be included in the petitioned-for unit. These eligibility and inclusion issues can and should be decided after the ballots have been cast.

Therefore, I propose that the Board drop the proposed requirement that eligibility or inclusion disputes be deferred only if they involve less than 20 percent of the petitioned for unit. Instead, I suggest that the Board revise its proposal so that once a question concerning representation is presented, all disputes concerning eligibility or inclusion of the individuals into the unit be deferred until after the election has occurred, regardless of the impact on the unit.

Can I make one more comment, please?

CHAIRMAN LIEBMAN: Yes.

MR. LEFF: Finally, none of this has anything to do with

the employer's free speech. These rules in no way limit an employer's free speech or its right to challenge the appropriateness of a petition. At the present time, if no issues are raised at the pre-election hearing and the parties agree to a stipulated election agreement, the election is set within a certain timeframe. Nobody has ever claimed that this timeframe is so short that it deprives an employer of its free speech rights.

All that these proposed rules seek is to ensure that all petitions are scheduled for an election within a reasonable timeframe. By instituting these rules, employers, unions, and employees will know from the beginning when a hearing will occur and when an election will be held. All issues challenging the petition will be dealt with in due course after the balloting. The predictability, uniformity, and certainties of these rules will benefit everyone involved in these elections. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Leff.

Questions?

MEMBER BECKER: I've got a question about your example, a statutory question and then a practical question. The statutory question is it seems to me that there is at least a statutory argument that we could not do what you've proposed. That is, the statute says that if a petition is filed, and there's probable cause to believe that there's a question

concerning representation, we need to have a hearing to determine if there is a question concerning representation. And that suggests that you have to determine that there's a question in an appropriate unit. I take it the employer's argument in your case was a single facility is not an appropriate unit?

MR. LEFF: That's correct.

MEMBER BECKER: I wonder if there's a practical solution, which is the one proposed, and whether it would have worked in your scenario. That is, you have a presumptively appropriate unit. The rules propose that if a party argues that presumptively appropriate unit is not appropriate, that they have to make an offer or proof. So, prior to your six nonconsecutive days of hearing under the proposal, you have an offer of proof, and the hearing officer would say this is a single-facility, presumptively appropriate unit. You said this and that, but even if you could prove it, that's not going to be sufficient. So, we're going to close the hearing. Would that have been a practical solution in your situation?

MR. LEFF: If it could go that way. I mean, again, our main goal is certainty in the election and not allowing anything to delay the date for election. I think that the employers may argue look, we want a full and fair hearing on that, and I don't have a problem with that, so long as it

doesn't delay the election date. If you want to do it after, fine, and the union takes a risk by, you know, petitioning only for that small unit. If the employer turns out to be right, there's no, no representation rights. You know, if there are issues that the hearing officer can decide beforehand that are very clear cut, if the union tries to put a general manager into the unit, and that person is so clearly a supervisor, the hearing officer at a pre-election hearing can summarily deny the request. I don't have a problem with that, so long as we don't have to have a full-blown hearing and a 25- to 30-day wait period which pushes off even the scheduling if not the date of the election.

So, I don't -- I leave it to you all to determine the best way to resolve these disputes, whether some can be resolved before, or if they all have to be resolved after. What I think the goal is is the setting of the election date as early as possible, whatever timeframe is adequate to allow employers and unions to give their free speech, and then doing, except in the most exceptional circumstances, not messing with that election date.

CHAIRMAN LIEBMAN: Anything further?

Thank you very much.

MR. LEFF: Thank you.

CHAIRMAN LIEBMAN: Appreciate it.

Mr. Kadela, and then we'll finish up with Professor

Bronfenbrenner.

MR. KADELA: Chairman Liebman and Members of the Board, good afternoon. My name is David Kadela. I'm a shareholder in the Columbus, Ohio office of Littler Mendelson. And it's my privilege to appear before you today on behalf of the firm to share with you our views on the proposed amendments. With over 800 attorneys, Littler is the largest firm in the country representing management exclusively in labor and employment matters. We have represented countless clients from Fortune 100 companies to family-owned enterprises in representation matters in every Region of the Board.

Today, I cannot capture in my comments the views of all of my colleagues regarding these proposed changes. Collectively, however, we do share the view that the changes would, first, unduly and severely cut into the time that employers have to communicate with employees during an election campaign, when their right to do that is at its greatest and most important. And, secondly, that it would establish unnecessary procedural requirements that would stack the deck against and increase the burdens upon employers.

We believe that in the main, the proposed changes are unnecessary and would have so sweeping an effect on the processing of elections that if they are to be considered, it should only be by Congress, like the Employee Free Choice

Act, and going back much further, like the Labor Reform Act of 1977, which also included a provision that did not get through Congress, of course, providing for quickie elections.

With this background, I'd like to turn now to some of the specific concerns, and given that my time is brief, I realize I may not get through all of them. So, I'm going to start with the expedited election process. It's been reported that the proposed changes would result in elections between 10 and 21 days compared to the 38-day median that exists today. You all have heard many on the union side champion that change, arguing that the action is necessary to curb the opportunities that employers have to coerce and intimidate employees in election campaigns. The facts, at least in my experience and my colleagues' experience and, I think, virtually everyone you've heard from here on the management side, don't bear that argument out.

I'm sure that that dispute is not going to be resolved during the course of these proceedings, but I would submit to you that the reality is that unions can only pin a very small number of their losses and can only pin the delay upon the conduct of very few employers. In our experience, the vast majority of employers are vigilant and steadfast in complying with the law during organizing drives. Do some individual supervisors slip up and commit minor violations? That happens from time to time. But primarily, my experience is

that employers are vigilant in complying with the law and that their focus is on communicating accurate, factual information to employees on what union representation would mean.

In our view, the communication of that measure in large measure explains the poor showing by unions in organizing new workers. As we see it, it's no wonder that the union side would throw their support behind changes that would serve to muzzle employers' exercise of their rights under Section 8(c). The Board, however, has an obligation to ensure that those rights are protected.

In its notice, the Board said that the purpose of the proposed changes was to streamline and modernize representation procedures to foster the objective of resolving questions of representation quickly, fairly, and accurately. That's a lofty goal, but the changes, in fact, really only go to the speed of the process. While promoting speed, they would undermine employer free speech rights and put at risk the fairness and accuracy of elections. The Act mandates that the perceived need for speed must yield to these other considerations. Fairness and accuracy are of paramount importance. Individually and collectively, they trump speed as a factor.

To ensure that they are conducted fairly and that they accurately reflect employee sentiment, elections necessarily

cannot be timed so that employees mainly, if not exclusively, hear only the union's message. Again, the debate between our employer's bad actors and are they responsible for intimidating and coercing employees, is that a cause of the poor showing by unions? You know, is that the issue, or is the experience, as others have said, that employers typically do not learn about a campaign until the election petition is filed? You've heard totally different polar views on all of these subjects during the course of this proceeding, that we don't think that you'll be able to resolve.

But there are certain things that you can say. And Section 8(c) is interpreted as the Supreme Court has said Congress intended, employers must be afforded ample time to communicate their views on unionization to their employees. Ten to 21 days doesn't cut it. Denial of a fair opportunity to exercise a right is a denial of the right. On this particular topic, I'd like to address one other thing too. It has been said, but it hasn't necessarily -- it's been linked to Section 7 but not otherwise, that employees must be afforded sufficient time to consider the views of both management and labor and to study the issues on their own before they vote.

Besides Section 7, that right can be gleaned from Section 1 of the Act, which provides that a central purpose of the Act, really one of two, is to protect the exercise by

workers of full freedom of association, self-organization, and designation of representatives of their own choosing. Full freedom means freedom to consider all views and opinions. The current system provides employees with such freedom. If the amount of time employees have to consider information is cut by as much as or more than half, as the proposed amendments would do, it will create a very real risk that when employees enter the voting booth, they will not have been provided with all of the information they need to cast an informed ballot. Speed for the sake of speed doesn't warrant taking that risk.

I see the red light is flashing already, but --

CHAIRMAN LIEBMAN: Well, let me see if my colleagues have any questions.

MEMBER HAYES: I do. I know that you've been involved with the American Bar Association with the Bar Association's Practice and Procedure Committee. My question is that when the Board typically contemplates changing even minor rules or regulations for practitioners before the Board, is that typically something that is discussed with the Practice and Procedure Committee before the rule changes are proposed?

MR. KADELA: There have been occasions where there have been initiatives that have been presented to us as a committee. Then we as a committee meet internally. And the way those issues come out of our committee would only be if

the management side and the union side reached a consensus. And then in that event, we would report our consensus view to the Board. Otherwise, certainly individual members of the committee are free to express their own views to the Board.

MEMBER HAYES: Is this proposal one that perhaps would have benefited from a referral to your committee to at least elicit the views of your members before a rule was proposed?

MR. KADELA: I certainly think that it would have. Given the divergent views that we've heard on this subject, it's a virtual certainty that we would not have reached a consensus. But it may well have resulted in our members forming views and information that individually they could have shared with the Board by providing comment.

MEMBER HAYES: And just finally, wouldn't the activity of soliciting the views of labor and management practitioners in that forum have been in accord with President Obama's Executive Order with respect to rulemaking by both Federal agencies and independent boards?

MR. KADELA: Whether or not it would have complied with the letter, it certainly would have complied with the spirit.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: I wanted to follow up. I actually was going to ask some similar questions, particularly because of your comment about -- I think you used the phrase polar views. I think it's been obvious to most of us here over the

last few days the wide divergence of viewpoints, and I know it's been suggested that we should have conferred more, say with the Practice and Procedure Committee. And you just said you think the likelihood of having reached a consensus wasn't great. But let me ask you another question. Do you know whether had we conferred with you on this, we would have been in violation of the Federal Advisory Committee Act?

MR. KADELA: I do not know the answer to that off hand.

CHAIRMAN LIEBMAN: Yes, because I think we would have. That's number one. But on many occasions, issues are brought too. For example, I think the possibility of electronic voting, there was a presentation and a lively discussion of that; is that not correct?

MR. KADELA: No question about it. But I would say with respect to the advisory committee issue, our committee is not an advisory committee. And so, that would have -- the presentation to them would have presented us with -- the first challenge we would have met in a meeting had we been presented with these proposed changes would have been to say whether we can touch them as a committee because it would -- we would be serving in an advisory capacity. And it may be very likely that we would have never gotten past that hurdle. That said, we certainly as a committee appreciate it on every occasion that the Board comes to us with information and solicits our views. Whether or not we can move forward and

provide the feedback for which the Board is looking is another matter. It's a very helpful process nonetheless.

CHAIRMAN LIEBMAN: We did have a discussion at one of the meetings about Professor Estreicher's article and his suggestion for reforming the election process and other suggestions, didn't we?

MR. KADELA: Yes.

CHAIRMAN LIEBMAN: We had a long, quite lively discussion of his proposals; am I not correct?

MR. KADELA: That is true.

CHAIRMAN LIEBMAN: So, in fact, we have on numerous occasions come and discussed issues that are relevant to this proposal; isn't that right?

MR. KADELA: Well, I would say that the context in which the issues have been discussed will vary from a presentation by a speaker that is known to be that speaker's own views when people go back and forth knowing that our objective is not to reach a consensus on an issue or provide advice on an issue, but to get the issues on the table and express our views and have a free exchange. To what end, it's difficult to say, but it's no different than any other type of seminar situation in my view.

CHAIRMAN LIEBMAN: I guess my point is that it may not have been presented as “this is the Board's proposal to change its rules,” but many of the substantive areas have

been discussed quite freely at a variety of practice and procedure committee meetings?

MR. KADELA: That is very true.

CHAIRMAN LIEBMAN: Thank you.

Anything else?

Thank you for coming and giving us your input.

MR. KADELA: Thank you very much again. I appreciate the opportunity.

CHAIRMAN LIEBMAN: And our last speaker of the day is Professor Bronfenbrenner.

PROF. BRONFENBRENNER: Thank you, Chairman Liebman, Members Becker, Hayes, and Pearce, for giving me the privilege of testifying here today and for the fair and dignified manner in which you've conducted this hearing. My name is Kate Bronfenbrenner. I'm from Cornell University where I am the Director of Labor Education Research. I've spent the last 23 years engaged in scholarly research in the area of labor and management behavior in certification elections in the private and public sector.

For the last two years -- for the last two days, we've heard many voices, some coming from the employer's side who are outraged that you would tamper with a system that has served them so well for so many decades. Unions are winning, they say, in NLRB elections. But as the workers who testified here made clear, those numbers only include the

fewer than 50,000 workers a year who manage to survive the gauntlets of threats, harassment, intimidation, coercion, retaliation they have to endure first to even get to a petition, much less get to an election or win.

We have heard multiple employer representatives state that employers first learn of campaigns after the petition is filed, and if the campaign process were streamlined, they wouldn't have enough time to prepare for their campaign and communicate with their employees. And this lack of communication would have an impact on election turnout that would bias in favor of unions.

Last, they repeatedly mentioned that the streamlining proposals, such as giving the union the e-mail addresses, are an unprecedented invasion of privacy. But my past research along with the NLRB's own documents as summarized in the study I conducted with my co-author Dorian Warren say otherwise.

As Professor Warren explained earlier, before our research, no one knew exactly when employer campaigns began because they were using the only variable at their disposal, the date unfair labor practices were filed. But by going through the painstaking process of searching through FOIA NLRB documents for each unfair labor practice allegation in our sample, and since I've personally reviewed every single case and document, I can assure you how painstaking that

research was.

We were able to develop and add a new variable to our already unique dataset of ULP allegations occurred. This allowed us to examine the relationship between petition date, election date, and when the most serious allegations of employer opposition actually occurred during the representation campaign. It also allowed me to, in answer to your earlier question, to make sure that the allegations were indeed election-related allegations and were tied to the specific election that occurred.

Our data not only show that nearly half of all serious allegations occur before the petition, but the percentage is the same for serious ULP allegations won. And that many occur many, many months before the petition and for most continue straight up through the elections and beyond. Thus, contrary to employer testimony, for a significant number of employers, opposition starts long before the filing of the petition and continues on after the petition, while workers wait for the election to be certified and persist still after that.

This mission is accomplished through multiple tactics at the employer's disposal. They're the building blocks of employer campaigns that I've seen in my research for the last 20 years. These include threats, interrogations, surveillance, fear, coercion, violence, retaliation,

harassment for union activity, promises and bribes, and interference with the election process itself.

It is notable that threats, interrogation, and surveillance are especially concentrated before the petition is filed. For example, with 72 percent of surveillance allegations occurring before the petition filed, it is difficult to take employer concerns about privacy seriously. As for their ability to communicate with employees, they have a host of legal means of communicating with employees, such as captive audience meeting, supervisor one-on-ones, letters, leaflets, videos, and e-mails that our data show they use early in campaigns. Ninety percent of campaigns that did weekly supervisor meetings, 67 percent that did 5 or more captive audience meetings, and 57 percent that did 5 or more letters had at least one serious allegation occur 150 days before the election took place. If they can communicate that well before the petition, they should have no trouble communicating afterwards.

Nor will lessening the delay impact turnout. Turnout is averaged above 85 percent in NLRB elections regardless of delay because both employers and unions know that every vote matters, and they work very hard to get their voters to turn out.

But the finding that is most relevant to the issue of timing of elections is this. Employer opposition to unions

is constant and cumulative. I stand here at the close of the hearing process to reassure you that the streamlining of the election process matters. Timing matters. Not in the way that scholars have usually plugged it into longitudinal elections, longitudinal equations with outcomes that dependent variable with very mixed results. But the time between when the employer campaign starts, when the petition is filed, and when the election is held matters very much to whether workers are able to withstand the intense opposition that the majority of employers routinely engage in today, long enough to file a petition, stay through the election, through the challenges, and then certification.

The proposed rule change will be a step closer in ending the process of having workers winnowed out at each stage for no other reason than delay and the employer opposition to continue one day longer than the workers could bear. Thank you for your patience.

CHAIRMAN LIEBMAN: Thank you for your thoughts and for being here with us.

Are there questions?

MEMBER BECKER: I just want to get a sense of the universe. So, the numbers that you were giving us today and that your co-author gave us were from the last year of your study; is that correct? So, for example, a 72 percent surveillance finding is pre-petition?

PROF. BRONFENBRENNER: Yes.

MEMBER BECKER: And how many elections were studied in that last year?

PROF. BRONFENBRENNER: In the last year, there were 154 elections and 236 ULP allegations out of our full sample of 1,000 elections, of which there were 49 percent had ULP allegations.

MEMBER BECKER: And then the 50 percent of serious allegations pre-petition and 72 percent of surveillance pre-petition, those percentages are when the conduct occurred, which eventually led to a finding, or when the conduct occurred which eventually led to a charge?

PROF. BRONFENBRENNER: Those are of -- those are 47 percent of -- well, it's both. Forty-seven percent of where charges were -- 47 percent of charges that were filed, but we also found 47 percent of charges that were won either with a settlement or a Board or court win.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Anything else?

Well, we thank you very much for sharing your research with us.

PROF. BRONFENBRENNER: Thank you.

CHAIRMAN LIEBMAN: And that, I suppose, concludes our second day. We thank all of you who have stayed with us until the end for being here. We thank all of the speakers

for your thoughtful contributions. As I said at the beginning, we take this meeting very seriously. We have open minds. It has been most interesting, I think, for all of us to hear the diversity of viewpoint, the diversity of experience. I think you have made this rulemaking much richer.

We look forward to seeing all of your written comments. As I said at the beginning, my colleagues, once they read any written testimony that you may submit with us today, may have some further follow-up questions. We'll endeavor to have those to you if we have any within a week. You have until August 27 to file any responses. But we do thank you very, very much for being here with us.

Do my colleagues have any closing comments? No, well then, I guess we are adjourned. And, again, thank you for being with us. I know a lot of you came a long way.

(Whereupon, at 3:42 p.m., the public hearing in the above-entitled matter was concluded.)

CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB) in the matter of the **PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES** at Washington, D.C. on July 19, 2011, were held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing.

Free State Reporting, Inc.
1378 Cape St. Claire Road
Annapolis, MD 21409
(410) 974-0947

_____

Timothy J. Atkinson, Jr.

Official Reporter

BRIAN E. HAYES
1099 14TH STREET, N.W.
WASHINGTON, D.C. 20570-0001
(202) 273-1770

MEMBER
NATIONAL LABOR RELATIONS BOARD
brian.hayes@nlrb.gov

The Honorable John Kline, Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

November 18, 2011

Dear Chairman Kline:

I am in receipt of your letter to the National Labor Relations Board dated October 27, 2011, in which you requested information regarding the Board's current rule-making activity. Specifically, your letter sought information regarding the posture of the Board's current proposed rule that would implement sweeping changes to the NLRB's Representation Case Procedures. Those proposed changes were contained in a Notice of Proposed Rule-Making published in the Federal Register on June 22, 2011.[1]

The Board's Solicitor answered your correspondence in a letter dated November 10. As I did not believe the November 10 correspondence to be fully responsive, and believed it to be misleading, I declined to approve its content.

The central fact omitted from the November 10 response letter is that *there is a timeline for anticipated actions.* My colleagues are committed to issuing a final R Case Rule before Member Becker's recess appointment expires at the end of the current Congressional session. Indeed, I was advised of this fact by the Board's Chairman on the very day that the response letter was forwarded to your office. I was further advised that in the event I did not agree with the final R Case Rule, it would, nonetheless, be approved and published based on their two-member vote. Moreover, if, as will necessarily be the case, I am not afforded the requisite opportunity to review and draft a dissent to the rule, I was advised that I would be limited to doing so after publication of the rule. As more fully explicated below, these actions would contravene long-standing Board tradition and the Board's own internal operating rules. These rules and traditions have been established to protect the legitimacy of the Board. They cannot, in

[1] 76 FR 36812.

my view, simply be cast aside in pursuit of a singular policy agenda without doing irreparable harm to the Board's legitimacy. Further, absent my agreement to delegate decisional authority on this matter to a group of three Board members, I have substantial doubts about the legal viability of my colleagues' proposed course of action in light of the Supreme Court's *New Process* decision[2] and the representations made by the Board to the Court during the course of that litigation.[3]

Let me briefly outline the specifics of my concern. As you are aware, prior to the expiration of former Chairman Liebman's term, the 3-member Democratic majority took a number of actions to which I dissented. Among those actions was the June 22 Notice of Proposed Rulemaking that contemplates an unprecedented and sweeping series of changes to the Board's representation election procedures.[4] The period for written comments and replies to comments closed on September 6. The website source for reporting such comments indicates that 65,957 comments were filed.

In my dissent to the Notice of Proposed Rulemaking, I criticized the majority's use of "a rulemaking process that is opaque, exclusionary, and adversarial," in contravention of the spirit of the Administrative Procedure Act, the Government in Sunshine Act, and President Obama's January 21, 2009, Memorandum on Transparency and Open Government, and in sharp contrast to the Board's procedural practice during the 1987 – 1989 rulemaking for appropriate bargaining units in the health care industry. That criticism apparently made no impression on my colleagues, who have continued this process in the same manner, and without my participation; and, who have now made it unequivocally clear that they intend to publish a final rule before the expiration of Member Becker's appointment without regard to Board tradition or rule. Utilizing a team of attorneys and examiners from their own staffs, the office of the Executive Secretary, various offices of the Acting General Counsel, and regional offices, quite possibly in violation of Section 4(a) of the Act, they are drafting a final rule with responses to comments filed without my participation or input.[5] Until this week, my colleagues and the team of attorneys that they have enlisted from throughout the Agency have shared absolutely nothing with me or my staff save for a single CD which merely sorts or "codes" the over 65,000 public comments in differing degrees of support or opposition to the rule. There have been no comprehensive summaries of

---

[2] 130 S.Ct. 2635 (2010).

[3] Brief of NLRB p. 21 n. 16, citing, inter alia, *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 991 & n.1 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989) 2010 WL 383618.

[4] 76 FR 36812.

[5] I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me. I note as well the amount of time spent by Board staff on rulemaking to expedite the conduct of representation elections has had a serious adverse impact on the Board's ability to process pending unfair labor practice and representation cases. The number of final decisions issued in September was far below the norm for that month, and current figures for October indicate a continuing diminution in productivity. My colleagues have attempted to disguise this fact by providing you with their Exhibit 3, inflating the number of monthly Board decisions by adding actions that are not traditionally included in Board productivity reports, such as the November 8, 2011 press release for case production in FY 2011. See http://www. nlrb.gov. Still, even by these misleadingly inflated numbers, the adverse impact of the use of staff on rulemaking is demonstrable.

the over 65,000 public comments circulated or shared with my staff, no drafts of the proposed responses to the comments circulated or shared, and, with one exception, no indication of what portions of the 185 page proposed rule my colleagues intend to include, exclude, modify or add to their draft of the final rule. That exception involved a take-it-or-leave it "compromise proposal" presented to me Tuesday, with a deadline for acceptance by noon today, Apart from compelling my agreement to the compromise rule itself, my colleagues' proposal would also have bound me to an unprecedented "emergency" revision of the ordinary internal rules for processing all pending cases from now until the end of Member Becker's term. In effect, the "emergency" procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases. This process, or, more accurately, lack of process, is so diametrically at odds with traditional decisional processes of the Board that it quite frankly defies description.

My colleagues' procedural preferences bear an unfortunate resemblance to those of the Democratic majority at the National Mediation Board in changing the majority vote requirement for elections conducted by that agency. Indeed, NMB Chairman Elizabeth Dougherty sent a letter to Republican Senators on the Health, Education, Labor, and Pensions Committee objecting to her two colleagues' resort to an arbitrary, exclusionary, and rushed rulemaking process.[6] Like Chairman Dougherty, I would under normal circumstances prefer not to discuss Board process so publicly. However, the circumstances of the present NLRB internal process are even more egregious than in the NMB situation and compel my public protest.

First, and perhaps of greatest institutional significance, is the fact that if my colleagues' final rule resembles the proposed rule---and I reasonably expect that it will---they will be overruling Board rules and precedent, including precedent established in case-by-case adjudication. For decades, it has been the Board's unwavering practice not to overrule extant law without the affirmative votes of 3 Board members, regardless of the total number of sitting members. That practice was recently reaffirmed both in decisional law[7] and in on-the-record representations to Congress by former Chairman Liebman.[8] Now, however, present Chairman Pearce has made clear to me that he intends to issue a final rule even if it is approved by only 2 Board members. To the extent that the Chairman believes the undisputed consistent practice of requiring 3 votes to change Board law somehow should not apply to rulemaking, I strongly believe he is mistaken. There is no basis whatsoever for distinguishing the Board's practice of requiring 3 affirmative votes on a matter of such magnitude on the pretext that this practice has developed in adjudicatory proceedings. The notion that we would not change precedent in the absence of three affirmative votes to do so in a case that may potentially affect only a handful litigants, but would freely do so in a matter affecting every single employer, employee and labor organization that utilizes our representation case procedures cannot be seriously countenanced

---

[6] November 2, 2009, Letter from NMB Chairman Dougherty to Republican Members of the Senate Health, Education, Labor, and Pensions Committee.

[7] Hacienda Resort Hotel and Casino, 355 NLRB No. 154 (Aug. 27, 2010).

[8] February 25, 2011, Letter from NLRB Chairman Liebman to The Honorable Phil Roe, Chairman, House Subcommittee on Health, Education, Labor, and Pensions.

Second, beyond my colleagues' intent to ignore the Board's decades-old majoritarian requirement, they also plainly intend to contravene the Board's own internal rules regarding the circulation and issuance of majority and dissenting opinions. The most recent expression of that rule, approved by Board vote, is set forth in Executive Secretary Memorandum No. 01-01. That rule provides that when a circulating draft has been approved by two Members of a panel, the remaining Member will act on the matter within 90 days. Only if the minority Member fails to circulate a dissent within the 90 day period can the majority publish and issue without a dissent. Again, while the rule references "cases," there is no rational basis for not applying it to substantive rulemaking as well. Further, the rule has never been enforced, even in circumstances where individual Board members took over a year to circulate a response to a consensus majority opinion. Since no draft of the final rule has circulated as of yet, and since Member Becker's recess appointment will expire in less than 90 days, it is quite clear that the two Board members nevertheless intend to breach the Board's internal operating rule and, for the first time in the history of this agency, not allow the requisite time for preparing or circulating a dissent. Indeed, as noted above, I have been specifically advised of this fact both with respect to publication of a final rule and with respect to a number of significant cases currently pending before the Board.

Finally, I note that my colleagues' rush to final rulemaking judgment is taken in the face of active consideration of H.R. 3094, provisions of which are in direct conflict with the Board's proposed rule. Although I make no comment concerning the merits of this legislative proposal, I believe its pendency provides yet another reason why my two colleagues should suspend their rulemaking efforts.

Thank you for your consideration of my comments.

Sincerely,

Brian E. Hayes
NLRB Board Member

Cc: The Honorable George Miller, Ranking Member, House Education and the Workforce Committee

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

November 21, 2011

The Honorable Brian E. Hayes, Member
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Dear Member Hayes:

I was greatly disappointed to read your letter, dated November 18, 2011, to Chairman John Kline of the House Committee on Education and the Workforce, which discusses in great detail internal Board deliberations and processes. Your willingness to publicly disclose pre-decision, deliberative conversations constitutes a dangerous departure from over 75 years of Board practice and threatens the ability of future Board members to deliberate freely and openly independent of external political and other pressures. Of even more concern, however, is the inaccurate and misleading nature of your description of those deliberations and processes. It is these inaccuracies that require me to clarify the record today.[1]

Before I address the specific allegations in your letter, it is important to note that you could have voiced all of the views expressed in your letter in an appropriate and public forum, but chose not to do so. In your dissent to the Notice of Proposed Rulemaking concerning the Board's representation case procedures, published on June 22, 2011, you stated, "I believe the Board should also have exercised its discretion to hold an open meeting under the Government in Sunshine Act." On November 10, I informed you that the decision about whether, how, and to what extent the Board would proceed with any final rules would likely be made at a public meeting. Last week, before you sent your letter to Chairman Kline, the Board sent a notice of such a meeting to the Federal Register and announced that the meeting would be held on November 30. At that open meeting, you will have a chance fully to express your views on the proposed rules, the procedures used to consider their adoption, and the propriety of the Board adopting them at this time, and your colleagues will have an opportunity to respond to your concerns. It would have been appropriate for you to express any views, however strongly held and however contrary to those of any of your colleagues, face to face, across the Board's conference table, and in public.

[1] Your letter and its release to the public have forced me to correct the record as to internal Board processes. I have, however, endeavored not to further compromise the deliberative process and thus have refrained herein from any disclosure of discussions of the substance of the proposed rules or pending cases.

Instead, upon the announcement of the public meeting, you immediately directed your Chief Counsel to inform the Board's Executive Secretary and the Board's Solicitor that you would not participate. You thus decided to refuse to participate in an open, deliberative process in favor of a one-sided and inaccurate letter to a congressional committee released late on a Friday afternoon.

No decision has been made on the proposed rules

In your letter to Chairman Kline, you make a number of false or misleading allegations. First, you assert that a decision has already been made to issue a final rule before the end of Member Becker's service on the Board. That is untrue. No decision has been made and no vote has been taken. As announced publicly last week, a decision on whether, how and when to proceed with any parts of the proposal will be made at the public meeting on November 30. The planned dates for circulation of a final rule and publication in the Federal Register were, when the Board's Solicitor wrote to Chairman Kline on November 10, and remain today, "unknown." Furthermore, the Solicitor accurately stated in that letter: "Discussions between Board Members on how to complete the R-Case Rulemaking are ongoing and no specific timetable has been established at this time." The fact that individual Members may have stated their views on these matters to you does not constitute a decision of the Board. Rather, it constitutes the normal deliberative process of a multi-member agency.

You have been fully informed about and invited to participate in the rulemaking process

You assert in your letter that your colleagues have proceeded to consider the proposed rules "without my participation." That is also untrue. Since the Board first began consideration of amendments to the representation case procedures, you have been kept fully informed and have been invited to participate fully in the deliberations. After you were sworn in as a Member, you were briefed on proposals to amend the rules. At each stage of the preparation of the proposed rule, you were advised of the other Members' thinking and invited to ask questions and provide comments. You were provided with a draft of the proposed rule as early as April of this year and offered a personal briefing concerning the draft. While you did not avail yourself of the briefing, detailed questions from your staff were answered by members of the drafting team, who offered continued assistance with any future questions that might arise. Although the Administrative Procedures Act does not require or provide for the publication of dissents from notices of proposed rulemaking, you were afforded an opportunity to write a dissent, which was published as part of the NPRM in the Federal Register.

The proposed rule, along with your dissent, was published in the Federal Register on June 22, 2011. On June 24, 2011, Board staff held a bipartisan, bicameral briefing for congressional staff. Your staff was invited to attend the briefing and did so. On July 18 and 19, 2011, the Board held a public hearing on the proposed rule. Prior to the hearing, you were briefed on the preparations for the hearing. You were provided a list of witnesses in advance of the hearing and you attended the hearing and participated in asking questions of the witnesses. Initial public comments on the proposals were due on August 22, and reply comments were due on September 6. You and all members of your staff had access to all public comments filed with the Board as soon as they were

filed. At no time did you request assistance in accessing those comments, although it was offered to you, or for additional staff help in reviewing those comments. Nothing in your letter to Chairman Kline suggests that you or any member of your staff has made any effort to review public comments concerning the proposals despite the statutory duty of the Agency, and, thus, of *each* of its Members, to review and consider all public comments. See 5 U.S.C. § 553(c); *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F. 2d 1516, 1520 (D.C. Cir. 1988), cert. denied 489 U.S. 1078 (1989) (agency has a "statutory obligation to consider fully significant comments"). While decrying a lack of public participation in the process, you have apparently chosen to simply ignore the extraordinary wealth of public comments concerning the proposal, many of which are highly sophisticated and contain valuable insights.[2]

Before the public comment period for the proposed rule closed on September 6, 2011, at my direction, agency staff began reviewing and coding the tens of thousands of comments that were submitted. You were invited to have your staff participate in the coding and review of comments. One member of your staff received training in coding, but, according to your Chief Counsel, never had time to participate because of other duties. On September 1, you were provided with a list of all the Board-side staff who had been trained to or were actually working on the comment review and coding[3] as part of my written request to you that the single member of your staff who had been trained to help be permitted to assist with the final review all the comments. After advising me that you would respond to the request after checking with your Chief Counsel, you never responded. In sum, the record is clear that you chose not to make any member of your staff available to assist with the large and complex task of reviewing and coding the comments. Every other Board Member contributed several staff attorneys. If you had honored my request to contribute members of your staff to this necessary work of the agency, they would, of course, have been able to keep you fully informed about the process.[4] Until Monday, November 14, 2011, neither you nor any member of your staff even inquired about the progress or status of the staff-level review of comments, although you were well aware that it was ongoing.

On October 7, you and your staff received copies of the comments Member Becker and I and our senior staff considered the most extensive, detailed, and useful (although all comments had been available to you since they were filed). You were also given computer generated reports identifying the issues addressed in all the comments that had been coded "most significant" and "significant" by the comment review team, along with instructions on how to locate any of the over 65,000 comments on the agency's shared computer system. On November 14, you and your staff were directed to comprehensive lists of issues raised in the most significant and significant comments, which had been prepared by staff who reviewed all such comments a second time. Thus, despite the fact that you refused to provide *any* staff assistance in the Board's review of the

---

[2] You may thus not be aware that, despite the strongly held views expressed in your dissent to the NPRM, the Agency received many comments supporting the proposal, not only from labor organizations representing millions of employees, but also from employers supporting many parts of the proposal.

[3] Despite having been given this list, and despite the receipt by your staff of updates identifying all of the other comment reviewers, you state in your letter to Chairman Kline on page 2, n. 5, "I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me." Your representation to the Chairman that you did not have access to the list is incorrect.

[4] In fact, your staff received numerous updates concerning the progress of the coding during September and October.

over 65,000 comments, you have been provided full and complete access to the fruits of that undertaking. [5]

In addition to fully sharing with you the results of the review of all public comments on the proposals, your colleagues have repeatedly attempted to engage you in discussion of the proposals in an effort to find some common ground. However, you have chosen not to engage in the ordinary collaborative process of deliberation. As stated above, you were provided with a draft of the proposed rule as early as April of this year and all of your staff's questions concerning the draft were fully and promptly answered. At no time during the consideration of the proposal did you suggest any revisions or attempt to engage your colleagues about the substance of the proposals or the process for their consideration. In your dissent from the NPRM, you stated, "Parts of what my colleagues propose seem reasonable enough," yet neither before nor since publication of the NPRM have you identified the parts of the proposed rules you consider reasonable.[6]

Shortly after the publication of the NPRM in July, Member Becker met with you in your office and asked that you consider which aspects of the proposals could be agreed on and specifically asked that you make proposals in relation to those areas of greatest importance to you. You indicated you would consult your staff and respond, but you never did. Since the end of former Chairman Liebman's term in August, numerous lists of priority matters the Board hoped to dispose of before the end of Member Becker's service have been prepared and circulated among the Members. The rulemaking process was among those matters. I have attempted repeatedly to discuss those priority matters with you in order to reach agreement on a schedule for their disposition and you repeatedly deferred the discussion. In the past two weeks, you declined to attend two regularly scheduled weekly meetings of the Board at which the Members were to have discussed a schedule for the disposition of the priority matters.

In mid-October, I specifically discussed with you a potential schedule for consideration of the rulemaking. You did not offer any alternative schedule. You did not present me with any specific concerns you may have had with the substance of the proposed rules. Instead, you indicated that, if the Board proceeded with consideration of the matter, you would consider resigning your position.[7]

In early November, in response to your suggestion that you would resign, thereby depriving the Board of a quorum and preventing the issuance of *any* form of final rule as well as the adjudication of many cases now pending before the Board, I offered to delay publication of a final

---

[5] Here, I must note that since August of 2010, when the term of former Member Schaumber ended, you have enjoyed the use of two full Board Member staffs, currently a total of 27 attorneys. Member Becker, by contrast, has a staff of only 14 attorneys.

[6] Indeed, many parts of the proposed amendments appear indisputably necessary, the elimination of references to the use of "typed carbon copy," to name just one. Yet at no time did you indicate *any* aspect of the proposal you would support.

[7] I note that you, like Member Becker and me, in response to the following written question from the Senate Health, Education, Labor and Pensions Committee -- "Do you intend to serve the full term for which you have been appointed or until the next Presidential election whichever is applicable?" -- provided, under oath, the answer "yes."

rule until after the new year when a quorum of the Board is reestablished (after the end of Member Becker's service), if you would simply agree that, after that time, you would produce a dissenting opinion within a specified time after receiving a draft final rule and notice approved by a majority of Members. I initially proposed a time period of 45 days. You advised me that that offer "did not work for you," and that you would suggest an alternative by the following week. You did not do so. It appears that you believe you are entitled to an unlimited amount of time to consider this matter in order to exercise an effective veto of the will of a majority, whether it be of two, three or four Members and whether it be this year or next.

On Thursday November 10, I advised you that despite your suggestion that you might resign, the Board majority wished to proceed with deliberations over the rulemaking. I encouraged you not to resign, but to participate in those deliberations. I told you that I was considering recommending significant modifications to the proposed rules and that I would appreciate your input. I told you that I would likely schedule a public meeting unless you preferred that the Board Members vote by electronic means (as we often do) on the questions of whether, how and to what extent the Board would proceed. You indicated that you thought a public meeting would probably be appropriate. I asked for your further views about how to proceed, and you said you would respond by Monday, November 14. I heard nothing from you by or on that date. On Tuesday, November 15, you emailed to advise me that you opposed a public meeting. In addition, you threatened to send an attached letter to Chairman Kline much like the letter you eventually sent at the end of the week.

In a final attempt to resolve our disagreements through the ordinary Board processes, Member Becker asked if you would consider a schedule under which the Board would consider only a very limited number of the proposed amendments and leave the remainder for consideration after the end of Member Becker's service. Member Becker did not ask you to agree to the amendments or to forego dissenting about any aspect of the proposals or the process used to adopt them, but simply that you agree to dissent within 30 days after receiving a draft final rule concerning the very substantially limited set of amendments.

Member Becker's proposal also included agreement of all Members to a temporary, emergency measure intended to permit the Board to issue decisions in cases that had been considered, voted on, and a majority decision written and approved before the end of Member Becker's service, given the possible loss of a quorum at that time. The proposal would have provided that no decision could issue unless a dissenting member had been afforded at least 30 days to write a dissent after receiving an approved majority opinion. Moreover, unlike the Executive Secretary Memorandum cited in your letter, the proposal would have allowed a dissenting member to take *any* amount of time he deemed necessary to write a dissent, which would then be issued and published separately from the majority opinion.[8] The proposal was expressly denominated an

[8] You state in your letter to the Chairman on page 3, "the 'emergency' procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases." This representation is simply incorrect. Under the written proposal you were given, you would have had *at least* 30 days to prepare a dissent, and the opportunity, if that period was not sufficient, to publish a dissent at any time after issuance of the majority opinion.

"Emergency and Temporary" measure, necessitated by the possibility that the Board might be "without a quorum and unable to fulfill its statutory duty to issue decisions at the end of the current congressional session and, possibly, for an extended period after the end of the session."[9] Last Friday, you informed Member Becker that you would not agree to any aspect of his proposal and made no counterproposal.

In short, you have not in any way been excluded from the process of deliberation concerning the proposed rules. Rather, you have refused to assist with that process in any respect and refused to engage in the normal give-and-take of deliberation of a multi-member board.

A majority of the current Board has authority to adopt a rule

You assert in your letter that the Board cannot proceed to adopt any final rule because of its tradition of not overturning precedent through adjudication without the agreement of at least three Members. Of course, the Board has made no decision to adopt any portion of the proposed rules to date. Moreover, the proposed rules do not purport to overrule any extant precedent. Nevertheless, I must point out that the National Labor Relations Act expressly vests the Board with authority to adopt rules and does not require any form of super-majority vote in order to do so. To the contrary, under the Act, a lawful quorum of the Board consists of three members (out of the five members provided for by the statute). Under Section 3(b) of the Act, so long as the Board has a quorum of three, sitting Members, the Board can "exercise all of the powers of the Board." 29 U.S.C. § 153(b). Rulemaking is one of the "powers of the Board." See 29 U.S.C. § 156. There is no statutory basis to argue that a three-member quorum of the Board must act unanimously—as opposed to acting by majority vote, as the Board ordinarily acts—in order properly to exercise the Board's powers, including rulemaking.

The Board does have a tradition, as you state, of not overruling its own prior precedents through adjudication with fewer than three votes to do so. See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 & fn. 1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (collecting cases dating back to 1985). This tradition, which is not unbroken,[10] is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure. No Board decision has ever articulated a reason for the practice.

---

[9] As you know, Member Becker has advocated adoption of such an internal rule since the start of your and my service on the Board, and has informed you directly that he would publicly support its retention *regardless* of any subsequent changes in the composition of the Board. I note further that the proposal parallels rules governing case processing in federal courts of appeals, designed, of course, to prevent a dissenting judge from effectively exercising a pocket veto through delay. See, e.g., U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures, §§ 5.5.3(b), 5.6; U.S. Court of Appeals for the Seventh Circuit, Operating Procedures, § 9(i).

[10] See *Mathews Readymix, Inc.*, 324 NLRB 1005, 1008 fn. 14 (1997), enf. granted in part, denied in part, 165 F.3d 74 (D.C. Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997) (same).

The closest approximation to such a rationale comes from a federal appellate court. On review of *Hacienda Resort,* the U.S. Court of Appeals for the Ninth Circuit acknowledged the Board's traditional approach to overruling precedent in adjudication:

> We recognize the Board's interest in protecting the stability of its legal precedent. Unlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking.... Under such a scheme, the Board's rules would be of little assistance to employers and unions in following the NLRA if the Board's rules interpreting the Act were subject to routine, frequent change. The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment.

Local Joint Executive Board of Las Vegas v. NLRB, 657 F.3d 865, 872 (9th Cir. 2011).

The Ninth Circuit's statement underscores a critical aspect of the Board's practice: It has been followed in the Board's *adjudication* of cases, rather than in rulemaking. The notice-and-comment process of rulemaking does not implicate the same concerns about the stability of legal rules that adjudication does, because it does not permit the "routine, frequent change" of which the court spoke. The greater stability inherent in rulemaking has been cited by the Administrative Conference of the United States in recommending increased use of rulemaking by the Board. See Administrative Conference of the United States, Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 Fed Reg. 33851 (July 24, 1991). In sum, the notice and comment procedures of the Administrative Procedures Act, which you have acknowledged have been fully followed by the Board, are an appropriate substitute for the self-restraint the Board has traditionally imposed on itself in the context of adjudication.

You do not possess a veto over all Board action

You assert in your letter that you possess veto power over *any* action of the Board at this time under the Supreme Court's recent decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). You assert that you must agree "to delegate decisional authority on this matter to a group of three Board members." Section 3(b) of the Act provides that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." At present, however, the Board, consisting of only three Members, is exercising its powers as a full Board and not delegating any powers to "any group of three or more members." Until now, you agreed, at least implicitly, with this construction of the Act: since the end of former Chairman Liebman's term, the three remaining Members of the Board have issued numerous decisions without any such delegation, including decisions in which a Member dissented. In fact, since that time, the language used in panel decisions when there are more than three sitting Members, "The National Labor Relations Board has delegated its authority in this proceeding to a three-member

panel," has not generally been used,[11] and you have raised no objection and never made the peculiar suggestion that the three sitting Members must somehow delegate authority to themselves until now.

No standing rule of Board procedure provides you with 90 days to dissent before publication of any final rule

You assert in your letter that Executive Secretary Memorandum No. 01-1 entitles you to 90 days to write a dissent to any final rule. That is untrue. Memorandum No. 01-1 applies to "Timely circulation of Dissenting/Concurring Opinions" -- i.e., it expressly applies only to the adjudication of "cases." While you acknowledge that the Memorandum applies only to adjudication, you assert that there is "no rational basis for not applying it to substantive rulemaking as well." There is one, however, and it is embodied in the APA. Significantly, as stated above, the APA makes no provision for publication of a dissent from either a notice of proposed rulemaking or final rule. Moreover, the APA requires a notice of proposed rulemaking. There is no parallel requirement of a published statement of a preliminary view by the majority in adjudication. Here, therefore, you have had a detailed statement of the majority's views since well before the NPRM was published in June. There is thus every reason to expect that "timely circulation" of an opinion dissenting from any final rule could be prepared in less than 90 days.[12] Finally, while you assert that your colleagues intend to "not allow the requisite time for preparing or circulating a dissent," the only proposal that has been made to you provided that if you did not believe you had sufficient time to prepare a dissent you could take as much time as you deem necessary and your dissent would be published in the Federal Register subsequent to the final rule.[13]

The Board's use of staff from its General Counsel's office and regional offices to fulfill its statutory duty to review public comments was entirely proper

You assert in your letter that the Board's use of staff from its General Counsel's office or regional offices to assist with the review of comments or in any other manner in connection with the rulemaking proposal somehow violates Section 4(a) of the Act. This allegation of illegal conduct is made without supporting citation or explanation. As you well know, nothing in that section prevents staff from any part of the agency, including the General Counsel's office or regional offices, from assisting in the review of public comments on a proposed rule or in research or drafting under a Board Member's supervision. Section 4(a), by its terms, applies to the

---

[11] Compare *Atlantic Scaffolding*, 356 NLRB No. 113, slip op. at 1 (March 18, 2011) (Liebman, Pearce and Hayes) with *Douglas Autotech Corp.*, 357 NLRB No. 111, slip op. at 1 (Nov. 18, 2011) (Pearce, Becker and Hayes). The absence of any delegation and thus of the delegation language in nearly all decisions since the Board dropped to three Members is consistent with the absence of any delegation (and thus the delegation language) whenever the Board acts through all its sitting members, i.e., when it acts *en banc*. See, e.g., *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 1 (Aug. 26, 2011).

[12] Indeed, Memorandum 01-1 expressly provides that "questions will arise which are not answered by these procedural instructions" and that they will be handled "on an ad hoc basis." Further, the Memorandum provides that "For good cause, the Board has the discretion to allow departure from these procedures on a case-by-case basis."

[13] Memorandum 01-1 creates a 90-day period for circulation of a dissent, but contains no allowance for the subsequent publication of dissents if the dissenting Member requires more time.

adjudication of cases (to which the General Counsel is a party) and has never been construed otherwise. Moreover, you are well aware that staff from the General Counsel side of the agency are detailed from time to time to Board staffs where they perform a variety of duties. It is disturbing, to say the least, that you would raise a charge of illegal behavior in a letter to a Member of Congress without first speaking with me about your concerns or raising them with the Agency's Solicitor or Inspector General, who could easily have allayed your concerns on this score.

Other Board Members have continued to fulfill their duty to decide cases

You assert in your letter that the Board has not properly attended to the adjudication of pending cases while it was fulfilling its duty under the APA to consider all public comments on the proposed rules. This is untrue. As you point out in your letter, action by all sitting Members is traditionally required before a decision is issued. While I do not believe it is appropriate to publicly reveal the status of pending cases in each Member's office, under separate cover I will provide you with a list of all cases we have designated as priority cases in which decisions are ready to be issued pending only your action. For you to suggest that the delay in issuing cases is due to other Members' devotion of their time or their staffs' time to the rulemaking proceedings is disingenuous, particularly when you have refused requests to provide any staff to assist with the statutorily mandated task of reviewing public comments.[14]

The rulemaking process has been the most open and inclusive process in the Board's 75-year history

Finally, your letter asserts that the rulemaking procedure has been rushed and exclusionary. This is untrue. On June 22, the Board published in the Federal Register a 36-page NPRM setting forth the proposed rules along with a detailed explanation of why they were being proposed. The Board sought written comments on the proposals for 60 days and written reply comments (which are not required by the APA) for an additional 14 days thereafter. The Board held an unprecedented two-day public hearing on the proposals attended by all sitting Board members, at which many of the most experienced and skilled members of the labor and management bar as well as employers, employees, and union leaders testified concerning the proposals and were questioned by Board Members. The Board has received over 65,000 public comments on the proposals, and each unique comment has been personally read at least once if not many times by Board staff under my direction. To describe this extraordinarily careful and open process as in any respect rushed and exclusionary simply ignores reality. It appears that in your view due process means interminable process or, at least, process that extends until the Board is either disabled from acting or its

[14] I further reject your suggestion that the Board attempted to "disguise" a "diminution in productivity" in its response to the congressional request. Exhibit 3, which you criticize in your letter, was prepared by the Executive Secretary's office in response to the request for a "monthly breakdown of decisions issued by the Board." When your staff pointed out that the request might refer to a subset of decisions, namely those in contested cases, a table providing that information was prepared as well, and attached as Exhibit 4. Both sets of numbers were provided to the committee at the same time. Neither even remotely supports your assertion that necessary work on the rulemaking proceeding has had an "adverse impact" on the issuance of decisions.

composition changes. But that is not how due process is defined under the Constitution or the APA, and the Board has fully and fairly complied with both the letter and spirit of the law.

In sum, I recognize that you may disagree with my views of proper administrative procedure and Board priorities, and you have every right to do so and every right to express that disagreement in an appropriate forum. That forum is the planned public meeting, a private meeting with me or Member Becker, or a published dissent. At every step of this rulemaking process, the other members of the Board have attempted to include you and your staff in the accomplishment of the tasks necessary to fully and fairly consider the view of the public, to engage in discussions with you, and to seek your views. At every step of the process, however, you have declined to assist, to participate, and to engage in collaborative deliberation. With all due respect, your conduct has been inconsistent with the collegial norms of the Board.

I deeply regret that you continue to decline to participate in a meaningful way in this deliberative body. I urge you to return to your work here on the Board. Many cases, vitally important to the employees, employers, and labor organizations who rely on this Agency as well as to the general public, await your consideration. Every day, Member Becker and I along with all the other employees of our Agency strive to make the National Labor Relations Act work as a mechanism for the peaceful resolution of conflicts that arise in American workplaces. If you disagree with the approach we have taken, state your disagreements face to face across the conference table, where they can be considered and debated, or explain your position in a dissent, as both Member Becker and I have done when we have been in the minority, and as previous Members of this Board have done since the creation of this venerable body. You can come back to the work of the Agency and contribute your views to our important deliberations, or you can continue down a reckless path of unfounded public accusation. I, for one, hope you will return to work, and I invite you to do so. We still have much to do on behalf of the American people.

Very truly yours,

Mark Gaston Pearce
Chairman

cc: The Honorable John Kline, Chairman
House Committee on Education and the Workforce
The Honorable George Miller, Ranking Member
House Committee on Education and the Workforce
The Honorable Tom Harkin, Chairman
Senate Committee on Health, Education, Labor & Pensions
The Honorable Michael B. Enzi, Ranking Member
Senate Committee on Health, Education, Labor & Pensions

STATEMENT OF
Chairman Mark Gaston Pearce
OPEN MEETING 11/30/2011

Inasmuch as this is an open meeting under the Sunshine Act, I welcome the members of the public and the press who are present, as well as those who are joining us through video link or watching on the internet.

I would like to begin with a short statement of why we are here today. There has been a lot of speculation in the press and on the internet as to the purpose of this meeting, and I think it is important to say what this meeting is, and what it is not. As was stated in the Notice published in the Federal Register on November 23, the purpose of this meeting is to vote on how to proceed in this rulemaking proceeding.

We are in the middle of a process that began with the issuance of a Notice of Proposed Rulemaking on June 22, 2011. Thereafter, we held two days of public meetings on July 18-19, 2011, with 66 witnesses testifying before the Board. Ultimately, over 65,000 written comments have been received and analyzed. The Board must now decide how to proceed in this matter. This decisional process is not the final agency action on this rulemaking. Final Agency action on this rulemaking will occur, if at all, after a proposed final rule is drafted and circulated for all Board Members to consider through our electronic case processing system.

1. Before starting our business at hand. I'd like to acknowledge the recent passing of two great labor law practitioners;
   a. **Andy Kramer**, Partner at Jones Day – who not too long ago addressed the Board during our public hearing regarding the very matter on today's agenda- and
   b. **James A. McCall,** Special Counsel to the International Brotherhood of Teamsters and formerly an attorney with the NLRB, having served on the staff of Board Member John H. Fanning and as a field attorney in Region 5.

   Both Gentlemen, assets to the profession, will be dearly missed.

2. I thank not only the late Mr. Kramer for his participation in the public hearing, but all the members of the labor and management bars, employers, employees, union officials, and members of the public who contributed to our consideration of this important matter.
3. We are here today to decide on how to proceed with respect to the proposal published in June of this year which would amend the Boards procedures regarding representation cases**. I reiterate much of what former chairman Liebman stated about the Notice of proposed rulemaking:**

   - Among the more important duties of the National Labor Relations Board during it's almost 76 year history is conducting secret-ballot elections to determine whether employees want to be represented by a labor union, and resolving representation questions quickly, fairly, and accurately.
   - The Supreme Court has explained that under the law, the Board is responsible for the rules that govern representation cases.

- The Board has revised its representation rules periodically, looking for ways to achieve a broadly-shared goal: making the representation process work as well as possible.
- One important result of prior Board revisions of the Representation Rules has been to reduce the typical time between the filing of an election petition (which triggers the Board's procedures) and the actual election.
- The current rules however are laden with ***unnecessary delays***, which ***encourage wasteful litigation***, and ***reflect old-fashioned communication technologies, which fail to utilize or consider best practices for case processing.***

4. This has been the most open and participatory proceeding in the 76 year history of the Board.

- The Board ordinary operates outside the public spotlight having held only two oral arguments in the last decade.
- On June 22, the Board published in the Federal Register a 36-page NPRM setting forth the proposed rules along with a detailed explanation of why they were being proposed. The Board sought written comments on the proposals for 60 days and written reply comments (which are not required by the APA) for an additional 14 days thereafter.
- The Board held an **unprecedented two-day public hearing** on the proposals at which it heard the testimony of over 65 members of the public including employers, employees, union leaders, academics as well as experienced advocates from the labor and management bar.
- The Board has received over 65,000 public comments on the proposals, each of which has been **read, some of them many times,** by Board staff under my direction.
- And today we hold a public meeting to vote on **some of** the proposals – the first such meeting in two decades.

5. The proposed amendments under consideration today **remain limited to the rules governing representation cases**.
   - They would not alter how elections are conducted.
   - Nor would they alter the rules governing any parties' campaign conduct or limit any party's speech in any manner

6. **Finally, the proposed changes do not establish inflexible time deadlines or a mandate that elections be conducted a set number of days after the filing of a petition**.

7. Now that the Board has had an opportunity to fully review the public comments on the proposals, the time has come to decide how to proceed. In order to do so in the most open and transparent manner possible, this public meeting was announced on November 18 and the notice of the meeting was published in the Federal Register on Wednesday November 23, 2011
8. On November 22, I **circulated to all my colleagues on the Board a resolution proposing how the Board should proceed** in relation to the proposals in the **NPRM**.

A week ago my colleagues each were provided with the proposed resolution. It is the same as has been posted on our website yesterday afternoon and it proposes a portion of what was already provided to my colleagues at the time of the June filing of the NPRM. I will not read it as there are copies available for you to look at.
What I'd like to do is summarize each of the six procedural amendments (items 1 a – f), which are all aimed at reducing unnecessary litigation in election cases before the Board:

1) ***Paragraph 1.a of the resolution seeks to limit litigation to relevant issues.***
   a) According to Section 9(c) of the National Labor Relations Act, the purpose of the pre-election hearing is to determine whether there exists a question of representation to be resolved by an election.
   b) Litigation of issues that are not relevant to that determination is unnecessary, expensive, and a waste of the time and resources of the Board and the parties.
   c) This proposed amendment would include in the rules the purpose stated in the Act and give the hearing officer express authority to limit the hearing to matters relevant to the issue to be determined: whether a question of representation exists.

2) ***Paragraph 1.b of the resolution seeks to avoid unnecessary briefing.***
   a) Most cases involve only routine issues and well known principles of Board law, which are familiar to all regional directors and hearing officers.
   b) In such cases, briefing adds nothing to the regions' decision-making process and substantially increases the parties' litigation costs.
   c) Regional directors can reach sound and fair decisions in such cases based on the record of the hearing. We know this because they are doing it every day, right now.
   d) The value added by briefing in such cases could be imparted with equal effectiveness by oral closing statements, at much lower cost to the parties.
   e) This proposed amendment limits unnecessary litigation by authorizing the hearing officer to decide whether to permit briefing depending on whether the case presents issues that would benefit from it.

3) ***Paragraph 1.c seeks to avoid multiple and unnecessary appeals.***
   a) The Board's current rules require parties to file two separate appeals to seek Board review of pre-election issues and post-election issues.
   b) Appeals concerning post-election issues are filed, of course, after the election.
   c) However, appeals concerning pre-election issues must be filed before the election under the current rules. It often happens that those issues are mooted by the results of the election. When that happens, all of the time the parties have spent litigating the issues is wasted time.
   d) The proposed amendment simplifies the procedure by consolidating the two appeals into a single post-election procedure.
   e) It also eliminates unnecessary litigation by doing away with appeals of issues that become moot as a result of the election.

4) ***Paragraph 1.d does away with an unnecessary waiting period.***

a) This proposed amendment follows directly from the elimination of a separate pre-election appeal. It ends the practice of delaying the scheduling of elections to permit time to file the pre-election appeal, which of course is not needed if there is no pre-election appeal.
b) It bears mentioning that even under the current rules, the delay does not serve its stated purpose because the Board almost always permits the election to be conducted while the appeal is pending and directs that the ballots be impounded until a decision on the appeal is reached.

5) ***Paragraph 1.e, like paragraph 1.c, seeks to avoid unnecessary appeals***.
a) This proposed amendment would narrow the circumstances in which a request for special permission to appeal would be granted.
b) Such permission would be granted only in extraordinary circumstances when it appears that the issue addressed in the appeal would otherwise evade review.
c) Board review would still be available - after the election - on all issues for which special permission to appeal was denied.

6) ***Paragraph 1.f again seeks to simplify procedures and avoid unnecessary appeals.***
a) The Board's current rules provide different kinds of appeals according to the kind of issue being raised:
b) Pre-election issues are appealed through a request for review; the Board grants review if it determines that issues raised by the party seeking review warrant closer examination of the regional decision.
c) Parties are invited to file briefs only if review is granted.
d) Post-election issues, such as challenges to voter eligibility and objections to the conduct of the election, are usually appealed through exceptions, and the Board is required to issue a decision addressing all issues regardless of their merit.
e) The proposed amendment would make the request-for-review procedure applicable to all appeals, not just those addressing pre-election issues.
f) This would simplify these procedures by making them uniform, and it would avoid litigation of appeals that do not present a serious issue for review.

- Items 1(g) and (h) are not procedural amendments. They deal with conforming existing regulations with the amendments as proposed and the elimination of duplicative language

- IT IS UNDERSCORED THAT THIS RESOLUTION LEAVES FOR CONTINUED CONSIDERATION AND DELIBERATION THE REMAINDER OF THE AMENDMENTS PROPOSED BY THE NOTICE OF PROPOSED RULEMAKING

I am gratified by the success of the Board's public meeting today, which was the first such meeting in over 20 years. The public had an opportunity to see the high quality of the substantive discussion of issues that takes place here on a regular basis, but normally outside of the public eye. The issues before the Board concerning the proposed rule to reform election procedures were thoroughly aired, and a decision was reached concerning the way forward. This is precisely how a deliberative body should function. I am also gratified by the participation of Member Brian Hayes and his public commitment to serving out his term and working with me on the many challenging tasks ahead.

Statement of Member Craig Becker
(As prepared for delivery)
November 30, 2011

Like the Chairman I would also like to take the liberty of beginning my comments on the proposed rules by noting the great loss to labor-management relations represented by the deaths of both Jim McCall and Andy Kramer last week.

Andy Kramer's list of clients read like a who's who of American business, including General Motors, Westinghouse and the Boston Red Sox. As the Chairman indicated, Andy attended the two day public hearing held on the proposed rule on July. During Andy's testimony I questioned him at length in an exchange which I know some observers thought was a bit combative. But I did not think it was and I am sure Andy did not think so because it was focused on the substance of the important matters before us. I was seeking to probe his analysis of the proposals and he was seeking to critique the proposals, to persuade, to convince. That is how sound public policy is made. Andy also filed with the Board on behalf the HR Policy Association and the Society for Human Resources Management 88 pages of learned comments on the proposal. I have personally read every page as have Members of the Board or our staff read every page of each non-duplicative comment among the over 65,000 public comments we received
That is how sound public policy is made. Sound public policy is not made through the type of reckless allegations and clever labels that have surrounded this rule making process. Sound public policy is made by openly addressing and debating the issues as Andy did and we are doing here today.

The Chairman thanked the members of the bar and the public who commented on the proposals both at the two day hearing and in writing. But let me add a thank you to our staff here at the Board who painstakingly reviewed, coded, classified and analyzed all of those comments while continuing to perform all of their other duties in relation to the processing of cases and other matters.

Let me turn to the resolution offered by the Chairman.

I support the resolution.

Among the central tasks Congress gave the Board is protecting employees statutory right to "representative of their own choosing."

When there is a dispute about whether employees have chosen a representative, whether their employer must recognize their representative, or whether the employees continue to support an existing representative, Congress provided that employees, employers and unions can petition the Board to resolve the dispute. In section 9 of the Act Congress called those disputes a "question of representation." It is not up to the Board to answer a question of representation. A question of representation cannot be answered through litigation. Rather, Congress provided that the question should be answered by employees in a secret ballot election. The Board's statutory duty is only to determine if such a question of representation exists and, if so, to supervise an election and, if the election has been conducted properly and fairly, certify the results.

Congress has repeatedly expressed its intention that the Board conduct election promptly in order to resolve such questions. An express purpose of the original Act's not subjecting Board certifications to judicial review except as part of a later unfair labor practice case was to prevent litigation from blocking prompt conduct of elections. In 1947, Congress amended the Act to provide the certification could only be granted based on an election and that "an appropriate hearing" must precede a direction of an election, but it also made clear that the issue to be addressed at that hearing is whether a question of representation exists. Again in 1959, Congress amended the Act to permit the Board to delegate the handling of representation cases to its regional directors expressly to speed the resolution of questions of representation.

The proposals that the Chairman recommends be adopted in a final rule are fully consistent with Congress' intent as expressed in 1935, 1947 and 1959.

Of course, as many commentors pointed out, speed is not the only statutory objective. Where a question of representation exists an election should be conducted as promptly as possible consistent with employee free choice. In addition, the Board has a statutory obligation to conduct an appropriate hearing to determine if such a question exists and all parties have statutory and constitutional rights in relation to that hearing.

The proposed amendments balanced all of these statutory policies, the competing policies have been further considered in relation to the public comments, and the proposals the Chairman recommends be adopted represent a balanced effort to improve the Board's procedures that fully respects all the policies underlying the statute.

While overall the proposals will reduce unnecessary litigation and regulation, each of the proposals addresses a separate problem that has become evident in the processing of representation cases and I support each one separately.

First, while the Act clearly states that the purpose of the pre-election hearing is to determine if there is a question of representation, the current regulations do not. As a result, parties have been permitted to insist on litigating issues at the pre-election hearing that need not be resolved in order to determine that an election is necessary. For example, if a substantial number of employees in an appropriate unit, say all service and maintenance employees in a nursing home, wish to be represented and their employer declines to recognize their representative, a question of representation exists and an election should be directed to answer it. Whether an individual otherwise in the service and maintenance unit is not eligible to vote, say because he is a supervisor, is not an issue that needs to be resolved prior to the election. The appropriate unit is all service and maintenance employees excluding supervisors. The individual can vote subject to challenge and, if necessary, the issue can be resolved after the election. The Board's experience suggests that in many cases the dispute is rendered moot by the election results or the parties, free of the tactical considerations that exist prior to the election, are able to resolve the matter without further litigation.

In fact, the current regulations lead to an even more irrational result. As explained, they have been read to permit parties to insist on litigating issues that are not relevant at the pre-election hearing, but neither the regional director nor the Board is obligated to decide the issue before the election and despite having taken evidence on the issue, the regional director and the Board nevertheless often defer decision and let the disputed individuals vote subject to challenge.

In fact, every Board Member in this room has repeatedly voted to defer such decisions until after elections

Let me give you just a few examples.

Those decisions make sense. What does not make sense is to permit parties to litigate disputes that need not be resolved and often are not resolved until after an election when they are often rendered moot.

The amendments correct this problem by defining the statutory purpose of the hearing and giving the hearing office authority to exclude evidence that is not relevant to that purpose

Second, most pre-election hearings involve routine factual issues and well established principles of Board law. In fact, the average hearing lasts only one day. In such cases, regional directors can reach a fair and sound decision based on the factual record from the pre-election hearing, including closing arguments. Yet the current regulations give all parties up to seven days to file briefs after the hearing, even when briefing adds nothing to the decision-making process and substantially increases the parties' litigation costs.

The amendments correct this problem by giving the hearing officer discretion to permit briefing depending on whether the case presents issues that merit briefing.

Third, unlike the ordinary rules of litigation in the courts or before other agencies, under which parties must ordinarily wait until there is a final order to appeal, the current representation case rules permit appeal to the Board both before and after an election. In fact, the rules have been construed to require parties aggrieved by pre-election rulings to seek Board review prior to the election to avoid waiving their objections. This results in unnecessary litigation and expense in several respects.

In 1985, the Supreme Court explained, "Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken." In 1995, the Court again explained, "An interlocutory appeal . . . risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary."

These same common sense principles of litigation should apply before the Board. First, in many cases the objection raised in a pre-election request for review is rendered moot by the results of the election, for example when an employer argues the regional director erred in finding the unit appropriate but the employees vote against representation. Second, even when the issue is not rendered moot, parties are forced to pursue two separate appeals instead of consolidating their objections into a single post-election appeal.

The amendments correct this problem by permitting parties to appeal all ruling by the regional director in one consolidated post-election proceeding.

Fourth, under the current rules, the regional director ordinarily will not schedule an election sooner than 25 days after the decision directing an election in order to give the parties an opportunity to request Board review and for the Board to consider the request. This waiting period is rendered unnecessary by the consolidation of all review post-election. But even under the current rules, the waiting period does not serve its stated purpose because requests for review are not filed in every case, they are granted in very few cases, and even when the Board has not yet ruled on the request or has granted the request for review, the election is held and the ballot are impounded.

The amendments correct this problem by eliminating the waiting period.

Fifth, the current rules provide for any party to file a request for special permission to appeal to the Board, but articulate no standard under which the Board evaluates such requests.

The amendments correct this problem consistent with the overall effort to avoid piecemeal appeal by limiting special permission to appeals to cases where the issue in dispute would otherwise escape review.

Sixth, under the current rules, the procedures for seeking Board review pre- and post-election differ. Pre-election Board review is discretionary. Post-election it is mandatory under most circumstances. The difference has no stated purpose and has never been explained. Requiring Board review post-election creates precisely the bottle-neck and delay Congress sought to avoid by authorizing the Board to delegate the resolution of questions of representation to the regional directors. Moreover, many post-election disputes have no legal or policy significance and are expertly handled by the

regional directors who are career civil servants with extensive experience with Board procedures and rules.

Again, let me give you a recent example. In Ruan Transport, an election was held on June 2, 2010. The sole post-election issue was the validity of a single ballot on which a voter had placed an x in one box and then marked it over with a purple highlighter and made a darker x in the other box. The hearing officer ruled on August 6 that the ballot should be counted. The case came to the Board on exceptions on August 20. The Board did not rule on the matter until November 30. While the validity of that ballot was no doubt very important to the voter who case it and to all of the 33 employees in the unit, it clearly did not merit full Board review and the attendant three month delay in the certification of the election results.

The amendments correct this problem by making Board review of regional directors' resolution of post-election disputes discretionary.

Finally, the current regulations contain two, separate and almost entirely redundant parts both describing representation proceedings. This redundancy is a potential source of confusion.

The amendments correct this problem by eliminating one entire subpart of the regulations and substituting a non-technical description of the representation case process to be published in the Federal Register with the final rule.

The Chairman's proposal is that the remainder of the proposal in the NPRM be deferred for further deliberation. While it is my tentative conclusion that many of those proposals should be adopted, given the volume of comments we received concerning some of them I believe the Chairman's proposal of further deliberation is prudent. Of course, I personally regret that it appears I will not be here to help bring that deliberative process to a conclusion.

However, if adopted in a final rule, the proposals identified by the Chairman would permit the regions to implement many of the procedures outlined in the NPRM using a set of best practices already in use in many regions while Board deliberates further on a more uniform system of implementation

I urge my colleague to support the resolution.

Thank you Chairman Pearce.

STATEMENT OF MEMBER HAYES

NOVEMBER 30, 2011 PUBLIC MEETING

THE DRAFT RESOLUTION ON PROPOSED RULE CHANGES WHICH IS THE SUBJECT OF TODAY'S PUBLIC MEETING WAS SENT TO ME ON THE EVENING OF TUESDAY, NOVEMBER 22. GIVEN THAT SHORT TIME FRAME, AND WITHOUT GREATER SPECIFICITY AS TO THE EXACT LANGUAGE OF CHANGES CONTEMPLATED, OR ANY FURTHER JUSTIFICATION OF SUCH CHANGES IN RESPONSE TO THE MASSIVE NUMBER OF COMMENTS FILED BY THE PUBLIC, IT IS DIFFICULT FOR ME TO ENGAGE IN A MEANINGFUL DIALOGUE ABOUT THE DETAILS OF THE CHAIRMAN'S PROPOSAL. SUCH SPECIFICS WILL HAVE TO WAIT UNTIL THE DRAFT FINAL RULE, WHICH STAFF COUNSEL HAVE BEEN PREPARING THESE PAST MONTHS FOR MY COLLEAGUES, IS CIRCULATED FOR MY REVIEW.

THAT SAID, EVEN A CURSORY EXAMINATION OF THE PROPOSAL MAKES CLEAR TO ME THAT IT FAILS TO ADDRESS THE CONCERNS I EXPRESSED IN JUNE OF THIS YEAR WHEN I DISSENTED FROM THE NOTICE OF PROPOSED RULE-MAKING. THE DRAFT PROPOSES TO ELIMINATE THE RIGHT TO A PRE-ELECTION HEARING FOR ANY CONTESTED ELIGIBILITY ISSUE REGARDLESS OF THE PERCENTAGE OF POTENTIAL VOTERS AFFFECTED. THE DRAFT PROPOSES TO ELIMINATE ANY MANDATORY MINIMUM TIME FOR THE SCHEDULING OF AN ELECTION AFTER A

REGIONAL DIRECTOR'S DECISION DIRECTING AN ELECTION. THE DRAFT PROPOSES TO ELIMINATE THE RIGHT TO PRE-ELECTION REVIEW OF ANY ISSUE AND THE RIGHT TO FILE EXCEPTIONS WITH THE BOARD ON POST-ELECTION ISSUES.

EVEN WITHOUT IMPOSITION OF THE PLEADING AND MULTIPLE NOTICE REQUIREMENTS IN THE NOTICE OF PROPOSED RULEMAKING, I BELIEVE THE NET EFFECT OF THE PROPOSED FINAL RULE IS CLEAR ENOUGH. THE TIME BETWEEN PETITION-FILING AND ELECTION IS SHORTENED TO THE POINT WHERE MANY EMPLOYERS AND EMPLOYEES WILL BE DEPRIVED OF A MEANINGFUL OPPORTUNITY TO EXPRESS LAWFUL VIEWS REGARDING THE MERITS OF COLLECTIVE-BARGAINING REPRESENTATION. EMPLOYEES WILL IN SOME ELECTIONS NOT HAVE A NECESSARY UNDERSTANDING OF THE COMPOSITION OF THE BARGAINING UNIT AND THE INTERESTS WHICH WOULD UNITE OR DIVIDE THEM IN COLLECTIVE BARGAINING. THE POTENTIAL FOR UNFAIR LABOR PRACTICE LITIGATION WILL NEEDLESSLY BE INCREASED BY THE FAILURE TO RESOLVE IN THE PRE-ELECTION STAGE THE SUPERVISORY AND MANAGERIAL STATUS OF PERSONS WHO MIGHT ACT AS A PARTY'S AGENT. PARTIES WILL LACK THE OPPORTUNITY TO CREATE AN ADEQUATE RECORD FOR COURT REVIEW OF ADVERSE BOARD DECISIONS. FINALLY, THERE IS NO APPARENT REASON WHY IMPLEMENTATION OF THE PROPOSED REVISIONS WILL ACTUALLY

SHORTEN THE MEDIAN TIME FOR ACHIEVING FINAL RESOLUTION IN ELECTION CASES OR WILL ADDRESS THE ROOT CAUSES OF LENGTHIEST DELAY IN ELECTION CASES.

WE ADDRESS THE PROPOSED CHANGES AGAINST THE SAME GENERAL BACKGROUND OF BOARD PRODUCTION AS IN JUNE. IN FISCAL YEAR 2011, ELECTIONS WERE HELD IN A MEDIAN OF 38 DAYS FROM THE DATE THE PETITION WAS FILED AND 95% OF ELECTIONS WERE HELD WITHIN 56 DAYS OF THE DATE THE PETITION WAS FILED. AS TO THE 5% OF ELECTIONS HELD MORE THAN 56 DAYS AFTER PETITION FILING, STATISTICS FROM THE ACTING GENERAL COUNSEL'S OFFICE INDICATE THAT A SUBSTANTIAL NUMBER OF THOSE CASES INVOLVED BLOCKING CHARGES. FOR INSTANCE, IN 2010, THERE WERE 233 BLOCKED PETITIONS AND THE MEDIAN NUMBER OF DAYS FROM PETITION FILING TO ELECTION WAS 113. STILL, MY COLLEAGUES APPARENTLY FEEL NO URGENCY IN ADDRESSING THESE DELAYS, IN SPITE OF COMMENTS RESPONDING TO THE INVITATION IN THE NOTICE OF PROPOSED RULEMAKING ON THE ISSUE OF REVISING THE CURRENT BLOCKING CHARGE POLICY.

FOR THESE AND OTHER REASONS THE SUBSTANCE AND EFFECT OF THE RULE REMAINS FOR ME AS UNACCEPTABLE NOW AS IT WAS IN JUNE. THIS DOES NOT COME TO ME AS A GREAT SURPRIZE. I HAVE

BELIEVED FOR SOME TIME THAT THE FINAL PROPOSAL WOULD LARGELY MIRROR THE JUNE PROPOSAL AND THAT I WOULD BE UNABLE TO SUPPORT IT FOR THE REASONS I SET FORTH IN MY PRIOR DISSENT. THIS BELIEF, COUPLED WITH THE FACT THAT SINCE AUGUST 28 THE BOARD HAS BEEN REDUCED TO THREE MEMBERS, HAS CREATED A SINGULAR PROBLEM FOR ME. I DEEPLY BELIEVE THAT WHATEVER ONE'S VIEW OF THE NEED FOR ELECTION RULE REVISIONS MAY BE, A FINAL RULE SHOULD NOT BE ISSUED IN THE ABSENCE OF THREE AFFIRMATIVE VOTES TO DO SO. REGARDLESS OF WHETHER A TWO-MEMBER MAJORITY HAS THE TECHNICAL AUTHORITY TO ACT OR WHETHER THERE IS NO INTERNAL RULE EXPRESSLY APPLICABLE TO THIS SITUATION, I BELIEVE THAT CHANGING CURRENT LAW AND PROCEDURE WITHOUT THREE AFFIRMATIVE VOTES WOULD BE CONTRARY TO THE SPIRIT OF BOARD DELIBERATIVE TRADITION ESTABLISHED AND HONORED OVER DECADES IN ADJUDICATORY PROCEEDINGS AND WILL ULTIMATELY CAUSE HARM TO THE AGENCY AND THE CONSTITUENTS WE SERVE.

I RECOGNIZE THAT IN A FEW SHORT WEEKS MEMBER BECKER'S RECESS APPOINTMENT MAY EXPIRE AND THE BOARD MAY BE REDUCED FOR AN INDEFINITE PERIOD TO TWO SITTING MEMBERS WHO LACK STATUTORY AUTHORITY TO ACT. WITH ALL DUE RESPECT, THIS IS NOT AN EMERGENCY SITUATION. BOARD MEMBERS COME AND GO UNDER

THE STATUTORY PLAN. THEIR TIMELY REPLACEMENT IS A MATTER FOR THE PRESIDENT AND THE UNITED STATES SENATE TO ARRANGE. IN FACT, TWO BOARD MEMBER NOMINATIONS HAVE BEEN PENDING IN THE SENATE SINCE JANUARY. INACTION OR DISAGREEMENT ON THE NOMINATIONS IS NOT, BY ITSELF, A JUSTIFICATION FOR PREEMPTIVE OR PRECIPITATE RULEMAKING ACTION BY TWO OF THREE SITTING BOARD MEMBERS.

FURTHER, NO MATTER HOW PASSIONATELY MY COLLEAGUES BELIEVE THAT THE PROPOSED RULE WILL RIGHT SOME FUNDAMENTAL WRONG, I TRUST THEY ARE FULLY AWARE THAT ON SOME QUADRENNIAL OCCASION THE PARTISAN PENDULUM WILL SWING, AND THE VERY PRECEDENT THEY ESTABLISH BY CHANGING THE LAW WITH ONLY TWO VOTES MAY FACILITATE REVERSAL OF THAT LAW, ASSUMING CONGRESS DOES NOT ACT FIRST. AS THE THOMAS MORE CHARACTER IN “A MAN FOR ALL SEASONS” ADVISED, “I’D GIVE THE DEVIL BENEFIT OF THE LAW FOR MY OWN SAKE.”

SO STRONG IS MY BELIEF AND CONCERN ABOUT PROCEEDING ON A FINAL RULE IN THE ABSENCE OF THREE AFFIRMATIVE VOTES AND IN THE WAKE OF WHAT I CONTINUE TO BELIEVE IS AN INADEQUATE AND FLAWED PROCESS THAT I CONSIDERED RESIGNING IN AN EFFORT TO RENDER SUCH CONCERNS MOOT. THIS WAS A MATTER OF PERSONAL

CONSCIENCE, NOT A RESPONSE TO OUTSIDE ENTREATY. I HAVE REJECTED THIS OPTION AND I WANT TO TAKE A MOMENT TO INDICATE WHY. FIRST, IT IS NOT MY NATURE TO BE OBSTRUCTIONIST. SINCE I ARRIVED AT THE BOARD, I HAVE PARTICIPATED ON MANY OCCASIONS IN THE EXPEDITIOUS PROCESSING OF CASES IN WHICH I STRONGLY OPPOSED THE MAJORITY'S POSITION. I DID SO AS WELL WITH RESPECT TO THE NOTICE OF PROPOSED RULEMAKING AND I WOULD DO SO AGAIN IF THERE WERE THREE VOTES FOR A FINAL RULE. SECOND, AS A PRACTICAL MATTER, RESIGNATION MIGHT OBVIOUSLY NOT MOOT THE ISSUE. NEW BOARD MEMBERS COULD BE APPOINTED TO REPLACE ME AND, IF NECESSARY, MEMBER BECKER, AND ALL THAT WOULD RESULT IS DEPRIVING MYSELF OF A VOICE ON THIS MATTER. LASTLY, AND MOST IMPORTANTLY, HOWEVER, I BELIEVE RESIGNATION WOULD CAUSE THE VERY SAME HARM AND COLLATERAL DAMAGE TO THE REPUTATION OF THIS AGENCY AND TO THE INTERESTS OF ITS CONSTITUENTS AS WOULD THE ISSUANCE OF A CONTROVERSIAL RULE WITHOUT THREE AFFIRMATIVE VOTES IN THE WAKE OF A FLAWED DECISIONAL PROCESS. I CANNOT BE CREDIBLY CRITICAL OF THE LATTER AND, MYSELF, ENGAGE IN THE FORMER.

THERE ARE MORE THAN ENOUGH REASONS FOR QUESTIONING THE VALIDITY OF ELECTION RULE REVISIONS THAT WILL ANNUALLY AFFECT HUNDREDS OF REPRESENTATION ELECTIONS, INVOLVING THOUSANDS

OF EMPLOYEES. I HAVE LITTLE DOUBT THAT SUCH QUESTIONS WILL BE RAISED AND COURT CHALLENGES MOUNTED IN ANY EVENT. TO THE EXTENT THAT HAPPENS, I BELIEVE THE FOCUS MUST BE ON THE SUBSTANCE AND PROCEDURE OF THIS RULE-MAKING AND NOT ON OTHER MATTERS.

ALL THIS SAID, MY VIEW REMAINS THAT THIS IS A FUNDAMENTALLY FLAWED RULE AND IS THE PRODUCT OF A FUNDAMENTALLY FLAWED PROCESS. IN THIS LATTER REGARD, I BELIEVE ONE FINAL POINT IS IN ORDER, AND THAT RELATES TO THE TRADITIONAL DELIBERATIVE PROCEDURES OF THIS BOARD. WHEN THERE IS A MATTER PENDING FOR OUR DECISION AND IT IS CLEAR THAT THERE IS A MAJORITY VIEWPOINT AND AN MINORITY VIEWPOINT IT IS THE TRADITIONAL RESPONSIBILITY OF THE MAJORITY TO DRAFT A PROPOSED MAJORITY OPINION WHICH SETS FORTH NOT MERELY THE CONCLUSIONS THAT THE MAJORITY WOULD REACH BUT THE REASONS WHICH UNDERLIE ITS VIEW; AND, TO OUTLINE ITS RESPONSE TO THE ARGUMENTS RAISED BY THE PARTIES THAT HAVE ADVOCATED IN FAVOR OF A DIFFERENT RESULT. THE MINORITY THEN HAS A REASONABLE OPPORTUNITY TO REVIEW THE DRAFT AND TO CONSIDER NOT MERELY THE RESULT OF THE MAJORITY'S VIEW BUT ITS STATED REASONS, RATIONALE AND DISPOSITION OF COUNTERVAILING ARGUMENTS. IT IS BY THIS PROCESS THAT REASONABLE, COLLEGIAL, DELIBERATIONS CAN BEAR FRUIT.

IN THE PRESENT CONTEXT, THE MAJORITY HAS YET TO PROVIDE A DRAFT DOCUMENT WITH SPECIFIC LANGUAGE FOR THE PROPOSED FINAL RULE AND ITS ANALYSIS OF THE OVER 65,000 PUBLIC COMMENTS THAT BEAR ON THE RESULTS IT PROPOSES. SUCH ARTICULATED REASONING AND TREATMENT OF COUNTERVAILING PUBLIC COMMENT IS INTEGRAL TO THE PROCESS AND WILL BE REQUIRED IN ANY FINAL RULE TO BE PUBLISHED IN THE FEDERAL REGISTER.. I HAVE NO IDEA WHEN THE MAJORITY PLANS ON TENDERING THE ACTUAL COMPLETE DRAFT OF A FINAL RULE. WHAT I DO KNOW IS THE REALITY OF THE CALENDAR. IF MEMBER BECKER'S TERM ON THE BOARD IN FACT EXPIRES WITH THE END OF THE CURRENT CONGRESSIONAL SESSION WE ARE LOOKING AT LESS THAN 20 WORKING DAYS TO RECEIVE, REVIEW, RESPOND, DISCUSS, DELIBERATE, AND POTENTIALLY DRAFT DISSENTING VIEWS ON A HIGHLY CONTROVERSIAL SERIES OF RULE CHANGES THAT ARE UNPRECEDENTED IN SCOPE AND THAT WILL EFFECT EVERY EMPLOYER, EMPLOYEE AND LABOR ORGANIZATION THAT IS A PARTY TO OUR REPRESENTATION CASE PROCESSES. IT HAS BEEN SUGGESTED THAT A FINAL RULE SHOULD ISSUE AS SOON AS APPROVED BY A MAJORITY. THEN I CAN TAKE AS MUCH TIME AS I WANT TO PREPARE A SEPARATE OPINION FOR SUBSEQUENT PUBLICATION. OF COURSE, IF THE BOARD IS REDUCED TO TWO SITTING MEMBERS, THERE IS GREAT DOUBT THAT THIS COULD BE DONE LEGALLY.

MOREOVER, ISSUING A DISSENTING VIEW AFTER ISSUANCE OF A FINAL RULE, WHATEVER ITS OTHER EFFECT, IS CERTAINLY NOT A STEP IN ANY TRADITIONAL BACK AND FORTH DELIBERATIVE PROCESS

IN LIGHT OF ALL THE FOREGOING, I AM OPPOSED TO PROCEEDING WITH THE PREPARATION OF THE PROPOSED FINAL RULE, AND I WOULD RESPECTFULLY ASK MY COLLEAGUES TO RECONSIDER THEIR APPARENT DECISION TO MOVE FORWARD.

NATIONAL LABOR RELATIONS BOARD
BOARD RESOLUTION NO. 2011-1

WHEREAS on June 22, 2011, the National Labor Relations Board published a Notice of Proposed Rulemaking (NPRM) (76 FR 36812), proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer; and

WHEREAS on July 18 and 19, 2011, the Board held a public meeting at which it heard testimony from sixty-six witnesses concerning the rule proposed in the NPRM; and

WHEREAS the Board has received over 65,000 written comments pursuant to the NPRM and has reviewed all of the comments received;

NOW, THEREFORE, IT IS HEREBY RESOLVED that the Board take the following action on the NPRM:

1. Prepare a final rule to be published in the Federal Register containing the following significant elements:

    a. Amend Sections 102.64(a) and 102.66(a) of the Board's Rules and Regulations (R&R) to state that the purpose of the hearing described in Section 9(c) of the Act is to determine if a question of representation exists that should be resolved by an election and to give the hearing officer authority to limit the evidence introduced at the hearing to that relevant to a genuine issue of fact material to whether a question of representation exists;
    b. Amend R&R Section 102.66 to provide that post-hearing briefs may be filed with permission of the hearing officer;
    c. Amend R&R Section 102.67 to eliminate parties' right to seek Board review of regional director's pre-election rulings while allowing parties to seek post-election review of all such rulings that have not been rendered moot by the election;
    d. Eliminate the language in Section 101.21(d) of the Board's Statements of Procedure that states that the regional director normally will not schedule an election until a date 25 days after the direction of election in order to permit the Board to rule on any request for review;
    e. Amend R&R Section 102.65 to clarify the standard for seeking special permission to appeal to the Board;
    f. Amend R&R Sections 102.62(b) and 102.69 to make Board review of a regional director's or judge's disposition of post-election disputes discretionary after both stipulated and directed elections;
    g. Substitute a revised statement of the general course and method by which the Board's functions are channeled and determined, to be published in the final rule, for current Part 101, Subpart C, of the Board's Statements of Procedure; and
    h. Make such other amendments as may be needed to effectuate the purposes of, or conform the remainder of the existing rules to, the amendments described above;

Provided, that no final rule shall be published until it has been circulated among the members of the Board and approved by a majority of the Board.

2. Continue to deliberate on the remainder of the amendments proposed in the NPRM.

Explanation of resolution

Q: What do the amendments in the Chairman's resolution provide for?

A: The Chairman's resolution contains six procedural amendments, all aimed at reducing unnecessary litigation in election cases before the Board:

- The National Labor Relations Act provides for a pre-election hearing to determine whether there exists a "question of representation" to be resolved by an election. Currently, parties can raise issues at the hearing that are not relevant to that question, which can result in unnecessary, expensive, and time-consuming litigation for the Board and all parties. The first proposed amendment gives the hearing officer authority to limit the hearing to matters relevant to the question of whether an election should be held.

- Most cases involve only routine issues based on well-known principles of Board law. In such cases, regional directors can reach a fair and sound decision based on the record from pre-election hearing, including closing arguments. Parties may currently file briefs after the hearing, but the briefing adds nothing to the regions' decision-making process in such routine cases and substantially increases the parties' litigation costs. The second proposed amendment authorizes the hearing officer to decide whether to permit briefing depending on whether the case presents issues that would benefit from it.

- The Board's current rules require parties to file two separate appeals to seek Board review of pre-election issues and issues concerning the conduct of the election, respectively. Appeals concerning pre-election issues must be filed before the election, and are often subsequently mooted by the results of the election. The third amendment reduces unnecessary litigation by consolidating the two appeals into a single post-election procedure and by avoiding altogether appeals of issues that become moot as a result of the election.

- The fourth amendment follows directly from the third, by ending the practice of delaying the scheduling of elections to permit time for a pre-election appeal. (In any event, even under the current rules, the delay does not serve its stated purpose because the Board typically permits the election to be conducted and directs that the ballots be impounded while it considers the appeal.)

- In keeping with the effort to avoid multiple appeals in a single case, the fifth amendment would narrow the circumstances in which a request for special permission to appeal to the Board would be granted. Such permission would be granted only in extraordinary circumstances when it appears that the issue addressed in the appeal would otherwise evade review. (Board review would remain available following the election on all issues for which permission to appeal was denied or not sought.)

- The sixth amendment would simplify appeal procedures and avoid litigation of appeals that do not present a serious issue for review. It would do this by giving the Board discretion to hear and decide any appeals to the election process, whether they concern pre-election or post-election issues.

Q: Do the amendments provide for anything else?

A: Yes. They would eliminate one entire portion of the regulations that is entirely duplicative and therefore a potential source of confusion. They would replace those sections with an updated and accessible description of the Board's processes that would be published with the final rule.

Q: What parts of the original proposed rule are not included in the Chairman's proposal?

A: The original proposal represents a comprehensive initiative aimed at modernizing and streamlining the Board's procedures in representation cases from beginning to end. It includes dozens of proposed amendments of the Board's rules affecting many aspects of representation proceedings. The Chairman's resolution includes only six procedural changes, leaving the vast majority of the proposed amendments for continued consideration by the Board. Among the many proposed amendments not included in the Chairman's proposal are the electronic filing of petitions, the requirement that hearings be set for 7 days after service of the notice of hearing, the requirement of a statement of position filing, inclusion of email addresses and phone numbers in the voter list, and the change of the period for filing the voter list from 7 to 2 work days.

Q: Does the Chairman's proposal mean that the remainder of the proposed rule is being rejected?

A: No. The Chairman continues to believe that modernization and streamlining of the Board's processes along the lines of the proposed rule would greatly increase the efficiency of the agency in carrying out its statutory mission. However, because of the possibility that the Board will lose a quorum at the end of the current congressional session, he is proposing a scaled-back final rule limited to several amendments specifically aimed at reducing unnecessary litigation. The limited nature of the resolution will make it possible for all members of the Board to consider it thoroughly in the time remaining for prompt action on the rule. The remainder of the proposed rule will remain under consideration by the Board for possible future action.

Q: Are there further steps that must be taken before a final rule can issue?

A: The text of the final rule must be finalized, circulated among the members of the Board, and approved by a majority of the Board. No final rule can issue without such approval of the rule itself.

Source URL: https://www.nlrb.gov/publications/rules-regulations/notice-proposed-rulemaking/proposed-amendments-nlrb-election-rules-an

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REPRESENTATION CASE PROCEDURE
FINAL RULE

RIN 3142—AA08

ORDER

The National Labor Relations Board having published a Notice of Proposed Rulemaking (NPRM) (76 FR 36812), proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer; held a public meeting at which it heard testimony concerning the rule proposed in the NPRM; received written comments submitted pursuant to the NPRM and reviewed all comments received; and resolved to prepare a final rule to be published in the Federal Register containing enumerated significant elements; it is hereby

ORDERED that the Solicitor take the following action:

1. Immediately upon approval of a final rule by a majority of the Board, submit the final rule to the Federal Register for publication;
2. Make such changes to the final rule of form or style as may be required for publication in the Federal Register; and
3. Cause to be published in the Federal Register at such time as they are finally approved following circulation through the Board's usual procedures any

separate dissenting statement ("dissent") that a Member of the Board who is serving on the dates of publication of the final rule and the separate statement ("current Member") wishes to publish concerning the final rule, together with any separate concurring statement ("concurrence") that a current Member wishes to publish concerning the final rule; provided, that no dissent shall be published that has not been circulated in draft at least 30 days before the effective date of the final rule, no concurrence shall be published that has not been circulated in draft at least 15 days before the effective date of the final rule, and no dissent or concurrence shall be submitted to the Federal Register later than 5 business days before the effective date of the final rule; and provided further that any such dissent or separate concurrence shall represent the personal statement of the Member and shall in no way alter the Board's approval of the final rule or the final rule itself.

It is further ORDERED that this Order shall constitute the final action of the Board in this matter.

Dated: Washington, D.C., December 15, 2011

By direction of the Board,

Lester A. Heltzer, January 30, 2012 nunc pro tunc December 15, 2011

Lester A. Heltzer
Executive Secretary

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

December 16, 2011

Dr. Winslow Sargeant
Chief Counsel for Advocacy
Office of Advocacy
Small Business Administration
409 Third Street SW
Washington, D.C. 20416

Dear Dr. Sargeant:

The National Labor Relations Board has submitted to the Federal Register a final rule amending its rules and regulations governing the filing and processing of representation cases under the National Labor Relations Act. A copy of the submission is enclosed.

As noted in the preamble to the final rule, under section 553(b)(3)(A) of the Administrative Procedure Act, notice and comment rulemaking was not required for the amendments contained in the final rule because they are wholly procedural. Therefore, the Regulatory Flexibility Act does not apply.

Nonetheless, as fully explained in the preamble to the final rule, the Board has determined that the final rule will not affect a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 605(b). The Board has also determined that the economic impact of the final rule will not be significant. The Board made analogous determinations in connection with the Notice of Proposed Rulemaking published in June. *See* 76 Fed. Reg. 36812, 36833 (June 22, 2011). The final rule includes only a portion of the amendments originally proposed by the Board. The Board has decided to deliberate further concerning the remaining proposals. The preamble to the final rule responds to public comments received with respect to these issues and contains the Board's analysis.

Accordingly, I hereby certify under the Regulatory Flexibility Act that the final rule will not have a significant economic impact on a substantial number of small employers.

Sincerely,

Mark Gaston Pearce
Chairman

24722

Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☐ Speaker of the House of Representatives ☑ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency
National Labor Relations Board

2. Subdivision or Office

3. Rule Title
Representation--Case Procedures

4. Regulation Identifier Number (RIN) or Other Unique Identifier (if applicable)
RIN 3142–AA08

5. Major Rule ○ Non-major Rule ●

6. Final Rule ● Other ○ _____

7. With respect to this rule, did your agency solict public comments? Yes ● No ○ N/A ○

8. Priority of Regulation (fill in one)

● Economically Significant; or Significant; or Substantive, Nonsignificant

○ Routine and Frequent or Informational/Administrative/Other (Do not complete the other side of this form if filled in above.)

9. Effective Date (if applicable) April 30, 2012

10. Concise Summary of Rule (fill in one or both) attached ● stated in rule ○

Submitted by: Lester A. Heltzer (signature)

Name: Lester A. Heltzer

Title: Executive Secretary, National Labor Relations Board

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	○	●	○
B. With respect to this rule, by the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	●	○	○
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	○	●	○
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	○	●	●
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	○	●	○
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	○	●	○
F. Did you discuss any of the following in the preamble to the rule?	●	○	○
• E.O. 12612, Federalism	○	●	●
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	○	●	○
• E.O. 12866, Regulatory Planning and Review	○	●	○
• E.O. 12875, Enhancing the Intergovernmental Partnership	○	●	○
• E.O. 12988, Civil Justice Reform	○	●	○
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	○	●	●

• Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

E.O. 13563
Administrative Procedure Act
Regulatory Flexibility Act

Summary of Rule

On December 22, 2011, the National Labor Relations Board ("Board") promulgated a final rule enacting various amendments to its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The full text of the rule is available at 76 Fed. Reg. 81038 (Dec. 22, 2011).

The final rule makes eight amendments to the Board's regulations governing representation case procedures. First, it amends § 102.64 in order to expressly construe § 9(c) of the Act to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists. Second, it amends § 102.66(a) and eliminates § 101.20(c) (along with all of Part 101, Subpart C) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and which is relevant to the existence of a question concerning representation. Third, it amends § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects addressed and the time for filing. Fourth, it amends §§ 102.67 and 102.69 to eliminate parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all parties' right to request Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings.

Fifth, the final rule eliminates the recommendation in § 101.21(d) (along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review. Sixth, it amends § 102.65 to make explicit and narrow the circumstances under which a request for special permission to appeal to the Board will be granted. Seventh it amends §§ 102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary. Eighth, as mentioned, it eliminates part 101, subpart C of the regulations, which is redundant.

The remainder of the amendments merely conform other sections of the Board's Rules and Regulations to the eight amendments described above. The Board has concluded, after careful review of all public comments and after deliberation, that adopting those eight proposals in a final rule will eliminate wholly unnecessary litigation and delay in the processing of petitions filed under Section 9 of the Act and thus in the resolution of questions of representation.

There are no information collection, record keeping, or reporting requirements imposed on private parties as a result of the final rule.

REPRESENTATION CASE PROCEDURE RIN 3142---AA08
FINAL RULE

AFFIDAVIT

I, Lester A. Heltzer, hereby declares as follows, based upon my personal knowedge:

1) I am currently employed as the Executive Secretary of the National Labor Relations Board. I have been employed in this position from June 2003 to the present.

2) The attached Order was circulated among Chairman Mark G. Pearce and Member Craig Becker and Member Brian Hayes on December 14 and 15, 2011.

3) As of December 15, 2011, all three Board members voted on this Order. Chairman Pearce and Member Becker voted in favor of the Order, and Member Hayes voted against the Order. As it states, the Order "constitute[s] the final action of the Board in this matter."

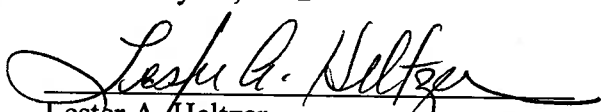
4) To date, as directed by the Board in the attached Order, the Solicitor has taken appropriate action, including publishing the Representation Case Procedure Final Rule in the Federal Register.

5) Due to an inadvertent administrative oversight, I did not sign the attached Order on December 15, 2011.

6) Today I have signed the attached Order correcting that inadvertent administrative oversight. The Order is dated December 15, 2011, and signed by me as follows: Lester A. Heltzer, Executive Secretary, National Labor Relations Board. My signature is dated January 30, 2012, nunc pro tunc December 15, 2011.

I have read this statement consisting of 1 page, including this page. I fully understand its contents, and I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on January 30, 2012



Lester A. Heltzer
Executive Secretary, National Labor Relations Board

Final Rule Errata Sheet

The following typographical errors to the Board's Final Rule, *Representation—Case Procedures*, 76 Fed. Reg. 80138, are corrected below. Additions to the document are shown in italics.

1. The Acronym "NMA" was inadvertently used for citations to comments from both the National Mining Association and the National Meat Association. Therefore, on page 80152 the last clause in footnote 46 ("National Meat Association (NMA)") should be replaced with "*National Meat Association*". Also, on page 80153 in footnote 56 "NMA" should be replaced with "*National Meat Association*".

2. On page 80151 in the first paragraph of the third column "S. Rep. No. 1684, 85th Cong., 2d Sess. 27-28 (1958)" should be replaced with "*105 Cong. Rec. 5984 (April 15, 1959) (statement of Sen. Kennedy)*".

3. On page 80155 in the third paragraph of the third column "Form NLRB 666" should be replaced with "*NLRB Form 5492*".

4. On page 80155 in footnote 73 the citation "American Trucking Associations" should be replaced with "*American Trucking Associations (ATA*)".

5. On page 80165 in footnote 116 the citation "93 Cong. Rec. 7000 (June, 12, 1947)" should be replaced with "*93 Cong. Rec. 6858, 6860 (June, 12, 1947)*".

6. On page 80167 in footnote 122, "Kuryakyn Holding" should be replaced with *"Kuryakyn Holdings"*.

7. On page 80167 in footnote 126, "Kruchko & Fries" should be replaced by "*NRMCA"*.