BEFORE THE

NATIONAL LABOR RELATIONS BOARD

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IN RE: NOTICE OF PROPOSED)

RULEMAKING, REPRESENTATION) VOLUME I

CASE PROCEDURES)

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Public proceedings before the National Labor Relations Board, MARK GASTON PEARCE, Chairman, held at 1099 Fourteenth Street, N.W., Washington, D.C., the Margaret A. Browning Hearing Room, commencing at 9:27 a.m., Thursday, April 10, 2014, before Keith A. Wilkerson, a notary public of and for the District of Columbia.

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A P P E A R A N C E S:
National Labor Relations Board Members:
MARK GASTON PEARCE, Chairman
PHILIP A. MISCIMARRA, Board Member
KENT Y. HIROZAWA, Board Member
HARRY I. JOHNSON, III, Board Member
NANCY SCHIFFER, Board Member

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P R O C E E D I N G S

MR. PEARCE: Good morning. Welcome to this open meeting of the National Labor Relations Board. My name is Mark Gaston Pearce. I'm the chairman. To my right is Kent Hirozawa, Board Member, and Philip Miscimarra, Board Member, and to my left is Harry Johnson and Nancy Schiffer, Board Members.

Now, on February 6th, 2014 the NLRB published a notice of proposed rulemaking to amend the rules and regulations governing the filing and processing of petitions relating to representation of employees for purposes of collective bargaining with their employer.

The notice of proposed rulemaking set out a procedure for filing written comments for that proposal. Those written comments were due this past Monday, April 7th. The Board will also consider all written comments submitted in connection with its previous notice of proposed rulemaking -- that notice was in 2011 -- along with all the testimony presented at the open meeting held in June of that year.

Today and tomorrow at this open meeting the Board is providing another opportunity for

interested persons to provide their views on this important matter. This remarkable group of practitioners, academics and advocates asked to make presentations, and the Board was able to accommodate everyone. Each speaker has submitted a summary of his or her remarks, and those summaries will be made a part of the record. We are grateful for the effort that all our speakers have made to be with us. The purpose of the meeting is to hear from and question individual presenters. The Board has grouped the speakers by topic solely for administrative convenience to make the meeting run more efficiently and be more useful for the Board.

Although presenters are encouraged to reply to the extensive prior written commentary submitted in this rulemaking, this meeting is not a forum for group discussion. Speakers should address the Board, not other speakers in the group.

Before we start let's cover some housekeeping items. There is considerable public interest in this proceeding, and we expect a pretty full house. I believe that we have been able to accommodate all requests to attend the meeting in person. In addition, we have streamed these proceedings live over the Internet, so I hope you're

all looking good.

When you were checked in you were given a badge. That badge is pretty important because, as in your favorite nightclub, if you don't have the badge you don't get back in. Please keep the badge with you at all times. If you leave the room you must take your badge, you'll not be allowed to return to the room without your badge, and if you are a speaker this morning and you wish to return for the afternoon session you've got to have your badge with you. When you leave the building for the day make sure and return your badge to retrieve your ID, or else you'll be driving without a license.

Please note that there are two exits to this room, the main doors to my left 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 door to the left. No food or beverages are allowed in this room, although we may all want a drink at some point. Bathrooms are located outside the hearing room to the left and to the right. We have staff in the hallway to direct you to the restrooms or escort you back to the first floor in the elevators.

We ask that you not go into other areas

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of the building. Today's meeting will be divided into two sessions, morning and afternoon, in addition to a lunch break that will be approximately at 12:30. We will take a brief midmorning and midafternoon break. I would ask that if at all possible you try not to leave the room except during those times. If you absolutely must leave the meeting, please move quietly to the nearest exit and an usher will assist you. If you are a speaker, you are welcome to leave after you've made your presentation if you wish.

Now, let me review the guidelines for our speakers. We will follow the order of speakers that is set out in the schedule that was released earlier and is set forth on the website. Each person making an oral presentation will be given five minutes to present his or her remarks.

Executive secretary Gary Shinners, who is sitting below me to the right, will be our timekeeper along with members of his staff. And though you may not see them, there are big, burly people in the background that will begin forcing the time. There are lights on the podiums to assist you. Your five minutes to speak after you introduce yourself and anyone you have with you, so talk fast.

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At that point a green light will come on, the yellow light will come on that you have one minute remaining, and the red light will indicate that your time has expired. As may be the case, the red light may come on, and if there are burning questions that the Board has we will show some latitude as best as we can.

Board members may wish to question you during or after the remarks. For that reason, I will be somewhat generous, not too generous, but somewhat generous with the time for the speakers. But in order to keep on our schedule I'll say this to my colleagues as well as to the speakers. At some point I will need to indicate that it is time for the next speaker to begin, as all the speakers should get a fair opportunity.

Please note that this meeting is limited to issues related to the proposed amendments to the Board's rules governing representation-case procedures, so any philosophical discussions about the meaning of life we should refrain from, even though I might be interested later on. No other issues will be considered at this meeting.

I want to particularly caution our speakers that they should not discuss other matters

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now pending before the Board. That is not only improper, but it will be very confusing to us.

I will ask everyone to please silence your cell phones or other electronic devices. We'll now hear from our first speaker, Mr. Joseph Torres, followed by Mr. Alvin Velazquez.

MR. TORRES: Thank you. My name is Joseph Torres. I'm a partner in the labor and employment relations department of Winston & Strawn based in their Chicago office.

Chairman Pearce and members of the NLRB, thank you very much for the opportunity to address the Board today regarding its proposed election rule changes. This morning I would like to address the Board's consideration of permitting the use of electronic signatures to satisfy the showing of interest necessary to file a petition.

This proposal should not be adopted, because it will increase the risk of false or inaccurate showings of interest, given the well documented ease by which e-signatures can be manipulated and misused and given the limited facial review that the Board permits of material submitted by a petitioner.

As the Board noted in its notice of

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proposed rulemaking, one of its obligations is to ensure accurate vote determinations. That obligation does not only begin when the first ballot is cast, it cannot take a back seat to any policy considerations the Board might believe will promote more expeditious resolutions of questions concerning representation.

Current policy prohibits litigation regarding the adequacy of a showing of interest, and current policy also limits the regional offices to conducting no more than a facial review of that showing of interest. In addition, the collection of signatures that petitioners present in supporting a showing of interest occur in an unregulated and unsupervised process.

Given this backdrop, permitting any type of electronic showing of interest would further degrade the existing minimal safeguards currently in place, and any purported ease that permitting such showings of interest would provide to employees or labor organizations is far outweighed by the further reduction in credibility that would attach to the Board's election procedures if showings of interest based on e-signatures were permitted.

Each day brings additional press reports

regarding how electronic commerce is rife with intended and unintended misuse of electronic information. While e-commerce may be a natural and inevitable consequence of our global economy, it provides no support for permitting employees' fundamental rights under the National Labor Relations Act to choose to engage in or refrain from engaging in protected concerted activity to be put at risk from misuse from intended or unintended manipulation as part of the Board's election process.

Any type of e-signature carries these risks: a responsive e-mail that an employee signs by including his name, reproduction of physical signatures, an electronic acceptance which the employee clicks to signify acceptance. Equally problematic are the numerous mediums, websites, e-bulletin boards, Facebook pages, et cetera, by which requests for support can be requested and transmitted.

An example of these concerns can be found in a recent court decision that refused to enforce private arbitration agreements that the employees in question electronically accepted.

In that case the course declined to

enforce the agreement because it found there was no evidence of any security around the passwords employees used to enter the site, there was no evidence of processes in place to restrict access to the screen where an employee was deemed to have accepted the agreement, and there was no process in place to verify the authenticity of the signature and no evidence that the employee in question actually opened the e-mail and accepted it.

Given all of these potential issues, there is simply no reasonable way to ensure that the electronic collection of showings of interest can be conducted in a manner that does not raise serious questions about the integrity of the process, particularly given the limited oversight that the Board policy provides for that part of the election procedures.

These risks far outweigh any of the purported reasons cited by the Board in its notice of proposed rulemaking. The Board cited the Government Paperwork Elimination Act. And while I'm sure we all agree that reducing the tidal wave of paper engulfing the federal government is a laudable goal, requiring e-signatures in that circumstance is distinguishable, because in those circumstances

there are safeguards attendant to submitting information to the government that are not available in the private gathering of e-signatures.

The Board also cited the signatures in the Global and National Commerce Act. Again, e-commerce occurs in a regulated environment where the ability to detect and challenge inaccurate signatures can be addressed by the parties to the transaction. No such checks and balances would apply in these instances.

The Board also cited its own advances in providing for e-filing and issuance of decisions and remedial notices electronically. None of those laudable advances provide any parallel support for e-signatures in this instance. E-filing and electronic service of pleadings carries compliance with ethical obligations or sanctions for misuse of those systems.

While embracing technology is laudable, the Board in this instance should not embrace possible technological advances where the potential risk degrades the ability to ensure accurate vote determinations.

Thank you very much.

MR. PEARCE: Joe, what about the security

piece? Suppose a proposal provides the security that was suggested existed in government e-filings like the filing of e-signatures for taxes and e-filings in the courts? Would that resolve the issue?

MR. TORRES: I'm not sure how you could mandate those types of processes on to a private party. I think that's the problem. If you've got organizations and individuals out there soliciting signatures, it's hard to imagine how you could fashion a system that could consistently ensure that all of those solicitations are occurring through some process that might be used where there's a unified portal for individuals, for example, to file petitions with the Board or to file a complaint with the federal court. I just don't see how the Board could impose that type of process in the myriad of instances where individuals are being solicited to sign authorization cards.

MR. MISCIMARRA: Mr. Torres, there is a significant array of financial transactions that's done currently electronically. Is there anything special about showing of interests that you think would require a different treatment or counsel towards a different treatment?

MR. TORRES: Again, I think the parties to a financial transaction have the ability to look at both sides of that transaction if there is an issue regarding the validity of that transaction. Here, the employer who's being subjected to the petition has no way under the current Board policy to say, "Wait a minute, I've got a question as to whether this transaction was actually legitimate." And the Board has made determination they're not going to permit litigation of those issues and they conduct a very limited facial review, so I think there is a distinction there as to a financial transaction where both sides obviously can, if necessary, get to the other side of the transaction and see what actually happened.

MR. JOHNSON: In the 2014 comments submitted by the AFL-CIO, which you may or may not have had a chance to read, there is a piece in there about electronic signatures where the suggested proposal is basically that the union, the employee, provides their home address and phone number and some sort of indicia of signature in an e-mail, and the union confirms back to the employee in an e-mail, thereby getting their consent that essentially we're going to use this as an electronic

signature. That gets forwarded to the Board agent. Then the Board agent is able to call up the employee at the phone number, and to the extent that there is a personal e-mail address in there they can e-mail them back and then verify that. Would that satisfy you in terms of the checks and balances that you're envisioning?

MR. TORRES: I think there's two points there. One, I think the Board would have to modify its current policies, because in the current instance the Board has to accept at face value that what's being provided to them is legitimate. That would require a whole new level of oversight.

Second, the cost associated with the Board physically calling people in, let's say, a 2,000 person bargaining unit, I just don't know that administratively the cost and expense is going to be manageable. I just don't see the Board dedicating those sorts of resources to this. Given the thousands of petitions that are filed, I just don't see that could be workable solution.

MR. JOHNSON: Well, don't you think that would be able to smoke out mass fraud, though? If you go back to the cases like Bakelite in the 1940s and H.G. Hill, where the rationale was first an

advance for the no collateral attack rule, the point of the rule was basically, "Look, we just simply want to safeguard against frivolous proceedings, we don't want to have indiscriminate institution of representation proceedings by parties who have nowhere close to any employee support."

Assuming that that's what our rationale is, A, why can't that be satisfied by the procedure suggested by the AFL-CIO? Or, B, do you want us to open up the no collateral attack rule so that now the respondent will have a chance to basically attack the showing of interest because, as the articles that you cited by Dr. Lopez Hernandez-Ardieta suggested, basically we have to go behind the evidence here and see if it is really evidence of non-repudiation, as he says?

MR. TORRES: Well, given all of the numerous ways in which the professor notes that e-signatures can be manipulated, I do think that if the Board is going to allow a process where the regional offices are going to start questioning the means by which things are being transmitted, it would be only fair for employers to have an ability to look at this process and evaluate whether they believe it's being done in some proper manner.

Again, if the Board is going to really go down that road, I don't think you can just on the one hand open up the process for the regional offices and still preclude employers from being able to comment on that process, given the numerous ways that the professor indicates that these processes can be manipulated.

MR. JOHNSON: But he doesn't say that it the is an impossible proposition to rely on electronic signatures. He basically says the reliability of a signature as evidence in a legal proceeding will highly depend on the capability to find and prove the existence of a vulnerability in the process. So if we had that capability, it seems like that would remove your objection.

MR. TORRES: Perhaps. But, again, I don't think that you can only have half a loaf in that instance. Again, you're tying the hands of employers to just accept that whatever processes the Board decides to adopt to check on these beyond simply a facial showing is adequate.

I think the professor's point is that there is some mutually acceptable means by which the parties are verifying that the signature is acceptable, not just a unilateral process that one

party decides to propose and declares to be acceptable.

MR. JOHNSON: Do you agree that the digital signature standard supported by the Department of Commerce in 2013 would be adequate enough to show an electronic signature?

MR. TORRES: Subject to verification, yes.

MS. SCHIFFER: There is a lot of technology, and certainly technology has grown by leaps and bounds. I know I almost never sign my signature on anything anymore, and there is a whole variety of ways, and I have no idea what the verifications are when I sign it. I don't verify what they're doing on their end of it. Sometimes I sign it and sometimes it's a click. There are a lot of different ways.

As this technology moves along, doesn't it seem to not contemplate the possibility of using technology in this area as well, which puts us back to when the Act was first drafted and where we still have in the Act that service can be made by telegram?

MR. TORRES: Well, certainly the technological advances provide opportunities for

streamlining and making things more efficient, and all of us are perhaps every day knowingly or unknowingly signing things electronically. The point here is, though, that we have a process that in its current framework is unregulated, and so your ability to verify, if questioned, the validity of your signature allows for bilateral process, and that bilateral process currently is not permitted under the Board's rules.

So to the extent we embrace technology, as I was saying to Member Miscimarra, there typically is a bilateral ability to challenge and check on whether those signatures are valid. It may be 20 years from now or 30 years from now that we're at a place where the strength of those types of submissions are even less subject to manipulation, but just seeing what happened with the major retailers over Christmas shows you that the amount of mischief that can happen with respect to electronic transmissions suggests that we are far from a place where these processes are safeguarded enough that we could assume that an unregulated process could occur without any real risk of there being some manipulation, intended or otherwise.

MR. PEARCE: Mr. Velazquez?

MR. VELAZQUEZ: My name is Alvin Velazquez, and I'm currently associate general counsel for the SEIU. In that role I practice business law and also electronic social media law. I've presented to the American Bar Association on many occasions regarding social media and social media topics. I want to thank the Board today for giving me the opportunity to speak on electronic signatures and the use of the showing of interest.

I think that, to begin, it's really important to kind of take a step back and appreciate what the Board's done here insofar as it's bringing up to date its practices with current commercial practice. In other words, the proposal to accept e-signatures, first of all, brings it in compliance or in line with what the Board is doing with regard to accepting position papers. Position papers are always signed by attorneys and sometimes by non-attorneys with an electronic signature. When you go to shop on line we also understand that those are electronic signatures.

I think that if you look at other agencies, the FEC, HUD, the EPA, FERC, agencies of all sizes and dealing in all sorts of industries, they also accept electronic signatures for all sorts

of various requirements. They can go for things as simple as just updated regulatory filings to much more sensitive things like your personal taxes.

Similarly, electronic signatures are typically accepted, again, in buying things off of Amazon all the way to things as sensitive as your last wills and testaments. I think it's very important to kind of take a step back and realize that what the Board is doing here is coming up to speed with what the rest of the world is doing.

Secondly, I want to just point out that the Board has also come into compliance with congressional law and federal law. The Government Paperwork Elimination Act, the GPEA for short, and the E-Sign Act both require the acceptance of electronic signatures. If you read the E-Sign Act it says: Notwithstanding any other statute, a signature, contract or other record relating to any transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form.

That language by Congress is fairly categorical, and that was enacted several years ago. Similarly, the GPEA asked that the OMB issue guidance requiring acceptance of electronic

signatures by various agencies and to come into compliance with that in 2003. So we definitely appreciate that the Board is bringing up to date its standards in terms of the proposed rulemaking.

The other thing I want to talk a little bit about is the issues of fraud. I think that's a very important issue to address. There are a couple ways to address that. First of all, we did some research on all the E-Sign cases. We looked at all the GPEA and the E-Sign. Not once in those cases is fraud ever alleged. No one ever says, "Somebody else took my signature and faked it." You have questions of what the terms of a contract mean, and those are pretty typical business disputes. Those are pretty typical standard contract disputes.

The other thing, too, is that the Board can put in very simple guidelines regarding the showing of interest that are in compliance with, for example, the working group that the ABA established on contracting practices, electronic commerce and the cyberspace law committee. This was issued in around 2002-2003. I don't remember the date exactly. They gave a bunch of kind of just very basic types of protections for people who are going on web pages and shopping. For example, when you're

using PayPal you're using Amazon.

What are some of those? Some of those are using clear words of assent, that you're agreeing for example to be a union member, that you want to be a union member. You can have language like that on the page and require showing on the page that the union is using it in order to show a showing of interest. In other words, it's the same as a card.

When a Board agent looks at a card they'll see the language saying, "I want to be a union member and I am authorizing the union to represent me and serve as my exclusive bargaining agent." It's the same thing with electronic practices. You can require that similar type of language on a web page and use that as the union's form.

The third thing I want to talk about is just that it takes more effort to put in information than it does to not do anything. Here's what I mean. If you have a card, some people could just sign it and say "I'm done," and the Board agent is left to compare signatures. When somebody goes on line -- there's a truism about being on line: we are inherently lazy on line. For us to actually go out

of our way and get our credit card to buy something takes effort. It means you want to do it.

The same thing with somebody who wants to be a union member. If they're going to take the time to put their address, their date of birth and sign and click, that actually takes effort, it means they actually want to be a union member, and it is less susceptible to fraud for that reason.

MR. PEARCE: Well, isn't there a difference between an electronic signature when you're making a submission on your behalf that you would be subject to taking responsibility for it? We're talking about a submission that would be a tax return, a legal brief, a mortgage application or what have you. You have kind of a personal accountability. These electronic signature proposals deal with a union asserting that this signature was made by a constituent, someone that they solicited, so it's kind of a third-party assertion that these signatures were legitimately made.

That's kind of one step removed and creates a little bit of a concern about authenticity that is distinguishable from these commercial examples that you raised, don't you think?

MR. VELAZQUEZ: No, not necessarily. And the reason why is because if you look at the current standard practice in the commercial world, you disclose what you're selling and the terms at which you're selling it. With union membership, if you look at an authorization card it talks about accepting the rights and responsibilities of union membership, in that way making it clear that if you want to be a union member you're going to engage in certain responsibilities and that you're going to enjoy certain rights as a result of being a union member once the union certifies.

The way you can use the card, like I was saying before, is you have language that is typically on an authorization card, and then at the end you have the click saying "I agree to be a union member." That gives a worker and a potential member the opportunity, just like we were talking about in the financial world, to actually look at what they're entering into, and, not only that, but to affirmatively accept. In other words, it's no different.

MR. MISCIMARRA: Mr. Velazquez, I'll preface this by saying between the two of us one of us has deep expertise with respect to technology

issues, and that's not me.
MR. VELAZQUEZ: Thank you.
MR. MISCIMARRA: Here's the question that I have. I'm looking at Google News, and there are three headlines: Critical Security Bug Heartbleed Hits Up to 66 Percent of the Internet, Heartbleed Online Security Bug Isn't Easily Fixed, After Catastrophic Security Bug the Internet Needs a Password Reset.
I have a practical question. If one assumes a showing of interest was authentic and accurate and if one subsequently discovers a potential security flaw -- and again my assumption is the showing of interest was sufficient -- then what would be the appropriate treatment of the petition if it turned out one couldn't really verify that the showing of interest was in fact affected by the potential security flaw? And then after that, if you could tell me whether I have to change all of my online passwords by the end of the day, I'd appreciate that, too.
MR. JOHNSON: You can do that piece off the record.
(Laughter.)
MR. VELAZQUEZ: I think there is an

important distinction here between security and the actions of a third party who's not involved with the Board process. For example, in retailing you have two sets of contracts. You have one as between the retailer and a customer, and then you have a third-party hacker or miscreant or whatever word you want to use going in and taking that information despite the best security protocols. There is not much they can do at that point.
Now, I think in the Board processes you have two protections against that. The first protection is very simple and is something that employers have been saying for a very long time, which is, "Well, we have to have an election because a showing of interest may not actually represent the will of the workers." So if the employer requests that, per their rights, then in that case we'll know what the members and the workers in the bargaining unit are actually thinking about union representation. That's the first thing.
The second thing is that, with regard to actual security breaches, the threat is simply overblown insofar as regards this process. As far as I see it -- at least speaking for the SEIU, we've never had a major security breach, and we use

industry compliant standards per our vendor contract and other things -- so the likelihood of that happening as I see it is very slim, so I would caution the Board against taking an exception and making the rule.
MR. MISCIMARRA: And that would be a mistake, to work to the exception or work to the worst case.
MR. JOHNSON: Do you agree with the principle, though, that the reliability of a signature as evidence in a legal proceeding will highly depend on the capability to find and prove the existence of a vulnerability in the process, which is the thesis of Dr. Hernandez Ardieta?
MR. VELAZQUEZ: Well, I haven't read that article, so I can't answer exactly to the article.
MR. JOHNSON: It's pretty dense.
MR. VELAZQUEZ: Well, I read dense electronic material pretty regularly. I just haven't gotten to that. I'll say this: Again, if we're looking at worst case scenarios, then we might as well not do online banking. We might as well not buy anything on line. You might as well just say to your teller, "I'll start going to the bank again and taking out money."

MR. JOHNSON: So do you think the E-Sign model is one we should use basically for the showing of interest?
MR. VELAZQUEZ: Well, to be honest, I don't think you have a choice because E-Sign requires it, and if not E-Sign, then GPEA requires it.
MR. JOHNSON: I think in that model, though, the consumer has to give their consent the electronic signature is being used qua electronic signature. And it seems like, at least from your comments, when, for example, on page 11 you got approval from FEC to do payroll deduction authorizations, it looks like you got employee consent to get an electronic signature. Would that be part of the model that you're suggesting?
MR. VELAZQUEZ: There is various ways to get consent. The actual card and having somebody sign on line is consent, especially when you make clear to them the terms of being union members.
MR. JOHNSON: Right. So multiple levels of attestation and multiple clicks to you is consent. You don't have to have an interaction actually between the union and the employee, with the union e-mailing the employee, "By the way, we're

using this as an electronic signature?"
MR. VELAZQUEZ: Well, given the process that we use at the FEC and what we're using here, they're somewhat different processes in terms of just the regulatory structure of what governs the FEC versus what governs the Board. I wouldn't say it's quite apples and oranges. You still have electronic signatures there.
But in terms of what the Board can actually practically think about, it's just saying, "Okay, what type of clicks, how many clicks are we going to require, here's why." Just like I said earlier, when you actually go ahead and enter information, that's an affirmative action, so you're already having information being entered that's an affirmative action. You're already saying, "I want to sign up and be a member, I've read everything." That takes care of all the concerns and issues. And not only that, but it's the direction the case law has been going, too, in the commercial sphere.
MS. SCHIFFER: Is there a difference in the technologies that would make a difference with respect to the considerations for signing a showing of interest in terms of one being better than another and what kind would be more appropriate for

this; in other words, doing it through e-mail and actual signing on a screen and other various forms?
MR. VELAZQUEZ: Well, regarding the various forms, I think the OMB guidance makes it very clear that you have to look at the various forms of signatures and accept all of them. You're not allowed to discriminate based on a signature. For example, if you have a back slash S Alvin Velazquez versus a facsimile of my signature that I take on the MS Word clip art and clip it on to the end of a document, there is no discretion in the Act to actually discriminate once versus the other. You have to accept them all.
I think there is prudential consideration there, and that is that technology is quickly evolving, it's always evolving, and so you want to make sure you have flexibility to accept whatever types of signatures are being developed in commerce. In other words, we don't know, for example, if tomorrow we can do an e-signature through Google glasses where you can look and it will automatically affix a signature if you hit a button on your Google glasses.
We don't know where technology is going to go because it's dynamic and it evolves quickly.

So you not only have the legal regulatory issue with that, but you also have a prudential issue, which is that you want to make sure that whatever rules you enact today, especially given all the proceedings, that they are flexible enough to withstand the test of time.
MR. PEARCE: Thank you very much. The next topic would be scheduling pre-election hearings. Could Maury Baskin, Jonathan Fritts and Caren Censer approach, please? You may proceed.
MR. BASKIN: Good morning. My name is Maury Baskin. I'm a shareholder with the national labor and employment law firm Littler Mendelsohn and Littler's Workplace Policy Institute. I'm here representing Associated Builders and Contractors, ABC, the national trade association of merit shop construction, and with me is Lauren Williams from the ABC staff.
ABC strongly opposes many aspects of the proposed rule. I think it's fair to say that the credibility of this Board as a neutral administrator of the Labor Act is at stake here. As we said in our written comments, these are the most radical and sweeping proposed changes to the Board's election case handing regulations in at least 50 years, and

since no serious problems with the current system have been identified employers understandably think there is a nefarious purpose behind these proposals, so we urge you to withdraw them entirely.
But with that introduction let me focus, as you requested, on a single proposal that is the subject of this panel: namely, the Board majority's proposal to shorten the time between union election petitions and the statutorily required pre-election hearing.
The proposed new rule says hearings shall be scheduled within seven days of petition filing except for undefined special circumstances. There has been some confusion about exactly what's intended by that. There's some reference to codifying current law, but that is definitely not the current practice. The current practice is hearings are held anywhere between seven and fourteen days, and requests for postponement on sufficient grounds are routinely granted, as they should be, because seven days has been the bare minimum, and in many if not most cases employers simply cannot prepare intelligently for the types of issues that are going to be raised at these hearings in just the seven days.

And I should add that, looking around the federal government, fourteen days seems to be becoming the standard for notice of hearings in other contexts. One need only look at your own regulations. Fourteen days is the minimum for unfair labor practice hearings, and of course we know they're usually noticed much farther away than that.

The U.S. Department of Labor's Office of Administrative Law Judges, which conducts hearings under 60 some federal laws, they've announced a proposal, an interim final rule, going to fourteen days. The definition of fair hearings under such laws as Medicaid and Social Security, they're going with fourteen days.

So our recommendation is that you should go with the 14 days. It certainly should not be shortening the process if that's what's intended by the proposed rule, which is what most people think you intend, and if you don't intend just say so and we'll all go home. But people think that, because otherwise why make the changes at all? Why are you proposing changes from a system that seems to be working okay?

We see no reason for the Board to be a

rogue agency that gives employers so little notice of pre-election hearings. I would say, further, that we represent a lot of small employers, but also big ones, and they both have problems preparing for these hearings. The smaller ones, particularly in the construction industry, they don't have the resources, they don't have HR directors, they don't have lawyers on staff or even on speed dial, and maybe they're members of ABC, the smart ones, but even there they have to know that they even need a lawyer. They have to know that there is a National Labor Relations Board, and many of them know that much, but they don't know what's involved in this process, the issues that affect construction contractors in particular.

Many other types of employers have these very complicated unit issues, just more so in the construction industry in terms of single employers and multi sites and crafts. And then you've brought in this Specialty Healthcare concept which may not even apply to the construction industry, but we're seeing regional directors starting to apply it, so it's a question and an issue that should be raised. The contractors don't know it.

The larger contractors also have issues.

They have more resources, but they have more projects. They have people all over the place. And in the construction industry, recognized by the Labor Department as having uniquely fluid and temporary ever-changing workforce, it is much harder to keep track of, and we'll hear more about that when we discuss things like the voter eligibility list and the statement of position.

It all boils down to the fact that seven days is the bare minimum for the contractor. For employer that's ready, fine, but in most cases they are not ready, they can't even reach their lawyer, the lawyer's not ready, has other things that are about to happen, and it should not stand in the way of some arbitrary minimum time like this. It should not stand in the way of protecting the rights of employers, employees and unions to a fair due process in the hearing. That's what I've got to say.

MS. SCHIFFER: Do you think that there should be a timeline for scheduling a hearing?

MR. BASKIN: Well, the way it's been working is ten to fourteen days, ten to start, and in seven sometimes some of the regional directors are doing it and setting it to 14 days. We think

when the need arises it should be extended beyond that. There is no need to rush to judgment, which is what a lot of these rules seem to be about.

MS. SCHIFFER: Do you think that it should just be based on whatever that regional director does and have that sort of difference among the regions across the countries?

MR. BASKIN: Actually, I'm not a big fan of differences of regions around the country.

MS. SCHIFFER: So uniformity could be good?

MR. BASKIN: It could be.

MS. SCHIFFER: You've mentioned a couple different sort of standards, if you will, for when there should be more time. Do you think there should be a standard that should be applied in all cases where an extension could be granted?

MR. BASKIN: Well, there have been standards of sufficient cause, sometimes called good cause. The "special circumstances" I've never seen before. But sufficient cause has been working, to my knowledge, to my experience, and I've never really had a reasonable request for a postponement turned down, so that's a good standard.

MS. SCHIFFER: So what your experience

has been is in some regions seven and in some regions fourteen.

MR. BASKIN: Seven has been the starting point. I'm searching my brain trying to remember one that actually went forward to a hearing in seven days. I can't think of one. There has always been, if a case was really going to a hearing, there's been a need for more time to get everyone's act together to be able to present a credible record, first to recognize the issues and determine what the facts are, and then present a record that the Board can make an intelligent decision from.

MS. SCHIFFER: And just for the record, I would like to point out that I do not have a nefarious purpose. I don't know which one of us or all of us you are accusing of that, but I don't have one.

MR. BASKIN: Well, I'm just saying that that's how the rules as they're proposed can be read. In fact, some might say it's the only way it can be understood because, as I say, there is no good reason for doing it.

MR. MISCIMARRA: Mr. Baskin, can you comment on -- I mean, there is a tradeoff here, which is we've got people who have sentiments

regarding unit representation or not, and it's in the interests of those people for things to proceed more quickly and in an orderly way. But then there is a tradeoff in terms of the type of hearing that we then inherit when reviewing difficult questions about the unit composition and whether someone is a supervisor. Many of our cases require a record that doesn't just get into how things work. We often require specific examples about how things have worked.

In your own preparation and in your experience as a labor attorney, what's involved in your preparation with clients who have not previously had experience with the Act in preparing for a hearing?

MR. BASKIN: Thank you for that good question, because there may not be a full understanding without walking through -- every case is different, first, but first it requires significant education of most clients as to what is involved first with the Labor Act, the Labor Board and the hearing process, what are the issues that may affect, just taking the construction industry, and we listed quite a large number in our comments. So it's educating them. Then it's finding out from

them. They have to educate the advisor, the attorney, of what their business is like because every contractor operates differently, which is one of the reasons why the Board has to hold the hearings, in order to learn what their processes are like.

We also find, and sometimes this is with the larger employers as much as the smaller ones, they don't know enough about their business. They know enough about their business to build things and get things done, but in the peculiar way that the Board looks at it and what the Board is looking for in these hearings, the contractors have often given very little thought to how that workforce shapes up in comparison to that. So when you start asking them questions you get a blank look, you know, "We'll have to research that," they themselves, about the employee interchange or what their craft workers do and which sites they're on, and in fact recently, and this was a little surprising to me, even who their employees were.

It was a joint employer situation. The union seemed to be a little confused, too, because they named a supervisor working for a different employer, which caused confusion in the service of

the notice, confusion as to who was even involved, and everyone was confused.

This is not atypical. It takes a while to sort these things out, to educate the client, have the client educate you and themselves, and then find people who can testify intelligently about what's happening and what's expected in cross-examination, that we're not here about whether the union is good or bad, that we're just here trying to figure out what people do and what their benefits are and supervision and all these other questions that come up.

And not everybody has all that information. Very few people have that at their fingertips. So that's just really the tip of the iceberg. It is a significant undertaking to go through one of these hearings. That's probably why more than 90 percent reach a stipulation, and we reach many stipulations, but when you have to go forward because there are serious issues it's a significant undertaking to get the job done.

MR. PEARCE: Thank you.

MR. FRITTS: Good morning, Chairman Pearce and members of the Board. I'm Jonathan Fritts with Morgan, Lewis & Bockius. I'm here on

behalf of the Coalition for a Democratic Workplace, which is a coalition of hundreds of employer associations, individual employers and other organizations that represent millions of businesses of all sizes. They employ tens of millions of individuals working in every industry in every region of the United States.

I'd like to focus my remarks on how the scheduling of the pre-election hearing affects the negotiation of an election agreement. The Board is well aware there is no pre-election litigation in 90 percent of cases under the current rules, and that's because in 90 percent of cases there is an election agreement. If the purpose of the proposed rule is to avoid litigation, the Board should make sure that there is enough time for the parties to negotiate an election agreement, and to do so in an intelligent way that doesn't produce disputes after the fact.

The proposed rule provides that the pre-election hearing would be scheduled seven days after the notice of the hearing is served absent special circumstances. The proposed rule would limit the discretion that regional directors currently have to schedule the hearing more than seven days after the petition is filed. And as

Maury discussed, I think the practice is somewhere in that seven to ten day period that discretion is currently exercised. But I think, even more significant than that, is that the proposed rule seems to limit a regional director's discretion to postpone the hearing, but the rule isn't clear about that. There is nothing that I see in the proposed rule about postponements and whether the current standard and discretion would change.

Under current procedures, regional directors do generally grant postponement requests up to fourteen days after the petition is filed, and these postponement requests are frequently productive and provide more time for the parties to negotiate a stip. I don't think that time is typically to prepare for a hearing, to prepare for litigation, and it may be, but I think in the vast majority of cases that time is used to negotiate a stip. And so if the proposed rule can be read, and I think it can be read to limit a regional director's discretion to postpone the hearing at least to that fourteen day mark, I think that's going to be a problem in terms of providing the parties enough time to negotiate a stip.

As I read the proposed rule, it would cut

in half what in practice is the standard fourteen days with a postponement request down to seven days absent special circumstances, and seven days is just not that much time to negotiate a stip.

Before an employer can even begin to negotiate a stip a lot of things must happen. First, the petition is filed, but it has to get to the right person in the company who knows what to do with it. That can take a couple of days or it can take more, and it doesn't matter if it's a small business or a large corporation, but getting it to the right person sometimes consumes a couple of those days and sometimes more of that initial seven day period.

The company then has to retain counsel. Once counsel is retained, they quickly drop everything that they're doing and start to gather information about the bargaining unit, the petition, whether the unit's appropriate, whether there are other employees who should be included, whether there are issues of supervisory status and whether there is an issue of bar to the election. Once counsel has figured all of that out, then he or she can start the process of intelligently negotiating an election agreement.

The ground rules for this panel said that we should assume that no position statement is required, but I will note that if that requirement is imposed, then that position statement, the list that would go with it, would just give counsel more to do during that initial seven day period, which means even less time to negotiate the stip.

CDW urges the Board to maintain the current practice of allowing regional directors discretion to schedule the hearing more than seven days after the petition is filed and to maintain the discretion that they have now to postpone the hearing up to fourteen days after the hearing is filed and sometimes more in extraordinary circumstances. This is time well spent, and in the vast majority of cases it's going to lead to an election agreement. Thank you.

MR. JOHNSON: A few follow-ups. First of all, it sounds like, and tell me if this is not an accurate characterization of your position after I read your comments, whether or not there is going to be a formal statement of position that's produced, you have to think through the issues ahead of time to produce a stipulated election agreement.

MR. FRITTS: Yes. I think the issue is

that there is a significant amount of time and effort that goes into just figuring out what the unit is. Counsel may not even know the business, it may be a new client, and so you have to understand the business, you have to understand the unit, and you have to understand what other issues there may be. I think that has to happen before you negotiate a stip, or otherwise you're just not negotiating with any information or intelligence.

MR. JOHNSON: Well, is it possible or is it usual to be able to negotiate a stipulation and think through these issues in less time than it would take for an actual hearing to have happen under, let's just say, the Croft Metal standard?

MR. FRITTS: I think it's hard to say that negotiating a stip would necessarily take less time than preparing for the hearing, if that's the question you're asking. I think everything that precedes the negotiation, at least in my experience, is something that you would do to identify the issues that may be subject to litigation. And so if you're going to negotiate a stip I think you have to know what the issues are that you might go to hearing on, and then you have to decide if you can resolve them. The process of identifying those

issues, what the evidence is, what the circumstances are, that's going to happen I think regardless of whether you go to a hearing or whether you go to a stip. It's only once you've done all that that you really begin the process of negotiating a stip.

So I don't think there is a real difference, if I'm understanding the question, in terms of what the standard should be whether you're going to have a stip or whether you're going to have a hearing, and I don't think the time necessary is necessarily all that different.

I think when the postponement request is made for up to fourteen days, I think at least in my experience in many cases it's because you're trying to negotiate a stip. You may also be preparing for the hearing as a fall-back if you don't get a stip, but in many cases that's additional time that you need to go back and forth with the Board agent and with counsel for the union to work it out.

MS. SCHIFFER: Has it been your experience that the date of the hearing provides a deadline, if you will, for getting that stip?

MR. FRITTS: It does, it certainly does, and the morning of the hearing. But I think the concern is that if you tighten it down to seven days

I think it's just not going to give enough time to do that, and you're going to back into situations where you have a hearing or you're going to have very rushed negotiations where mistakes are going to get made and disputes are going to happen down the road because you haven't intelligently negotiated a stip.

MS. SCHIFFER: And is there some optimal time between the seven and the fourteen, or is it just that's what it is so that's what you base it on?

MR. FRITTS: Well, our position is that the current practice provides discretion at seven to fourteen days. I think in practice fourteen days is usually the standard. And I think fourteen days, while tight, I'm not saying it's easy to get it done even in fourteen days, but I think that's the current standard, and in 90 percent of cases you get a stip in that period of time.

MR. MISCIMARRA: In follow-up to that, if you talk to some federal court judges, they might say that the quickest way to get a settlement of a complicated case, and in fact I think some judges have said this, is to take a complicated case and say, "You're going to trial next week." So if you

assume hypothetically that seven days is an artificially tight deadline for preparing for a hearing, why would that be a bad thing? A, would that really create an incentive to have more stipulations? And B, you made reference to problems that might exist if the parties rush to a stipulation, and what do you mean by "problems?"

MR. FRITTS: Well, the first part of the question I think is really about whether there is enough time to figure out what the issues are and determine what you might litigate. I think if you're going to negotiate from a standpoint where you know what the issues are, you know what you're prepared to go to hearing on and you know how strong your case is and that informs your negotiating position, I think you're going to figure all that out first and then decide what can you sort of pare back with, what can you concede on. You've got to work with the client, of course, on that.

But I think that process, if it's seven days, I would say it's going to be difficult to have the back and forth in that seven days necessary to work all the issues out, and so I think you end up defaulting to whatever the lawyer has prepared to do on that seventh day in terms of presenting evidence

and identifying the issues.

I think it becomes a situation where, if the time is too short, yes, it's an incentive to negotiate something. But the default position for employers at least, and I would think for unions as well, is we're going to be prepared to go on that seventh day, so if we don't get it done by the seventh day then we're going to a hearing. That's the concern.

MR. JOHNSON: One quick question on more or less ambiguity produced during rushed negotiations for a stipulation.

MR. FRITTS: Thank you, Member Johnson. I think that was the second part of Member Miscimarra's question. I think the problem that I was articulating is there are some issues where you may either decide, in the course of negotiating a stip, to defer certain issues until after the election. You may intentionally not resolve those issues as part of negotiating a stip.

Typically, if it's less than 10 percent of the proposed unit you can do that, but there may be mistakes as to the scope of that. And it may turn out that you then have more challenges post election because there were issues that you didn't

flesh out, didn't resolve, or maybe it's just a situation where you were doing it so quickly that the parties were talking across each other and there wasn't really a meeting of the minds on certain issues and someone seeks to withdraw from the stip. So I think those are the types of problems that can arise.

Either it's an intentional deferral of issues until after the election, or it's simply that mistakes were made during the negotiation process that caused disputes to arise that have to be resolved through litigation as opposed to everyone sort of knowing what they agreed to and they move forward under the election agreement.

MR. PEARCE: Thank you, Mr. Fritts.

MS. SENCER: Thank you for allowing me this opportunity to address you. My name is Caren Sencer. I'm a shareholder at Weinberg, Roger & Rosenfeld. I'm based in our Alameda office, which is our main office, and we represent a wide array of clients and a wide array of trades and other unions.

I want to start from a different proposition: that the idea here for a seven day election and that the idea for the Board is not to be neutral but to be able to help workers express

their desire one way or the other. It is not an agency designed to, although in some ways it is, to balance the interest between management and unions, but really the core purpose of the Act is to protect the Section 7 rights of employees. And however we go about doing that in the most efficient way is what we should be looking at, not necessarily what is best for employers, what is best for unions, but what is best for workers, who are the underlying population that is intended to be served by this Act.

The seven day setting is fairly common everywhere in the west. It is the notice that I get on a regular basis that the hearing will be held in seven days. As indicated by Mr. Baskin, frequently the employer requests it, even over union objection, and is provided an extension for that time. Whether that time actually serves any purpose that gets us more stipulations or just results in more litigation is somewhat open. Maybe others might have statistics on that, I certainly don't, but seven days is enough to secure the most basic issues that the employers have been talking about.

Employers all across the country are subject to state and federal law regarding wage and

hour, regarding employment, regarding employment discrimination, and so they have access to or contacts with counsel who can be called on to provide guidance in labor relations issues as well. If that counsel can't, they certainly know who can, and so the ability to secure counsel, counsel of their choosing, is I think kind of a red herring when it comes to these issues.

As noted from the list of organizations that are represented through speakers at these meetings, many employers are part of a trade organization or more than one trade organization. Those organizations have tools for their members and access to counsel for their members, thus again lessening the impact of a seven day notice period.

And as technology changes and in fact even as the Board's technology changes, there is more information available publicly on the web and other sites. Your own site says "Who We Are and What We Do" and kind of explains the process, and I expect that that continues to grow and continues to be updated. As a result of this proposed rulemaking and hopefully the outcome of this proceeding, there will be a slew of employer publications about how you have to act under the new rules, how these rules

will affect your business, what services you can purchase now so that you have labor counsel on retainer in the event that you get hit by a union petition. We can expect those things coming.

Finally, on that point, employers know about organizing campaigns before they happen. If they choose to put their head in the sand and not seek counsel before a hearing or until the last moment they have no one to blame for that but themselves, and the employer's choice to be ignorant of the law on this issue is not a reason to delay an employee having a right to a free choice and fast election. The seven day standard moves us closer to that goal by providing one less hurdle to get over.

Sometimes there are in fact concerns of particular counsel, and particular counsel I think is less of a concern than the employers would like you to believe. Both of the gentlemen to my left are at big firms with deep benches, with lots of people who can represent an employer on any given issue regarding a hearing to be prepared for.

And these hearings are not as complex as they had been. Specialty Healthcare and other guidance has limited the issues that go to hearing. There are two issues that most commonly come up in

my practice: community of interest, which obviously Specialty Healthcare informs, and supervisory status. Supervisory status rarely affects more than 10 percent or the proposed 20 percent of a bargaining unit and therefore should not be a reason to push off the hearing date for more research to be performed.

Community of interest sometimes can raise issues of more than 20 percent. But because we generally know how those cases are going to come out, because we do have so many cases on it because for 50 years or more the decisions are published on how the Board decides these issues of community interest, the idea that there is so much work to be done before that makes it impossible to have a hearing in seven days I don't think references the current technology where all of this information is at your fingertips.

The current technology of employers, where these lists of employees are so easily pulled from their own databases, their own payroll systems and other electronic information are such that either employers large enough have all of this information already inside its system or it's small enough that it knows exactly what it is that each of

its employees do.

MR. PEARCE: Do you see any problems with having a hearing that is fourteen days or later in a schedule?

MS. SENCER: Fourteen days or later just adds to all of the steps of delay in the process. My concern is not the hearing itself but what that does to the actual election date. To represent my clients most effectively, we want them to be able to help the employees get to an election in the most reasonable and timely way possible.

The difference between seven and fourteen days is just one more week where there is uncertainty for the employees, where there is disruption to the workforce, and where there are things that could be resolved that would help the employees have their question of representation answered.

MR. PEARCE: In your experience, are you provided with the issues that are going to be presented at a hearing in advance?

MS. SENCER: In some cases yes; in some cases no.

MR. PEARCE: Has that affected your ability to prepare for the hearing one way or the

other?

MS. SENCER: Unless an employer tells me that they're not raising an issue, I assume that all of those issues will be raised and prepare myself on all of those issues. And the resources are out there to do so fairly easily. Between the guide for hearing officers and the outline on law and representation cases, you know what it is that the hearing officer is going to be looking for to put into the record for the reading of the record, and you can prepare for those.

MR. PEARCE: Have you had any challenges in your preparation with the amount of time allotted in order to do this?

MS. SENCER: I would say the most difficult problem is sometimes freeing up my schedule. I'm outside counsel, just like they're outside counsel, and in that situation I either rearrange my schedule or one of my other shareholders or associates steps into it, because the goal is for us to keep those things on schedule so that it continues to move forward.

MR. MISCIMARRA: Ms. Sencer, two things. One, I want to thank you for reminding us about the reference point of employee interests rather than

focusing this on kind of an employer or a union interest, although they're all important. The second thing is: Have you personally or your colleagues in any instances agreed to a hearing taking place longer than seven days, and what were some of the considerations if those cases arose that would have prompted that to occur under our current practice?

MS. SENCER: Sometimes we know that the employer's counsel is in fact truly unable to rearrange their schedule and is not at a firm that has the ability to back-fill that. If we think there is an issue that truly needs to be resolved in advance, for example as happens on the contraction and expansion of unit cases, we agree for the hearing to be put off of the seven days so that those issues can be fully litigated in advance, because that's important and you can't do it afterwards. It's a question of whether or not that election should occur. The same thing on joint employer kind of issues.

But when it comes to just a regular community of interest or supervisory status, what can end up as individual eligibility questions, generally when the request is made it's granted over

our objection.

MR. JOHNSON: Just really quickly, first, say hi to David for me. And second, you're an experienced litigator. Let's just assume the Board doctrine assigned you the burden within the seven days to produce an overwhelming community of fill-in-the-blank, we'll create some legal doctrine. Is it fair or unfair to believe that you're going to have to marshal a lot of evidence to surmount that burden?

MS. SENCER: I'm not really sure that it's always a lot of evidence, because one of the things that I see most frequently in these cases that are actually litigated on these issues, for example supervisory status, is a disconnect between upper level management and the people actually performing the job. Instead of talking to upper level management in preparation, if attorneys were speaking to the people actually doing the job they'd have a lot less preparation time and lot better evidence going in.

MR. JOHNSON: Right. But let's take the world as is. There's going to be a lot of bad attorneys out there who are inefficient and start talking to the wrong people. Do you think it's fair

or unfair in the situation where you have an overwhelming burden to limit a party to seven days to come up with its case?

MS. SENCER: I understand why there's an idea that it could be unfair. It is a lot of evidence. It is on the union's timeline. When they file the petition the employer doesn't always know exactly what's going on maybe. I think the employers do know what's going on. I think the employers for the most part are preparing in advance.

You'll have testimony, I'm sure, because Professor Bronfenbrenner is here, regarding what is actually happening in these cases. But the amount of evidence is dependent on what the employer wants to fight about. Specialty Healthcare and other cases make clear what actually is the standard on this.

If the employer did not want to fight an appropriate unit for the unit that they wanted, which may also be an appropriate unit, if they would accept the union's appropriate unit when the unit is appropriate, and the unions are pretty skilled at identifying them at this point, that burden isn't all that onerous. And I don't think that it is that

onerous to prepare in seven days, particularly given the communications that go back and forth, the fact that these communications happen outside of business hours, that a lot of this is electronic, that this information can be pulled and that telephone conversations can be just as good as face-to-face meetings.

A part of the reason for this seven days and this idea of a burden is because there's an education component going on to the client and the client's employer that that should be happening beforehand. It's not up to the employees to be sitting and waiting so that the employer can get itself educated. The employees have the right to move forward.

MR. JOHNSON: If we had a super short timeline for the employer, and let's just say two days or three days or seven days, however you wanted to look at this, if we switch to like a Section 8(g) model to take care of all the employer notice concerns in terms of finding counsel and all that, would you approve of that? In other words, if the union was thinking about filing a petition they would send the employer a letter, and then the union would get the benefit of a shorter timeline, like

seven days before the hearing because the employer couldn't say anything like, "We had no idea this was coming, we couldn't find counsel?"

MS. SENCER: Maybe I'm biased, coming from the west. We have in California the Agricultural Labor Relations Act. That runs on a really tight time frame. Elections are held in a week. Unions have access to the employers' premises during that week. The employer has to produce a list in two days, and somehow their world is not falling apart. They still have fair hearings, they still resolve their issues, and they still get to the question of the employee choice quickly and for the most part without litigation, so I don't think that it's too much of a burden.

MR. JOHNSON: Thank you.

MR. PEARCE: Thank you. We are going to take five minutes, and then we will have the topic of the requirement for written statements. The speakers will be Kuusela Hilo, F. Curt Kirschner, Elizabeth Bunn, Maneesh Sharma and Ronald Meisburg.

(Recess.)

MR. PEARCE: I want to thank the speakers and my colleagues for adhering to the time limitations. For this next topic we actually have

three groups and a total of ten speakers. We may not have time for every Board member to questions of participant, of every speaker, so I'd ask my colleagues to keep that in mind and to choose carefully who they wish to speak to. And please don't go strictly by popularity or we'll be speaking with Ron Meisburg all day. In our effort to try to get through and give everybody a fair shot we will exercise that kind of restraint. We know that's a lot to ask of attorneys. That being said, welcome, panel, and you may proceed.

MS. HILO: Good morning. My name is Kuusela Hilo, and I am an organizer with the United Nurses Associations of California, the Union of Healthcare Professionals. I strongly support the Board's proposal to require written statements raising issues and providing initial disclosures of relevant information. When my union UNAC/UHCP filed an election for a registered nurse only unit at Universal Health Systems, Incorporated in Corona, California, we had great difficulty getting to a stipulated election agreement even though there were not any disputed issues.

In the week leading up to the pre-election hearing, our lawyer and the company's

outside lawyer frequently communicated about the petition, but the company's counsel never told our lawyer or the Board what were their issues with our petition.

This meant that we had to prepare for any possible issue that could be raised at a hearing, from finding RNs from every unit and every shift -- we are a 24 hour facility in the hospital -- to taking the day off of work, to driving hours in rush hour Los Angeles traffic, and possibly being seen by UHS identifying the depth of their involvement in the campaign.

Once we got to the hearing the company finally identified a few concerns, but the union was willing to agree to all of them. This meant that all the work spent identifying witnesses and our tremendous effort to be prepared was all in vain. And despite the agreements on all issues, the company successfully insisted on the hearing so that it could state its evidence for the charge nurses being supervisors. The union had already agreed to stipulate to this.

Then there were transcript errors that delayed the region in being able to issue a decision and the direction of the election after the hearing.

It took many weeks before we knew the election dates. One of the requirements the company had before it would finally enter into a stipulated election agreement was that we withdraw our initial petition and refile a new petition. This led our election to occur 56 days after originally filing the election petition, but statistically the election looked like it occurred well within the 42 day period because we were forced to withdraw the original petition to finally secure an election date.

Again, I strongly support the Board's proposal to require written statements raising issues and providing initial disclosures of relevant information so that we can have a more efficient and modernized process and so that workers can have a free, fair and timely vote. Thank you.

MR. PEARCE: Was this your first experience filing a petition, or was this one of several?

MS. HILO: This is one of several.

MR. PEARCE: Have you had similar experiences in the past?

MS. HILO: Having these delays?

MR. PEARCE: Yes.

MS. HILO: No. It was with this particular company, UHS.

MR. PEARCE: Thank you.

MR. MEISBURG: Mr. Chairman, members of the Board, I am Ronald Meisburg. I'm representing the United States Chamber of Commerce here today.

MR. PEARCE: Who are you again?

MR. MEISBURG: My mother would say I'm Ronny.

(Laughter.)

MR. PEARCE: We'll note that.

MR. MEISBURG: We do appreciate the opportunity to participate in the hearing today. The topic for the panel of course is that after a petition has been filed the regional director is issued a notice of hearing that the employer shall file and serve on the parties a statement of position by the date specified in the notice. Failure to raise issues or otherwise completely respond to matters required in the statement of position will foreclose contests of the omitted matters except for Board jurisdiction and some voter challenges. Importantly, this proposed statement of position with its accompanying implications is an entirely new requirement, and therefore is a

dramatic departure from current Board procedure.

The Chamber remains particularly concerned about this proposal which, in practice, would routinely require employers to file position statements within seven days set for the hearing. The Chamber has expressed those concerns in our written comments filed in 2011, in our oral testimony in 2011, and expressed its other concerns also in our written testimony filed this year and again today.

We believe meaningful consideration of the Chamber's position with respect to this issue requires acknowledgment of several points. The first is that employers have legitimate and substantial interest in NLRB representation proceedings and the rules that govern them. The Chamber believes this to be unassailable. Employers undertake the numerous and substantial business risks required to start and maintain the enterprise, like raising and borrowing capital, developing business plans for the production, marketing and delivery of products or services, making commitments to vendors and suppliers and customers along the way, and of course hiring, training and supervising the employees necessary for the enterprise. So

these interests may not eclipse those of other parties, but they are certainly substantial and legitimate.

Second, it remains the case that many if not most employers involved in these representation proceedings are relatively small employers. This is strongly suggested by the Board's statistics showing that the median size of units in representation proceedings has ranged between 23 and 28 over the past decade, and of course that means half the elections involve even smaller units. And the Chamber's membership drives one of the reasons the Chamber is very interested in this, because 96 percent of the Chamber's members are small businesses with 100 or fewer employers, and 70 percent of the Chamber's members have ten or fewer employers.

Small employers are the very ones least likely to have full-time counsel or the human resources staff with the familiarity to deal with the kinds of issues raised when the union files an election petition. This can operate as a very great handicap for these small employers in an extremely short deadline period of seven days or less.

Most of us at this hearing are familiar

with the arcane labor law terms and rules and concepts involved in representation matters, and yet even we can sometimes struggle with their meaning and application. The Board must not lose sight of the fact that a small employer faced with perhaps its first and only election petition or organizing campaign would not have anything like the familiarity we have with the expertise of a trained and experienced labor relations counsel or advisor.

Instead, the employer will have to locate and retain counsel, perhaps other advisors, and that takes resources and time within this seven day deadline which is denied to the employer. While the stated goal of the proposed rule is to streamline the election process, the due process rights of employers and particularly small employers should not be sacrificed in order to do so.

Third, it has to be acknowledged that unions already carry substantial advantages into a representation proceeding. Prevailing wisdom seems to be that the employer holds all the cards because purportedly it can, without regard to the demands on managing its business, communicate constantly with its employees about union organization, but this simply ignores reality. The principal focus of the

employer is the satisfaction of customers' needs and the efficient management of their business.

By contrast, it's the very business of unions to organize and represent employees. They can do their organizing for weeks or months without the employer even knowing about it. They can frame the election issues, communicate with employees, determine what unit it wants to seek, file the petition at a time when it seems that it is most advantageous for them to do so, and it will have the resources it needs in place to handle any of the issues that come up.

So believe that the Board must evaluate the proposed regulations, and particularly what we're here talking about now, through the lens of these facts. Otherwise, there is a very significant legal and substantial risk that employers will effectively be denied important legal and due process rights and be forced to either unknowingly waive important legal rights because they were not counseled or raise every issue, even those that would not have been raised, in an effort to avoid any waivers. We frankly think this does not serve the purposes of the Act or free and fair elections and that it will reduce the efficiency of the

election process and not increase it.

MR. PEARCE: Wouldn't you say that in federal litigation, or even state litigation, that the party that is being sued, the defendant, if they don't know the issues, the bases for the litigation, that they would be at a decided disadvantage during the course of the litigation? Wouldn't you agree?

MR. MEISBURG: I think it depends. That's really going to be depending on the particular piece of litigation. Member Miscimarra asked a question a while ago about the quickest way to settle a complex lawsuit for a judge would be to say, "We're going to trial in seven days," and that focuses everybody's attention very quickly.

I think the problem there is leading up to a lawsuit first you'll have a history in most cases where somebody has written a demand letter saying "Here's what I want done or else I'll sue you." Then you have a complaint which has to lay out the statements for which you're being sued, the claims for which you're being sued. You have an opportunity for an answer and you have an opportunity for discovery, and so all of this takes far longer than seven days and permits the parties to have a keen appreciation of exactly what's at

issue, but it doesn't happen within seven days.

MR. MISCIMARRA: I have a follow-up question to that. In our unfair labor practice cases we permit the provisions of the complaint to be amended in many cases even after the hearing. What would be your position to the extent that the Board were to adopt a written position statement requirement but not to regard it as a waiver of positions that were unexpressed in the statement of position?

MR. MEISBURG: Well, I certainly think that would be an improvement, but we had a number of other objections to the statement of position that we're not addressing here in this oral testimony today. So while that may be an improvement, I don't know that it would be the complete answer to the issues that we're concerned about.

Let me just mention one other thing. It was interesting to me when General Counsel Feinstein issued his best practices memo back in 1998, in that best practices memo, which is really the basis for very much of what the Board's practices are today, the best practice was to start the hearing ten to fourteen days after the petition.

But in that best practices memo they

talked about the importance of trying to get these election agreements that the last panel talked about, and in there they made a very interesting statement. This is when they were going to start the hearing ten to fourteen days later. They were talking about trying to get a telephonic conference call, which back in that day was more of a technological novelty, to discuss the possibility of getting an election agreement, and they said approximately two days prior to the hearing to try and do that.

But then they said one of the difficulties in utilizing a conference call was that scheduling a time when the parties' representatives, and this is really two days before the hearing, are sufficiently knowledgeable about the issues to take a position.

I think it was acknowledged in GC Memorandum 98-1, the best practices memorandum, that it's not unusual at all that the parties might not be knowledgeable even when the hearings were to be set ten to fourteen days away, much less the seven days we're talking about.

MS. SCHIFFER: Are there particular pieces of the statement of position that are

objectionable, or is it the whole concept of it, the fact that it has to be in writing, the fact that it has to be submitted?

MR. MEISBURG: Member Schiffer, I appreciate that question. I don't want to put a gloss on our written comments. We've devoted about ten pages out of our document to pointing out which parts of the position statement, some of which we didn't object to but other parts of it which we did. I find it difficult to say that we have sort of a conceptual disagreement with the notion of a position statement but that there is no proposal on the table that's acceptable, and we stand by the objections we've voiced in the written comments.

MR. JOHNSON: Can I just jump in for a sec? Is there a real objection by the Chamber of Commerce about having a statement of position that would be binding at the end of the hearing?

MR. MEISBURG: That's not something that we've considered, and I don't have an answer for that question other than what we have said in our position statement.

MR. JOHNSON: I know this is kind of a combination of oral argument and speed dating, and sometimes it's more like speed dating.

MR. KIRSCHNER: Good morning, Chairman Pearce and distinguished members of the Board. My name is Curt Kirschner. I'm a partner with Jones Day. I'm testifying this morning on behalf of the American Hospital Association and two of its affiliated personal membership groups, the American Society of Healthcare Human Resource Association and the American Organization of Nurse Executives. With me today is Carla Luggiero of the AHA.

Thank you for the opportunity to speak this morning about the requirements for a written statement of position contained in the Board's notice of proposed rulemaking. A more thorough discussion of the AHA's arguments with respect to the NPRM is included in the written comments submitted earlier this week to the Board.

Drawing on the experience of its member hospitals that are routinely involved in NLRB elections, the AHA believes that the NPRM's proposed requirements that a statement of position including various employee lists that accompany that to be submitted within seven days of a petition being filed or risk waiver of any sort of number of issues is inconsistent with the Act and unreasonable in the real world and in fact could backfire, resulting in

further delays in the process of getting parties to a representative status.

In our view, this is one of several examples in the NPRM where the Board appears to be sacrificing a fair process to achieve the goal of faster elections. This is an imbalanced position, in our view, in light of the congressional mandate to hold an appropriate hearing under Section 9(c), but it also presents a substantial risk that more representation hearings will actually be held under the proposed scheme than under the current scheme and, therefore, that actual bargaining relationships will be delayed as a result.

The current rules result in stipulations without a hearing in over 90 percent of all petitions being filed. The NPRM proposes significant rule changes to virtually every aspect of the representation process. The net result of all of these overlapping changes happening at the same time is impossible to predict, and it's easy to see that the confluence of all of these different changes occurring at once would result in more petitions going to hearing and more delays in the process.

The NPRM proposes a requirement that the

non-petitioning party, which is almost nearly always the employer, shall state several things, including a description of the most similar unit that the employer concedes is appropriate if the petition unit isn't appropriate, also identifying any individual's occupying classifications which the employer intends to condition test along with the basis for that contention, and a description of all other issues that the employer intends to raise at the hearing.

Along with the statement of position, the employer must produce both the requested list of the petition as well as, if the employer contends that the unit is not appropriate, another list of the employees who would fit within the appropriate unit.

The penalties for failure to comply with these numerous requirements are significant. If the employer fails to furnish the employee list with the statement of position in a timely manner the employer shall be precluded from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument or by cross-examination of witnesses. In addition, the NPRM includes a preclusion penalty regarding evidence or argument

for any issue that the party failed to include in the statement of position.

The Board's proposal to preclude employers from raising issues of unit appropriateness as a penalty for failing to provide an employee list in the expedited manner is particularly troublesome. Many of the Board standards for determining unit eligibility and supervisory status are fact-intensive and time-consuming. Many of these cases arise from the hospital sector, and the AHA's members have great experience going through the fact-intensive time-consuming process of determining whether any particular set of employees such as charge nurses are or are not supervisors under the Board's current standards.

In addition, hospital bargaining units are oftentimes quite large, given the existing acute care rules, and having employer hospitals trying to determine who is, for example, a technical employee rather than a service employee can be a very time-consuming process. It will take some time to go through large units and determine who's in which unit and who's not, and the penalty for getting that wrong is significant under the proposed rules.

The proposed statement of position would require interested parties to articulate a fixed position with respect to the scope of the putative unit per the introduction of any evidence. We believe that is unfair and unrealistic in the real world, given that the hospitals's HR systems are not set up to align with the Board's current rules for bargaining units.

In fact, this could have an unintended consequence of prompting fewer election agreements and more contested hearings because during the timeline before the hearing, whether that's seven days or even longer, employers will be focused instead on providing and preparing the statement of position and the employees list, thereby taking the time away from trying to negotiate the stipulations that currently exist and that are reached in 90 percent of cases.

So by having this obligation, which we think is onerous, the risk is that employers will be focused on putting together everything they can in the statement of position. They'll be treating it like an answer in civil litigation, putting in every defense they can think of or risk waiver, and thereby using all the time to focus on that rather

than actually trying to reach an agreement with the union about what an appropriate unit is. Thank you.

MS. SCHIFFER: Do you think that it is -- well, let me raise very specifically, with respect to the proposed rules requirement that the employer identify a most similar unit, whether it helps the process of either stipulation or the process of hearing that the employer actually take a position on the unit that's petitioned for.

MR. KIRSCHNER: Speaking on behalf of the American Hospital Association, where we have prescribed unit rules, in my experience I think it is commonplace for hospital employers to identify whether the petition for classifications are those that fit within a service unit or in a technical unit or some other RN unit, for example, and oftentimes it should be incumbent on the union to identify which of those prescribed units they are seeking to represent.

MS. SCHIFFER: Presumably that's in the petition. I'm just asking does it help the stip or the hearing for the employer to take a position on what it believes the unit should be?

MR. KIRSCHNER: I would also assume that the prescribed unit would be somewhere within the

petition. Sometimes it's not. Sometimes they actually do just list classifications that they believe comprise the prescribed unit. So it is helpful still to get further information from the union.

At the time of the hearing and once the evidence is known about what the union is seeking, then I think it is appropriate for the employer to articulate a position with respect to what the appropriate unit would be under the acute care rules because they are prescribed.

MS. SCHIFFER: But not during the stipulation discussions or at the beginning of the hearing?

MR. KIRSCHNER: In my experience, given that virtually all petitions result in stipulations you do have that discussion with opposing counsel during that timeline leading up to the hearing. You couldn't reach a stipulation in an acute care petition unless you are putting out there what you think the appropriate unit would be. I think that during that process it's commonplace under the current rules for the parties to talk in advance of the hearing about what the appropriate unit would be.

MS. SCHIFFER: I don't think I got an answer to the question. Should the employer take a position before the start of the hearing during stip discussions and at the beginning of the hearing?

MR. KIRSCHNER: I believe that taking a position would be appropriate if the employer has been given sufficient information from the union with respect to what unit or units they are seeking to represent.

MR. MISCIMARRA: That's the technical legal proposition, what's sauce for the goose is sauce for the gander. Is that right?

MR. KIRSCHNER: Correct.

MR. MISCIMARRA: Here's one question that I have, and I'll be brief. Have you encountered any situations where you understood going into the hearing that a particular healthcare facility had classifications that operate one way and where in the course of the hearing you discover that the various job classifications actually interact in some different way?

MR. KIRSCHNER: There are several examples particularly in trying to determine whether employees are service employees or technical employees. You can have employees who work in a

lab, for example, where sometimes they do phlebotomy, and phlebotomy would typically be seen as a service position. However, they may have additional duties on top of that that may or may not be reflected in a job description which would put them in the technical classification.

The Board has these prescribed rules, but there are positions that are on the bubble and could go either way depending on how the hospital actually uses them. So it is not an easy answer for hospitals, particularly when faced with large bargaining units, to determine who are the people who are within one unit or the other. It takes sometimes evidence being put on at a hearing, and sometimes the union has it wrong as well because they misunderstood what people are doing.

MR. HIROZAWA: I have just one question for Mr. Kirschner, not so much as a representative of the American Hospital Association but as a very experienced practitioner. Wouldn't most of the information that's called for in the proposed statement of position be information that you would ascertain as a matter of course in preparing for a hearing?

MR. KIRSCHNER: Yes, it should. And it

depends on how much time you have before the hearing, which then intersects with some of the other proposed rules about whether it's seven days as a hard deadline. But I think that many of those topics are relevant to preparing for the hearing. Many of those topics are also relevant to negotiating the stipulation, which I think should be the emphasis during that time leading up to the hearing.

My concern is that, by having extensive obligations imposed on the employer and requiring them to provide answers on every possible issue that you could potentially raise during the hearing, the attention is going to be off the ball of trying to reach a stipulation. Instead, you're just going to be preparing a statement of position with the attendant employee list that is going to ensure that you're not inadvertently waiving anything. I think that is one of the real concerns. The statement of position coupled with the waiver issue makes this proposal particularly concerning.

MR. PEARCE: Thank you very much.

MR. SHARMA: My name is Maneesh Sharma. I'm associate general counsel at the AFL-CIO. On behalf of the federation and its affiliates, we

would thank you for the opportunity to speak here today. I'll be splitting my time, as you can see, with Elizabeth Bunn, who is director of organizing at the AFL-CIO, and because I'm splitting my time I just want to focus on a few things.

As you're aware, the AFL-CIO does not directly represent unions in our case proceedings. Therefore, in order to assist the Board in its rulemaking process we thought it would be useful to provide insights from union side lawyers who practice in regions across the country.

To do so, we conducted a survey of attorneys with extensive experience representing affiliates in representation proceedings. 57 attorneys in that pool responded. And as part of my testimony I wanted to highlight some of the aspects of that survey and also discuss some vivid examples that were provided by attorneys to illustrate the benefits of these proposed changes. The survey is discussed in more detail in our comments and the full results are appended to our comments.

First, I just want to note that there is wide consensus among experienced union side attorneys that the current rules fail to provide workers with free and fair elections. As it relates

specifically to the statement of position, 69 percent of the attorneys who responded said that they had been involved in cases where the employer refused to identify the issues it planned to raise at the pre-election hearing until the proceedings went on the record. Additionally, 44 percent reported involvement in a case where the employer did not identify its issues prior to presenting testimony.

One attorney reported to us in a recent R-Case for an RN unit that she called the employer's counsel after the petition was filed to ask them to identify what issues they might have and to see if the parties might be able to reach a stip. The attorney refused and stated, "There are always issues." The company then litigated the supervisory status of every charge nurse in the proposed unit.

Luckily, the union expended the time and resources to prepare for this potential issue before the hearing and was able to properly respond, but in many cases the union is not in a position to respond to a company's argument, as it has no notice that this will raised at a hearing. This type of hide-the-ball litigation serves no purpose but to avoid reaching agreement, create delay, and leave

the union in a position to waste resources by preparing for any and all potential arguments.

Also, the additional requirement that employers must include a list of employees with classification, shift and work location information is integral to this proposed change. The list aids the hearing officer and the parties in understanding issues and allows the union to investigate eligibility and inclusion issues so it is not forced to challenge voters unnecessarily or allow ineligible voters to vote.

One attorney provided us an example in which the union provided received an Excelsior list that included more names than the union believed should have been in the unit. The pro-union workers, who unfortunately were fairly unsophisticated, failed to challenge at least six voters who ended up having no connection whatsoever to the petition for a unit. If the union had the list of employees purportedly in the unit at the time of the pre-election hearing they could have explored those issues and resolved them then.

It should also be noted that the requirement for a written statement of position merely codifies the standard that is an existing and

formal practice. As our survey and examples show, the practice has varied widely and permits strategic behavior, sometimes very explicitly and sometimes abusively, where employers refuse to take a position or change their position in order to prevent agreement and create litigation, and for that reason we support the requirement for a written statement of position. I yield any time I have remaining to my colleague, Ms. Bunn.

MS. BUNN: Good morning. My name is Elizabeth Bunn, and I'm the organizing director of the AFL-CIO, a position I've held for about four years. Prior to that, my background includes working with the enforcement litigation division of the Board after law school, and 25 years first as an attorney and then as senior staff and an officer at the UAW. I oversaw the union's organizing program in the non-manufacturing sectors there, so I have many, many years of experience in helping workers to organize.

To Maneesh's compelling argument I would just add one small point. We suggest changing slightly the proposal concerning the employer's response to the scope of the bargaining unit. We recommend that an employer who objects to the

workers' proposed bargaining unit set forth with specificity who they contend must be added or subtracted in order to support their contention that the unit proposed is not appropriate.

We think such a proposal makes all the sense in the world. It prevents an employer from merely objecting for the sake of objecting in order to cause delay and gamesmanship, and it allows both the employer and the workers' representative the opportunity to problem solve their disagreement, hopefully satisfactorily.

MR. PEARCE: Ms. Bunn, have you had specific experience with respect to the problems that you suggest exist in the current hearing process?

MS. BUNN: My own experience is that many employers, too many employers, not all, but too many employers, in fact seek to delay the holding of the election, and they'll do that through raising unnecessary objections, challenges and frivolous legal arguments.

We'll talk later on as part of other proposed rules that the goal is delay, just pure and simple. And since the purpose of the pre-election hearing is to decide whether or not there should be

an election, to the extent that the Board, consistent with due process, can delay litigation of issues that are unnecessary to that question of whether there should be an election is appropriate. But yes, unnecessary delay has been our experience in many, many organizing campaigns.

MR. PEARCE: Are there circumstances where the position of the employer being presented only at the hearing or sometime during the midst of the hearing creates any kinds of issues with respect to the petitioner?

MS. BUNN: Right. It is difficult. Again, since the purpose of the hearing is to decide whether there's a question concerning representation, it's important for the workers and their representative to understand what the employer's position is, and to walk into a hearing without having that information is unnecessary and unhelpful.

MR. SHARMA: I would add to that just that one of the consistent responses that we receive from union side attorneys is how difficult it is to prepare for a hearing when you have no idea what the positions the employer will take at that hearing are.

MR. MISCIMARRA: Along those lines, if one assumes that seven days is an adequate time for an employer's counsel to plug into a particular situation and identify the relevant issues, because of this preparation issue and also the benefits of trying to negotiate a stipulation, would you support, for example, an alternative? If the Board required some written statement position at day seven, would there be utility if the union then had another four to seven days thereafter to take that into account in its preparation for the hearing or in the negotiation of a stipulation?

MR. SHARMA: I would say that that's not necessarily the case. Again, the union has a fairly good idea of what it believes the issues are at the time that it files a petition and is in a position in many cases to respond to those. Rather, it's the tactic of raising issues that are completely unforeseeable, because, as is often the case, they tend to be frivolous arguments that blindside the union and are issues that the union is not prepared to respond to.

Those don't necessarily need a whole lot of time to prepare for. It's just that if you had notice prior to the commencement of the hearing of

those issues, then the union is in a better position to respond to those. I don't think they need four to seven days necessarily to respond to those issues.

MR. MISCIMARRA: But presumably notice of frivolous positions is as useful in advance of the hearing as notice of non-frivolous positions. Is that a correct proposition?

MR. SHARMA: I would absolutely agree with that, but I wouldn't say that you necessarily need an extended period of time to prepare a defense to those or a response to those.

MR. JOHNSON: Vis-a-vis the timing here, would you support looking at this on a variable scope in terms of deadlines and what should be in the statement of position depending on the size of the petition for a unit?

MS. BUNN: I think that the crafting of these rules in many ways is extraordinarily elegant -- and hats off to all of you who put time and energy into this -- and I think that the exception allowing for exceptional circumstances would cover any particularly difficult situations.

MR. JOHNSON: Do you think we should define exceptional or special circumstances more

thoroughly?

MS. BUNN: I actually don't. That reminds me early on when someone said, "Let's define 'just cause' in the contract." Sometimes it's easier to have the general concept and work through it that way.

MR. JOHNSON: And one last quick thing. On the premise that it will help the parties sort through the bona fide real issues and perhaps lend toward whatever other reforms we might be thinking about, would you support actually asking the petitioning union to come up with a statement of position that more fleshes out the legal issues rather than just simply the petition itself, such as, for example, why the readily identifiable group was chosen, what the community interest and factors are that support it and why certain positions were excluded?

MR. SHARMA: I would say that I think for many of those issues the Board has fleshed out general principles that are fairly straightforward and that guide on those. The structure, as I understand it, is that the petition is filed, the statement of position provides a response, and then the union has to provide a response to those issues

raised in the statement of position, therefore joining those issues. At that point I think that you have a situation where both parties will be knowledgeable enough to know why positions are taken and be able to articulate their positions and that the Board will be in a position to knowledgeably respond to those.

MR. PEARCE: We'll have to move on. Thank you very much. In order to simulate your most exclusive fine dining experience, we're going to have a second seating, Melinda Hensel, Maury Baskin and Robert Godinez. You may proceed.

MS. HENSEL: My name is Melinda Hensel. I'm an in-house counsel for the International Union of Operating Engineers, Local 150. I've held that position for about twelve years, and prior to that I worked for a private firm on the union side. I'd like to thank the Board very much for having me here today and giving me an opportunity to present my views on what I think are some very, very important changes that the Board is considering making.

MR. PEARCE: Ms. Hensel, can you bring your mic a little closer?

MS. HENSEL: I'm sorry. That's a problem I routinely have. I'm very soft spoken.

MR. PEARCE: Aren't we all?

MS. HENSEL: Well, some of us.

(Laughter.)

MS. HENSEL: This proposed rule that a respondent party to a petition provide a position statement on a pre-election issue is hardly some radical policy shift, but it is a commonsense approach to streamline and increase the efficiency in the Board procedures.

A requirement that parties state a specific position is in line with the obligations that are imposed under the Federal Rules of Civil Procedure in 26(a). When you start a piece of litigation you're required to identify your witnesses who you have knowledge of. That gives the opposing party the opportunity to investigate the claims made by the opponent. We make position statements before various other administrative agencies, we take positions in arbitration, and taking a position is not an imposition.

In addition, in litigation we also file pre-trial orders before we head to trial because the judge wants to narrow the issues. The judge wants to expedite the case. There is no reason to spend twelve days litigating irrelevant and ridiculous

notions when a simple statement of what each side intended to present would narrow it and have it finished in two days.

I would say that due process is the cornerstone of every legal proceeding in the United States, or at least it should be. I feel that, in this context, the employer not having to take a position is one of the ways in which due process is not served.

You've heard some of my colleagues say that it's incredibly difficult to prepare for a hearing when you don't know what they're going to be proposing. I think that from my own perspective it does seem universally agreed that this Act is about protecting employee rights. It's not necessarily about me and it's not necessarily about Mr. Employer. It's about a group of employees who want to have a vote, they've expressed their intent to do so by signing the authorization cards, and at that point it becomes the Board's job to get that petition to a vote.

The dissent to the rules specifically did point out that having a question concerning representation is very disruptive to the workforce. Indeed it is. I've worked with these people. I

have experienced the disruption myself as part of an organizing campaign. It is incredibly disruptive, and therefore the Board is not serving the employees that the Act is meant to serve when it allows an employer to play games.

Inclusion of the rule requiring the position statement will allow the parties to determine ahead of time if there is some genuine issue that is in dispute. It's going to require a party to give some serious thought before they get to hearing of what it is that they're going to be presenting as opposed to, "Well, I'll just get there and make it up as I go," because I literally have seen that situation.

Another way demonstrating that the written position statement can reduce delay, I had a case a few years back in which the employer didn't refuse to state its positions, but it vaguely said, "Well, we have various reasons why the petition should be dismissed." It was all based on paper.

I sent a letter to the Board agent as well as the employer asking for a conference ahead of time, saying, "Can't we reduce the scope and length of the hearing if we can't get together, and I understand what your positions are, but present

the paper and maybe we can stipulate, and then we don't have to put on a witness to say, 'Yes, indeed, the settlement agreement was signed.'" We did that. And guess what? I think we cut at least a day off of that hearing.

It didn't stop the employer from showing up the day of hearing and announcing that the day prior it had recognized another union, so requiring the written position statement the day of hearing doesn't take away the elements of surprise. Of course, that is still there.

Requiring the written statement will also go a long way towards making it easier to deal with the case handling manual prohibition against harassment. When you don't know -- I'm sorry. My time is up. I have just a couple of very quick points, if I may.

MR. PEARCE: Go ahead.

MS. HENSEL: Harassment. If I don't know what the issues are, of course I'm going to have to subpoena everybody I possibly can because I don't know who I'm going to need to rebut whatever evidence it is that they choose to put on. And that also goes for documents. Why would I subpoena any given document that may not be relevant and I don't

know what it is that the employer is going to be disputing?

I would like to just give a quick example of why this position statement is necessary.

MR. PEARCE: If you can do it in a minute.

MS. HENSEL: I can do it in less than a minute. Just this past week my office handled an R-Case. Prior to the hearing the employer simply disputed the unit, didn't agree and didn't really say why. A day before the hearing he said, "Well, this is a multi-plant unit, we don't agree with your single plant." The union said, "Okay, fine." Or I'm sorry. They backed off of the multi-plant and said, "If you'll include this particular classification." The union said, "Fine, that classification doesn't exist at the single plant, so include it, we don't care, we can bargain about it later."

On Monday, when the hearing started, the employer renewed its multi-plant facility argument and tried to include the classification that didn't exist at the unit at the plant that it had already agreed to, and thereafter introduced multiple issues of supervisors and individuals who didn't belong in

the unit. After six days of hearing, and you can imagine the record must look like this (indicating), after six days of hearing, on the last day it backed off on its multi-plant unit and it's back to a single plant unit. That kind of wishy washy cannot and should not be allowed.

MR. PEARCE: Thank you.

MR. JOHNSON: First of all, thanks for coming. Just two quick questions. The Federal Rules of Civil Procedure model and civil procedure models in terms of civil litigation generally allow an amendment before some pleading that is going to bind a party goes into force. For example, you get a free amendment as of right with your complaint in many jurisdictions. What's your position on allowing the employer one free amendment or an amendment on one issue or two issues or three issues?

MS. SCHIFFER: Before you answer, that was exactly what I was going to ask, but I was going to ask it a little bit differently. Based on what you've said, should there be a period of time to change the statement of position, should there be a standard, and what should it be?

MS. HENSEL: Actually, I would encourage

the Board to consider requiring the position statement come in maybe the day before the hearing. I suppose, if it's coming in the day of, we're still facing the idea that if they haven't previously articulated what the issues are, you know, we're still in that position when we show up with the statement the day of.

I suppose, you know, amendments -- the hearing officer and the regional director have of course the discretion to define the scope of the hearing. And if as the evidence comes in it becomes apparent that there is an issue that wasn't raised in the position statement, you know, it's the Board's job to make sure that an election direction does conform to the law and that the unit is in fact appropriate. I think the amendments come that way.

The employers had a lot of time to review its position prior to getting to the hearing. They know what their workforce is. I think what I see the waiver going to is prohibiting an employer from playing these games, from changing its position from day to day just to confuse the issues, confuse the hearing, and add to the delay before the election can be held.

MR. JOHNSON: And one quick thing on the

heels of Nancy's great point there. What if there's a day six position statement instead of day seven, but day ten hearing to allow, or day eleven or day twelve or whatever we end up deciding on, so that the position statement actually rolls out in some intermediate area that allows the parties to talk about a stipulated election agreement? What's your thoughts on that?

MS. HENSEL: At the risk of upsetting anybody here, the two regions I primarily practice in are 13 and 25, and we have a pretty hard and fast ten day rule in both regions. I would not actually object to that, because I think it would be more beneficial to have that position to have a short opportunity to prepare for it. As my colleague said, we don't need four days, we don't need seven days, but the ten day rule I haven't had a problem with. And when they say only for good cause are extensions granted, they mean it. I've seen people re-juggle their schedules in Herculean ways in order to accommodate these hearings, and I'm not opposed to a ten day.

MR. JOHNSON: Thank you.

MR. PEARCE: Just one question. Have you had any experience with having to obtain witnesses

in response to a position that the employer has taken at a hearing?

MS. HENSEL: That has occurred. It's usually in the context of the employer not wishing to state its position prior to getting to hearing. There has been at least once where I know I subpoenaed the entire bargaining unit, and of course the region raised a question. And I said, "Fine, I'm willing to stagger how these people are going to appear, but I need to have them on deck so that if I need to rebut something I can do it."

That raises the cost for the union, too. I can't serve a subpoena without a check. Right? And if I don't end up calling the witness, I don't go back to that witness and say, "Give me my $50 back, please." These tactics unnecessarily raise the cost and the length and the time.

MR. PEARCE: Thank you.

MR. BASKIN: Thank you, and thank you for allowing me to appear a second time. I'm still representing Associated Builders and Contractors. We're still opposed to this rule in its entirety. Nothing in the last hour has changed that.

(Laughter.)

MR. BASKIN: But one thing that this

discussion brings out is the interrelation among the different provisions. Much of what I said previously, and I don't want to repeat it, about the difficulties of the time limits, applies to this aspect of the statement of position, and it also goes to this notion about doing the statement of position earlier than the hearing itself.

The concerns that we have, among many, about this: doing it in writing is a concern because that has time costs, and committing to it before the hearing is more challenging, particularly if it's locked in stone. The earlier question was whether it's the writing that people object to or the waiver, and the answer is, "Yes, both."

What is it about being locked in and why? Because the hearing is about the union's petition. The union knows what it wants from the get-go, and the employer does not. There have been several references to how the employer knows its workforce. First, that's not true many times, but it also does not know how that relates to the testimony that is going to be brought in at the hearing. And it is, we would submit, unfair to require the employers in all instances, as this does, to be committed to a position that may in fact change once testimony

comes in that is presented by the union.

And that's why some employers are saying they don't want to take a position. They're not gaming the system. They are not sure what the position is. They're not sure what the evidence will show because the hearing hasn't begun yet and because there's been no discovery. That's one reason why the analogies to the Federal Rules of Civil Procedure don't hold up at all. We have said in our comments why Rule 26(a) does not apply.

In general, the Federal Rules provide for a lengthy period for a first time to answer, 60 to 90 days in some instances just to answer. Then you go into the discovery process. It takes months before you reach the trial. It's a totally different environment than what we're talking about here, where the employer is largely in the dark, other than that they have this one piece of paper that says the union has a petition and wants to go forward to an election.

I think it is significant that when we had the earlier statement by Ms. Censer -- and she'll be back and will have the last word, and I don't think I'm misquoting her -- but when the chairman asked, "If you don't know, is it harder for

the unions to prepare," she said that actually it's still fairly easy because she assumes or she knows the laundry list of issues that the employer could raise, and so that does not prejudice the union's position. In fairness, the gentleman from the AFL-CIO seemed to take a different view, but we had some disagreement on the union side about that.

In truth, they do know what the potential issues are, and they also can in effect punish the employer who doesn't come forward with its position, as was suggested earlier, by subpoenas and going after the whole laundry list, and so it becomes to the employer's benefit if it chooses to give more information.

Going back to the issue of are the employers playing games, there is a strong disincentive to having a hearing just for a hearing's sake. It costs them money to have people like me and other lawyers to go through this process when there is no point to it. That's why the statistics show that it's only a handful of elections that are contested in the first place and that there's only a handful of that handful in which the sort of games that are being referred to are supposedly being played; that is, as that word is

now defined, not being sure what your position is and maybe changing that position midstream, which, as I've suggested earlier, are not really games necessarily, but simply going with what the evidence shows.

So we are concerned about committing employers in writing to these position statements, and even worse to do it at an earlier time, because the employers don't have time to come up with what all the different positions should be. And to lock them in we think is unfair and violates due process, and we think that you should withdraw this proposal.

And I did not want to leave, and I'm still on the yellow light, the employer lists. We haven't talked about the games that will be played with the required submission of these employer lists at a much earlier time than previously. The unions will get ahold of the list, including under your rule proposal, and list the people who they haven't yet petitioned for. They can, if they choose, withdraw the petition now that they've received information that they never had a chance to get and start going after all of these employees whose names they did not know. What is to prevent that from happening? I'll stop there and answer any

questions.

MR. MISCIMARRA: I may be misremembering, but I think you said before that some of our cases approach these cases in a peculiar way, and I just wanted you to know that I'm not offended by that characterization.

(Laughter.)

MR. MISCIMARRA: Here's one question I have. It strikes me that there is some utility in having an articulation of the employer's position because the union may in fact stipulate to it, but could you think of a reason why there is any utility in having an employer, if there is a position statement requirement, putting aside the question of waiver or preclusion and the union chooses to stipulate to the relevant issues, could you think of any reason why the Board should permit the employer to put on evidence anyway? Wouldn't that be duplicative of an agreement the parties were already willing to enter into?

MR. BASKIN: I may be misunderstanding the question, because if they have reached a stipulation how would the hearing --

MR. MISCIMARRA: In substance, if the union stipulates to a particular issue that's been

identified in advance of the hearing is there any utility in then having evidence presented at the hearing as to substantive issues the parties are in agreement about?

MR. BASKIN: I'm not confident enough in the question -- I'm just trying to think through the facts. "Never say never" is about the best I can do for you on that.

MR. MISCIMARRA: You've got a good answer. It's just a bad question.

MR. JOHNSON: This may be an even less understandable question. I did read your written comments, and there were a number of points in there made about the particular characteristics of the construction industry and on how Specialty Healthcare is going to be exacerbated and that it's more difficult for folks in the construction industry to deal with a seven day deadline or statement of position.

What I wanted to know, and you mentioned the sporadic workforce -- and we've already covered that and we recognized that a long time ago -- what else was there that was on your mind there?

MR. BASKIN: Well, you have 8(f) type situations. You have the disappearing units. You

have expanding units that are unique to construction. You have craft units, multi-craft units, people going back and forth.

MR. JOHNSON: But what is uniquely difficult in terms of preparing for a case with those issues?

MR. BASKIN: Well, the biggest difficulty for construction contractors in my experience is the people that are out in the field, those people who are called field employees that are in many different places and who are less accessible even to the employer to know what the facts on the ground are. That's why I've heard it said a couple of times today that employers should just educate themselves sooner.

But employers are actually trying to run a business, especially in the construction industry with very narrow profit margins. They don't have the time or resources to spend educating themselves in the nuances of labor law, and so understandably by and large they don't until lightning strikes and the union petition arrives and now they have to.

But the notion that because they know in some vague way that union organizing is going on or even specifically that they should do all of this --

that they should go to law school, in effect, and be ready to identify all of the issues that could be affecting their workplace, I can only say that it's a very small percentage of employers who think that that is a valuable use of their time until they absolutely have to, because it's expensive in time as well as resources and costs of attorneys and things like that.

MR. PEARCE: Thank you, Mr. Baskin. R. Godinez.

MR. GODINEZ: Good morning, Mr. Chairman, and members of the Board. I just want to begin by saying that it's an honor and that I'm very humbled to be here amongst you all and everybody in this room.

I'm here in support of the Board adopting many of the rules, particularly the rule requiring a written statement of position. As an organizer I have been able to see firsthand how an employer making an argument without merit can cause disarray and frustration for the workers seeking to organize. A case in point -- actually, first of all, my name is Bobby Godinez, and I'm an organizer for the International Brotherhood of Boilermakers.

Going back to the case in point, we filed

a petition for a group of firefighters, and the employer claimed that the firefighters were security guards and therefore should be excluded from the Act. It was my duty to bring this to the firefighters' attention, and many of them were frustrated. They all take pride in their firefighter duties, and they all knew that the employer had a separate department dedicated to security guards. They wore different uniforms. Firefighters knew the security guards, but they did not perform any of the security guard functions.

During this process I lost contact with some of the firefighters. We started with a majority of support, and I believe this claim actually took some wind out of the sails and the momentum of the election process.

With that being said, at the hearing the employer brought forth several witnesses, none of whom could substantiate the claims that the firefighters were security guards and that they performed any security guard functions or policing duties, and ultimately the regional director ruled that the firefighters were not guards. Again, this brought forth frustration with the firefighters. They just couldn't believe it.

I strongly believe that the rule for a written statement of position could have been a buffer, that the Board could have decided that the employer did not have substantial evidence to proceed with this claim during the hearing, and that that in theory could have actually kept the momentum and kept the firefighters' willingness to go forward and organize freely.

In closing, I strongly support the rule for a written statement of position in advance of a pre-election hearing specifically to safeguard the rights for workers to organize freely and fairly and to participate in elections.

MR. PEARCE: As an organizer, can you describe your experience, if any, with respect to getting employees to testify at a hearing once you know what the issues are?

MR. GODINEZ: It's very difficult to get the employees involved and come to a hearing. However, during that process -- once again, the firefighters took pride in their duties. A few of them really took responsibility and said, "No, I'm not going to let this happen, it's come too far, I'm willing to do whatever it takes," and they came forward on the union's behalf and answered

testimony.
Basically, it was a frivolous argument on the employer's part. They did not perform any security guard functions. Again, it's very difficult, to answer your question, to get workers to come forward in a hearing setting.
MR. PEARCE: Do you recall how long it took between the petition and the actual election that the time went?
MR. GODINEZ: For that particular election it was one year.
MR. MISCIMARRA: Actually, I had a follow-up question which was similar. Do you recall what the time was from the filing of the petition in the firefighter case and the start of the hearing?
MR. GODINEZ: I'm sorry. I don't know that. I can't give you a truthful answer on that.
MR. JOHNSON: First, thanks for coming. Second of all, just so I understand your point of view here being on the ground as an organizer, is it basically that if an employer takes a frivolous position employees should know about it before the hearing?
MR. GODINEZ: In this particular case that I'm testifying on, what it did was it took the

wind out of the sails of the campaign. If it's a frivolous issue and the employees never learn about it and it was put out before the hearing, there would be no need for testimony. There would be no need for a hearing. I think the campaign would have continued with the momentum that it had, with a majority of support, and that the workers would have had a better opportunity to have voted freely and without bias.
MR. JOHNSON: Thank you.
MR. PEARCE: Thank you all very much. The next seating is Kara Maciel, Caren Censer and Homer Deakins. You may proceed.
MS. MACIEL: Good morning. Thank you, Chairman Pearce, and distinguished Board members for this opportunity to speak on the dramatic changes you've proposed to the current representation-case procedure. My name is Carol Maciel, from the law firm of Epstein, Becker & Green. I represent the National Grocers Association, which is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food and distribution industry.
NGA opposes the proposed rule because small and medium sized employers are not armed to

respond to a union's petition in seven days. Enforcing them to do so would violate their due process rights and free speech. As small and medium size business owners, many if not most NGA members are not equipped with legal staff, and it takes time to locate, retain and consult appropriate labor counsel on the significant business and operational issues posed by an RC petition.
As we've heard today, labor law is complex, and the changes to the rules that the Board proposes complicate compliance even more significantly. For most grocery store owners, they are the human resources department, they are the compliance department, and they are the legal counsel.
The proposed rule would require grocers to immediately stop running their businesses, disrupting customer service and food delivery, and instead force them to focus on analyzing how to respond to the union's petition by week's end.
Every employer has a protected right under the National Labor Relations Act to communicate with its employees about the union's petition and to raise questions concerning representation to the Board prior to an election.

Limiting the employer's time to investigate, analyze and raise issues to seven days would significantly hamper and ultimately silence an employer's right to respond to the petition.
NGA strongly supports the rights of employees to make an informed decision on whether or not to be represented by a union, and the only way for employees to make a free choice is by having an election process and procedure that provides an opportunity to hear the views of both the union and the employer.
The reality is that employers are at a serious information disadvantage to unions when petitions are filed. Unions are in sole control over when they file a petition to trigger that seven day clock. I have heard testimony from union organizers in Board proceedings that they take ample time to stealthily prepare for an organizing campaign for months before filing a petition. Many times it is not until that petition is filed that an employer has an opportunity to communicate with its employees about the petition.
Unless employers have adequate time to consult with labor counsel and evaluate the significant issues raised by a petition and prepare

a response, employees will not be supplied with balanced information prior to making a decision as to unionization.

Given the realities of NGA's members, they would face difficulties simply investigating the factual issues which are increasingly discrete and that vary by each type of employer, much less ensuring that every legal argument is properly raised and thoroughly raised within seven days.

The majority asserts the proposed rule is intended to avoid needless delay. Requiring employers to put every possible issue in a position statement or be subject to waiver will actually increase the adversarial nature of the proceeding and make it less likely that grocers will voluntarily resolve disputes early in the process.

Under the Board's current procedure, as we've all heard many times today, approximately 90 percent of all elections are resolved by stipulation or agreement. Fearing that they may waive issues not set forth in writing, grocers may be hesitant to enter into a stipulated election and will, instead, raise every conceivable issue prior to a hearing. Thus, the proposal may actually promote the adversarial process and frustrate rather than foster

the friendly adjustment of industrial dispute that lies at the heart of the Act. Due process mandates thoughtful deliberation and thorough communication in response to an RC petition, but this is eroded by the proposed rule.

I appreciate you allowing me to share the National Grocers Association's views. NGA believes the rule, including the requirement to include every possible legal argument in a written a position statement within seven days or risk a waiver would limit employer free speech during a pre-election period and prevent employees from receiving balanced information in order to make an informed decision on how to vote.

Accordingly, NGA urges the Board to withdraw the proposal. Thank you.

MS. SCHIFFER: Thank you for conveying the views. I appreciate that. I have a question about the issues that you raised in terms of complying with the written statement. Would it make a difference if the time period was different?

MS. MACIEL: Respectfully, the fact that the grocers in small and medium sized businesses need to be focused on responding to the petition, evaluating facts, pulling things together,

consulting with counsel and then also spending time negotiating potentially a stipulation, as most of the time happens, I believe that time is better spent leading up to an election than focusing on a written position statement setting forth written legal arguments.

MS. SCHIFFER: So you think that the processes are not similar.

MS. MACIEL: I believe the way that pre-election hearings work now are successful, with over 90 percent reaching stipulated elections. I think if there was a requirement of a written position statement, that would take the focus away from reaching those stipulated election and, instead, move towards a litigation posture where people are spending time with their legal counsel developing written position statements in advance of a hearing rather than trying to negotiate an agreement.

MS. SCHIFFER: And are there particular issues that would be required in the statement of position that the employers would not be looking at anyway?

MS. MACIEL: Well, I think it's a lot of information they're looking at at any given time.

Every employer is different, every worksite is different, and so you can't really have a "one size fits all."

They're looking at these issues not in a vacuum, but as the workforce is adjusted and what type of petition has been filed and what the union is contemplating. And facts change. As we've heard many people testify earlier today, facts change as the process goes on, more information is learned, and hopefully there is an opportunity to reach an agreement, but if there is not there is a right to raise evidence at a hearing. And at that point issues may change and develop as well. And so forcing an employer to submit all of its positions in writing without the opportunity to change it later as evidence may develop at a hearing really prevents the parties from reaching agreement and/or focusing their attention elsewhere.

MR. MISCIMARRA: Ms. Maciel, I have a grocery store question. I spend a fair amount of time in grocery stores because my children insist on eating almost every day. Here's the question: Are there grocery stores, and let's say smaller stores, where the owners or the supervisors when times are busy actually do cashier worker or like on

Thanksgiving when things are busy do some stocking of shelves?

MS. MACIEL: Absolutely. Many of NGA's members are small and medium size businesses where the owners wear multiple hats. These are sometimes single store operators. And so they are. They're not only running their business, but they're filling in when people call in sick. This is often a seasonal workforce because of the variety of changes in the industry and the scheduling, so the owners and the senior management do wear a number of different hats.

MR. MISCIMARRA: Excluding the owners, like if the supervisors are doing cashier work and if some or all of them actually end up being considered unit employees that are voting in the election can the employer lawfully rely on those people to provide information used in preparing the written position statement if one were required?

MS. MACIEL: I think it creates a lot of confusion as to who is eligible and not eligible to be included in the unit. I know that's subject to further panels, but it does create a lot of confusion as to what information grocers, small businesses and medium size businesses, can rely upon

in developing that. That's part of the challenges that they face as small businesses in preparing for the hearing.

MR. PEARCE: The National Grocers Association, do they have a website?

MS. MACIEL: Yes, they do. It's NationalGrocers.org.

MR. PEARCE: And I haven't looked at the website. Does the website contain information with respect to labor relations and employment issues?

MS. MACIEL: The trade association does an excellent job of trying to educate its members on their rights and responsibilities under federal law and under a whole host of different requirements.

The realities of the situation are, however, that these people are focused on running their businesses. And despite the widespread education efforts, a lot of times these people aren't able or don't have the time or the money to participate and be educated the way they should prior to an election campaign.

And I think as Mr. Baskin said earlier, the reality is they don't educate themselves about labor law until the lightning strikes and the petition is sitting on their desks, which may take a

day or two before it gets in the right hands. And they're not armed --

MR. PEARCE: So the material might be in front of them, but they may not have time to look at it.

MS. MACIEL: It varies. It absolutely varies. It's a widespread membership. But you're right. That's the realities of their businesses.

MR. PEARCE: Thank you very much. Ms. Sencer.

MS. SENCER: Thanks again for having me. I'm going to start on some of the points that haven't talked about regarding the statement of position.

MR. PEARCE: And that's a good segue. I'd like everybody to be reminded that if we have multiple seatings on the same issue and a point has been made, it's not necessary to repeat it. It might be more valuable to go into stuff we haven't heard about. Thank you.

MS. SENCER: I'm going to start with the proposal to include potential dates and times for the election on the statement of position. It is really frustrating when you go back to a bargaining unit and say, "We have your decision and direction

of election, and now we'll start the negotiation process about when your election is actually going to be held." Identifying up front not necessarily the actual dates but the days of the week and times based on shifts at the get-go eliminates one of the choke points later on in getting to an election in a timely manner regardless of whether or not there is a hearing.

I would also say the same thing about the list by requiring the employer to disclose the classifications or job titles that are used by the employer. Frequently we have a problem where we talk past each other. The employee identifies themselves as a technician. The employer identifying them as an associate. We say, "Technicians are in" and they say, "We have no technicians, we only have associates." And we might actually not have a disagreement, but we're using different language to talk about the same points. So simply having the classifications used by the employer would allow for the easier resolution of issues because everyone would know what they were talking about, and we haven't really had a chance to talk to those two before.

I want to go back to the ability of the

statement of position to limit the issues that are going to be raised at hearing. It allows the union to tailor the witnesses that they want to bring forward. The union side does recognize that it can be a hardship on an employer when the union subpoenas the vast majority of employees in the facility, and I'm saying in the facility, not just the proposed bargaining unit, because if I don't know in advance that the employer is going to limit their opposition or their proposals or their position to whatever it may be, I have to come prepared for everything.

And yes, I said I can easily prepare. I've been doing this a while and I've been to a lot of cases, and I have a lot of support back in my office that makes sure that I have that information at my fingertips. But you do have to prepare. I'm over-preparing when I wind up having to prepare for positions that are not being taken by the employer, and we're over-preparing witnesses and taking more people out of the workforce and more people out of the employer's facility on a daily basis than need to be because we don't know the positions that are going to be taken in advance.

And I actually think that that's a

lose/lose. It's an advantage for an employer for us to only pull out from their facility the employees who may actually have testimony relevant to the issue at hand. It would be less disruptive for both the union and the employer for everyone to be focused on the witnesses who actually have some information to provide on the matter.

I'd like to also talk about how this dovetails into the idea of oral closing arguments, which I'm going to be on a panel about later. If there were a position statement in advance, for the employer it acts as an outline to their oral closing argument. For the union it acts as a guidepost as to what they need to be prepared for in their oral closing argument. And that, again, allows for both sides to do preparation and be properly prepared to address those issues in particular.

In a slightly similar kind of situation, I do a lot of as well, and under some contracts we only do oral closings. Both management and union have committed that, in order to have the process resolved on a faster basis, we are only going to do oral closing. The step process of the grievance procedure allows both sides to come in prepared to argue the case in arbitration and then the closing

brief.

I see the statement of position as providing a similar or analogous kind of information as the step process in the grievance procedure because it's putting all of those issues out there. They might not all be important, they might not all be raised and some of them might be resolved during hearing, but at least you have at the outset what the potential universe of issues are.

And that goes to what my final point is. Last month I testified at a hearing about the NLRB's ambush election rules, as they like to call them. I think the current system creates its own kind of ambush where the union is walking into a hearing where it does not know the issues that are going to be raised, and that's easy enough to resolve. That may depend and may require some tweaking of the waiver or the date that the statement of position needs to be provided by, but having something is very helpful.

As e-mail communication has increased we've seen more of it in advance, and it has actually become less of an ambush situation, although it has not been eliminated. Board agents regularly contact me, and opposing counsel, asking

about particular positions by e-mail, if the employer is committing in writing in advance of the hearing to particular positions via their communications Board agents which the union is then copied on. I think that's been helpful in trying to focus on what a hearing is actually about and in bringing the parties closer together for stipulation. Anything that we can do to move that process along has value in the system. Thank you.

MR. JOHNSON: I have one quick follow-up. Obviously the witnesses aren't supposed to refer to each other too much, so I apologize for the nature of this question. But assuming that one might have some sympathy for the plight the smaller employer who actually doesn't know about any of this stuff up front, what's your view on having some kind of variable deadline set that applies to those folks?

For example, in Board litigation we have the Equal Access to Justice Act, so if there are small parties that essentially fall victim to our procedures and they win, then they can get reimbursement. What about some quasi EI job deadline variable proposal?

MS. SENCER: I haven't thought about that, but I did see in the proposed rules that there

is the option of an employer getting assistance from the Board in filling out the statement of position. I don't see any reason why we should limit that to the day of hearing and therefore eliminate that problem by giving them that access as early as they want it.

MR. JOHNSON: But the hearing officer is neutral and is not really going to be a zealous advocate for whatever the employer's position might be. You would agree with me on that. Right?

MS. SENCER: Yes.

MS. SCHIFFER: This e-mail process that you described, the e-mails, do they contain issues that are the ones that would be the in the statement of position? Is that your experience?

MS. SENCER: Some of them, yes. Sometimes it's as simple as, "Well, this is what we call those people." Sometimes we're taking the position that this is an appropriate community with each other but not with the one you're seeking to go into. Sometimes the e-mail will say, "Well, we think that one of those people might be a supervisor." And so these e-mail chains do in fact get to some of the information that's in the statement of position. But the use of e-mail is

dependent on which Board agent is going to be processing the R-Cases in a particular region at any given time and the willingness of the other party to engage in that process.

MS. SCHIFFER: But the employers are in fact taking positions before the hearing.

MS. SENCER: Yes, in some cases.

MR. PEARCE: Just following on that, what has been your position with respect to the employer backing out of that position once those e-mails have been sent?

MS. SENCER: They generally tend not to, mainly because then I make a big deal of it. I think that they're very careful in the positions that they take in e-mail to the Board, because the Board I think -- the regions frown upon it also when they then go into the hearing room and frequently the person working the R-Cases is also serving as the hearing officer that day, although they might not be the reader of the record or the writer of the decision, and they will ask them, "Is this position still held," and most of the time I find that they generally do.

MR. MISCIMARRA: I want to compliment you on your analogy to the step process in grievance

arbitration, because we have many companies and unions, you know, nearly 80 years of history or more, dealing with kind of a generally worded grievance that provides a roadmap for the parties in grievance handling and arbitration.

So I'm not trying to lock you into this position, but if we were to adopt a written statement of position process that was flexible, similar to the role played by the written grievants in most grievance arbitration situations, would you agree that that would provide some reasonable measure of improvement over the present situation in comparison to what we have now?

MS. SENCER: Yes. I would think that just about anything that has the parties put the position out there and that gets some of these general facts out there so that everyone's playing from the same information would be an improvement over what we have now.

MR. PEARCE: Thank you. Mr. Deakins.

MR. DEAKINS: Mr. Chairman and members of the Board, my name is Homer Deakins, and I am appearing today on behalf of COLLE, which is the Council on Labor Law Equality. It is a trade association consisting of chief labor relations

executives from Fortune 500 companies.

With respect to this particular question, the written statement of position, I ask what I think is obvious: Why is it that we are trying to fix something that is not broken?

I have been practicing law before the Board for over 50 years. When I first started practicing in R-Case hearings the record was sent directly to the Board at the close of the hearing. The average time from the petition to the election was 82 days. In 2010 the average time between petition and election was 31 days. And it is incredible to me that in more than 90 percent of cases elections occur as a result of the parties consenting to the terms of the election, eliminating the need for any hearing. The Board's R-Case procedures are working better today than ever before, and this is happening without any rulemaking changes.

The proposed rule requires that the employer provide a detailed and comprehensive statement of position within seven days or less. This is especially egregious for small employers who must first go out and hire a lawyer or hire a consultant and educate its management on the whole

process.

The rule says that any issue not formally addressed in the statement of position will be waived, and the employer will be precluded from introducing any evidence or cross-examining witnesses. So the statement of position not only presents a substantial burden, but it also carries serious consequences.

Is this better than informal discussions between the hearing officer and the union and the employer? My experience has been that issues come up through these informal discussions and during hearings that the parties never thought of, and the parties work those issues out without any formality. Open discussions without penalties usually result in consents.

By imposing waivers the Board is encouraging employers to be more inclined to include all arguments and all positions versus trying to work out issues. The Board is forcing employers to focus on protecting and preserving their rights, dotting all the i's and crossing all the t's rather than working out an election agreement. In seven days or less you cannot do both. Under the Board's proposed requirements for a burdensome statement of

position I predict that conducting 90 percent of elections based on consent will become history.

On much of the information required I ask the question: Do we really need the information now? The employer should not be required to identify and concede the appropriateness of the unit before hearing any testimony that's been taken at the hearing, especially in the face of the new standard for unit appropriateness in Specialty Healthcare.

The proposed rules require the employer to submit the names of all employees in the petition for unit to all the other parties and a list to the regional office which contains home addresses, e-mail addresses and telephone numbers.

Why do the parties need names? Issues of eligibility are determined on the basis of job classification and not names. Why must the employer be burdened with providing even more details to the region which have nothing to do with eligibility? Can't these things wait until the Excelsior list is filed?

The rule imposes requirements such as stating a position on the polling places, the times for the election and so on before the unit has even been determined. These issues are now easily

handled after the decision and direction of election without any delay. Why do we have to put these things ahead of the hearing?

Some of the information that's being required in the statement of position is not information that I as a lawyer would gather before the hearing. I don't need to know the names of all the employees in the unit. I don't need to know the date of the election and where the polling places are going to be before I go to a hearing. That is information that I don't need that would be included in a statement of position before the hearing.

Assume an employer acts in good faith in not including certain information in the statement of position. Is the statement of position a straitjacket, or would it be fairer to say that the employer would be permitted to make amendments to the statement unless there was an absence of good faith involved?

MR. PEARCE: You're out of time. Would you like some more time?

MR. DEAKINS: Thank you. What assurances do we have that confidential information furnished in the statement will be held in confidence? The rule provides no such assurance.

The requirement of a statement of position is one of the most burdensome requirements in the proposed rule. In 2011, when this same proposal was advanced, the Board wisely determined to leave that proposal out of the final rule, and I would urge the Board to do the same thing in this case. Thank you.

MR. PEARCE: Mr. Deakins, it's good to see you again.

MR. DEAKINS: Thank you very much.

MR. PEARCE: Isn't it the case that under current practice the employer supplies to the Board a list of names and classifications in advance of the Excelsior list so that the Board can administratively determine whether or not the showing of interest is in compliance with the standards?

MR. DEAKINS: They may or may not.

MR. PEARCE: I don't understand.

MR. DEAKINS: As I understand it, it is the option of the employer to submit such a list to the Board to check the showing of interest, and in many instances that is not done. I mean, if I've had an election campaign going on for two years in a unit of 2,000 employees I may very well not take the

option of checking the showing of interest because I probably have a pretty good idea that they have more than 30 percent. It's not a requirement.

And that list of course would remain confidential with the Board. It would not be made available to the union. Under this rule the union can get the list of names of employees and then withdraw, and there is no penalty, and that list is not returned. The union organizer has a list to work from in the future.

MR. PEARCE: Now, with respect to names versus classification, there are certain circumstances, and it has been argued, that classifications are sometimes terms that are different with respect to what the employees understand themselves to be and what the employer defines them to be. If classifications are supplied without names, isn't there a disconnect with respect to whether or not the bargaining unit is the same group of people that everybody is trying to discern?

MR. DEAKINS: Well, you speak of a very, very rare situation that might come up. But if you produce the classifications at the hearing, in 99 percent of the cases why do you need to know the names of the people who are in that classification?

If the unit is a production and maintenance unit in an industrial plant you never even usually get into a discussion of the classifications. You have the production groups. You don't go into the classifications. They're all production and maintenance employees, and you don't have to develop that type of information.

I think what you speak of is an extremely rare situation, but to think that you need the names of employees for the purpose of the hearing is just something that I've just never run into.

MR. MISCIMARRA: I have just one follow-up. Again, I'm not asking you to endorse this approach, but similar to the question I asked before, if we would treat a position statement in a manner more similar to the generalized way that we have treated a written grievance in grievance and arbitration procedures, would that be an improvement in your view over the approach that's reflected in the current proposed rule?

MR. DEAKINS: Absolutely.

MR. JOHNSON: Really quickly, and this is following up on your 2014 written comments, specifically page 10 relates to access to counsel, basically access to counsel if you are faced with a

petition and how the persuader rule may or may not work out.

Is it your position or the position of the parties that you represent that we should hold this in abeyance to basically see how the persuader rule works out to see what the market impact is on the management of defense counsel with some confidence and experience in the United States?

MR. DEAKINS: It makes all kinds of sense to me.

MS. SCHIFFER: I'd like to follow up on what you just said to Member Miscimarra -- I think it was to him -- that you had never in your experience been required to provide the names or job classifications. I'm asking that and I'm curious about that because it is in the best practices that was produced by the committee that included regional directors and so on in the late '90s. But you're saying that that's never been implemented in your experience.

MR. DEAKINS: It hasn't been my experience, no.

MS. SCHIFFER: Well, it apparently was suggested, I guess, 15 years ago.

MR. DEAKINS: Frankly, in my experience,

I can't remember the last case I've been to an R-Case hearing where I have not been able to reach a consent. I think that largely happens because of the informality, where the hearing officer is the voice between the union organizer, the union lawyer and the management lawyer. And they work through the issues informally much better than they're going to if an employer has to take these ironclad positions in a written statement. That's going to almost force you to go to the hearing.

MS. SCHIFFER: And are the stips normally reached at the hearing, before the hearing?

MR. DEAKINS: Most of my stips are reached before the hearing.

MS. SCHIFFER: So within some period before -- I don't know what time your hearings normally are, but sometime under that hearing date schedule?

MR. DEAKINS: Yes. That's what I'm saying. I can't remember the last time I went to an R-Case hearing.

MS. SCHIFFER: So somewhere between seven and fourteen days you're reaching a stip.

MR. DEAKINS: Yes.

MS. SCHIFFER: And then the parties

basically are closing down all the other issues.
MR. DEAKINS: Correct.
MR. PEARCE: Thank you, everybody. It is lunchtime. I would ask that the topic debrief panel for "Issues for litigation at the pre-election hearing" be seated at 1:45. That would include Brenda Crawford, Homer Deakins again, Peter Ford, Martin Hernandez, Elizabeth Milito and Jonathan Fritts. I will see you after lunch.
(Recess.)
MR. PEARCE: We're back in session, and I hope everybody had a good lunch. We are getting started with this seating on issues for litigation at the pre-election meeting. I assume that we're going to be speaking in the order that you're seated, so Ms. Crawford, you can proceed.
MS. CRAWFORD: Good afternoon. My name is Brenda Crawford. I am a registered nurse, and I have been a registered nurse for 26 years and an employee of Universal Health Services, UHS, for 20 years. However, I'm here today to share my and some of my colleagues' points of view regarding the NLRB elections. I am not representing UHS in any way.
Last year RNs at my hospital and a sister hospital moved to organize a union without success.

Please allow me to share with you how the current process could be changed to be fair and equitable to all employees.
I strongly support the Board's proposed 20 percent rule. Just over a year ago we filed our petition for the registered nurses to be represented by UNAC/UHCP. We believed our charge nurses are not supervisors. They can't hire, fire, write evaluations, grant time off or discipline, but merely help facilitate the floor operations, including providing same patient care and participating daily in the patient's plan of care. They work side by side with RNs.
Charge nurses are responsible for facilitating care for all patients and supplementing any shortages. For example, they assist in providing care to patients when the nurse/patient ratio is higher than what California state law allows. This state law mandates the maximum number of patients per nurse, so the charge nurse uses that state ratio and assigns patients to beds and to nurses.
There is very little difference between staff RNs and charge nurses. Charge nurses are merely liaisons to management. They are not

management. On multiple occasions per week we have regular staff RNs who choose to step in to perform the role of charge nurse. The relief charge nurses, in other words temporary charge nurses, perform the same duties as the charge nurse. If nurses can be designated relief charge nurses at any time, how can charge nurses be considered management? Regardless of whether or not the charge nurses have the training or the background to manage a unit, they still do not have the ability to make changes without the manager's approval.
In 2012-2013, when we organized to become unionized the company had opened the charge nurse positions, and every charge nurse who was interested was required to either apply or reapply for a position. Administration said they were restructuring. Prior to the union election the company hired and/or promoted a large number of nurses to charge positions. Immediately after the election administration claimed they had too many charge nurses, so every nurse who was interested had to reapply and go through the process again. In my department alone they cut the charge nurse position down by 33 percent, and to the best of my recollection the other units had a larger number of

position cuts.
The message I got from this reduction was that administration wants to exclude this large number of charge nurses, my coworkers, from being allowed to vote. The charge nurses should be a part of the unit, but if we would have argued for their inclusion we knew it would have gone to hearing and the election would have been delayed.
Because our charge nurses were not more than 20 percent of the unit, if we had this 20 percent rule we would not have had to give them up. The 20 percent proposal would have allowed us to not give up our charge nurses who Congress intended to be covered by the Act and who deserve to be afforded the protections a union can offer. This change is necessary to have a free, fair and timely vote.
Thank you for giving me the opportunity to speak today.
MS. SCHIFFER: Thank you for coming and sharing that. You said that the union made the decision to exclude the charge nurses. Can you tell me sort of what the dynamic of that was, how it came to that decision?
MS. CRAWFORD: To the best of my knowledge, the company requested that the charge

nurses be excluded because they were part of management. The organizing committee and the union decided that we would go ahead and go with that because we didn't want any delay in the election.

MS. SCHIFFER: And what would the delay have been?

MS. CRAWFORD: It would have gone to a hearing and we would have had to wait. And during that time waiting for that hearing and for that decision to be made we were on a daily basis being approached by management and administration, being pulled from patient care, being sent to mandatory meetings and receiving a lot of anti-union campaigning going on there.

MS. SCHIFFER: So for the purpose of getting to an election sooner, you're saying.

MS. CRAWFORD: Yes.

MR. PEARCE: Do you recall how much time it took between the petition and actually going to an election?

MS. CRAWFORD: No, I don't. I'm sorry.

MR. JOHNSON: Were you in on the decision to voluntarily drop the charge nurse position? Were you involved in that decision?

MS. CRAWFORD: It was brought to the

organizing committee by the union, and we all agreed that that would be the best thing to do.

MS. SCHIFFER: Regardless of what you believed the facts were?

MS. CRAWFORD: Correct, just for the time constraints.

MR. JOHNSON: So you basically decided to give up on that position?

MS. CRAWFORD: Yes, because a lot of our staff were feeling very stressed by the frequent visits and meetings that we were forced to go to and just being taken away from patient care, when as nurses that's what we do, patient care, and we were being pulled from that to listen to one-sided arguments and being educated on one side.

MR. PEARCE: Thank you very much. Mr. Deakins?

MR. DEAKINS: I appreciate the opportunity to again appear to address the issues for litigation in the pre-election hearing.

The proposed rule eliminates the right of the parties to litigate employee eligibility if the group of employees is less than 20 percent of the bargaining unit. I think this is a direct violation of Section 9(c) of the Act, which calls for an

appropriate hearing upon due notice and virtually guarantees that this rule will be contested in court.

I also see a conflict in what the Board is saying here. For example, in describing the reason for requiring employers to file a list of eligible voters as a part of the statement of position, the Board says it does so because it is important to attempt to resolve disputes concerning eligibility rather than prolong them. Why is this important when it comes to giving the union an early list of employee names and not when it comes to actually determining employee eligibility?

The most important eligibility question in most cases is the supervisory status of certain employees. If the employees are supervisors, the employer must be sure to instruct these employees on the restrictions which apply to them in the campaign, including the instruction that they may not engage in union activity. On the other hand, if the employees are not supervisors they must be free to engage in such activities.

The result is that without litigation the employer acts at his peril and opens himself up to unfair labor practices and valid objections to the

election if he answers the question wrong. Such an issue is not rendered moot by the election results, as the Board theorizes.

Litigating supervisory status usually does not result in any delay in the hearing. In my 50 years of experience I can count on one hand the number of times a hearing has gone into the second day because of the litigation of a supervisory issue. All hearings last at least one day regardless of how much the Board restricts the litigation of issues.

The proposed rule results in a significant increase in the number of challenged ballots which would cause confusion among employees with the result of interfering with their right to make informed judgments. Knowing your ballot is going to be challenged will also discourage some employees from not voting. It is a form of intimidation for some groups of employees.

Finally, as raised by former member Hayes at the Board open meeting in 2011, if the Board does not create a record of the dispute in a hearing and then exercises its newly expanded discretion to deny post-election review, there will be virtually no record for the Board and the Court of Appeals to

consider in a subsequent technical 8(a)(5) case. In such cases it virtually guarantees that the issues will be returned to the region for fact finding.

MS. SCHIFFER: At what point in the process do you think it would be appropriate for the determination to be made on the supervisory issue?

MR. DEAKINS: I think the most appropriate time for the determination to be made is at the regional director's decision of direction of election. The regional director, as I understand it, has the discretion not to make the decision. Under current standards you have a substantive hearing on the issue, and then it's within the discretion of the regional director as to whether he will decide that in the decision of direction of election.

My experience has been that in most instances the regional director does make a finding, but it remains at his discretion. But even if he doesn't, at least management is in a situation where the issue has been litigated and both parties have stated their position and put on their evidence, so at least at that point, even though the regional director does not make the decision, at least the lawyer can step back and look at the record and then

express an opinion, which lawyers do on many, many things. So whether the regional director acts to make the decision on eligibility, it at least creates the record, which I think is important.

MS. SCHIFFER: So there is part of the election process during which there is still no determination regarding supervisory status.

MR. DEAKINS: There is such a situation, yes.

MR. JOHNSON: But even given that window, is it helpful to know whether an individual is a supervisor or not?

MR. DEAKINS: It puts the employee in such a difficult position if he doesn't know because the rights of that employee are going to be either legal or illegal, depending on what the judgment of the employer is in relation to what the ultimate decision is.

MR. JOHNSON: I have a question on -- of course hearing offices are prohibited under our statute for making recommendations. At what point do you see a decision on whether something is a genuine dispute of fact or not becoming such a recommendation?

MR. DEAKINS: I'm sorry. I'm not sure I

follow you.

MR. JOHNSON: Well, under the proposal there is the power for a hearing officer to decide whether or not something is a genuine dispute of fact and gets to go to a hearing. At what point is that power essentially to control the record going to be a recommendation, or is it at any point going to be a recommendation that a hearing officer would be prohibited from making?

MR. DEAKINS: Well, the hearing officer under the statute has no authority to make those decisions.

MR. JOHNSON: Right. What I understood from your comments was that at some point, once the hearing officer in control of the record decides not to take evidence on something no record is going to be created, so there will be nothing for us to review.

What I understood from your position on 9(c)(1) was that that started to amount to a recommendation that was prohibited under the statute, the recommendation as to whether we get any evidence or not, or do I misunderstand your position? It's okay. I mean, it's fine. I can basically ask someone else. What effect do you

think this is going to have on Courts of Appeal looking at basically technical 8(a)(5) cases?

MR. DEAKINS: Well, I think what they're going to have to do is send the record back for further hearing because they're not going to have the record they need.

MR. MISCIMARRA: Mr. Deakins, I have just one question. You talked about the employer acting at its peril, and I'd like to for purposes of this question just disregard that. I'd like to focus on the impact on employees. They're talking on these eligibility supervisory issues. There are kind of two versions.

One is the employer ends up treating someone as a supervisor and then during the campaign it turns out they were a unit employee, or, alternatively, if it turns out somebody believes they are a unit employee and they interact with another unit employees in a way it turns out they're a supervisor, in both of those instances where people get it wrong, not just the employer, what's the impact on the election when the election gives effect to what the employee's sentiments are at the end of the campaign?

MR. DEAKINS: Well, a typical example in

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my mind would be if you look at an industrial establishment setting and you've got some category called lead persons, those would typically be people that the other employees in the bargaining unit would look with favor on. They would be in some leadership role whether they're technically supervisors or not.

If those rank and file employees think that that person is going to be a part of the unit, then they're thinking, "Gosh, this is a guy I really have respect for, he's going to be in the bargaining unit so we're going to have a strong bargaining unit, and so I'd be more in favor of a union if the lead person is for the union and is in the union."

On the other hand, if he's not in the unit I may look at it and say, "Gosh, this is really going to be a weak bargaining unit." It's going to impact other employees' attitudes as to whether that person is or is not in the unit, and they're not going to know.

MR. PEARCE: Mr. Deakins, you said in your experience it has been the rare case that litigating a supervisory issue would go beyond or go to a second day. Would that include litigation that you've experienced since the Oakwood decision, where

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responsible direction and all of these other factors come into play in making those kind of determinations? That's been your experience?

MR. DEAKINS: Yes. My experience has been that if you're litigating a single supervisory issue, which typically would be on supervisory status because it's that mid person between clear supervision and rank and file, typically you're talking about maybe one to two witnesses by the employer and maybe one or no witnesses by the union. It just doesn't take that long to litigate that question. It all gets down to a question of what are their duties and responsibilities.

MR. PEARCE: And with respect to your concern about the examples that you gave about how a lead person may impact on the desires of others relative to their choice of going with a unit or not, wouldn't this 20 percent rule impact that determination because it would be exercised, as the NPRM proposes, in a situation where you have a relatively small percentage of the bargaining unit being placed in that category?

MR. DEAKINS: Well, on the supervisory question I don't think it would hardly ever rise to the level of being 20 percent, so it's always going

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to be a fairly small percentage of the employees. Under this rule those issues would never be resolved in the pre-election hearing. And I just think from a very important standpoint it's important to everybody so that they know whether that person is restricted or free to act on union activity and the impact it's going to have on other employees.

MR. PEARCE: Thank you very much. I think that in terms of the order of presentation we do have a variation from your seating. I believe we'll have Mr. Ford and Mr. Hernandez and then Ms. Milito.

MR. HERNANDEZ: My name is Martin Hernandez. I am the organizing director for UFCW 99 in Arizona. We believe that the Board's proposed changes to its election rules will make it more likely that workers can have a fair and timely vote and eliminate unnecessary litigation. The Board might need to decide several issues before it can hold an election. They include whether the Board has jurisdiction over the employer or the worker's employees and is there a bar to an election. But the most important issue is whether the bargaining unit the workers want is appropriate. If the petition describes an appropriate unit, then an

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election should be held in that unit.

The issue that employers most often want to litigate at the pre-election hearing is whether workers belong in a unit. Typically the dispute is about whether they are supervisors, or, if not supervisors, do they share a community of interest with the work as described in the petition.

My unit faces these eligibility issues in almost every organizing campaign. To avoid the delay that results from litigating these issues we agree to what the employer wants whenever possible. We support the proposal to put off litigating Board eligibility issues involving less than 20 percent of the proposed unit until after workers have voted. These issues don't need to be litigated before the election.

Whether there is a stipulated election agreement it is often unclear if some workers are supervisors. Also, the Board often lets workers whose status is unclear vote by challenged ballot. The proposed 20 percent rule would be similar, except that many voters' eligibility disputes would be litigated after the election.

Local 99 recently organized a unit of 360 workers at ten grocery stores and a warehouse after

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a nine year campaign. When we forced the petition the company forced us to a pre-election hearing, and the main issue was whether 40 to 50 department heads were employees or supervisors, as we believe. After several days of hearings the union agreed to include the department heads to avoid further delay. We never lost the election.

After years of unfair labor practice litigation we petitioned it again in 2011. This time we stipulated the department as supervisors. We lost the election by a wider margin than the challenged ballots. Last year the company recognized us, and we agreed on the status of the department heads.

With a 20 percent rule in place we could have avoided the pre-election hearings and maybe our workers would have had union representation a lot sooner. We support the proposal as a fair, practical and commonsense way to streamline the election process. Thank you.

MR. FORD: My name is Peter Ford, and I'm assistant general counsel of the UFCW. We support the Board's proposals to streamline the pre-election hearing. For example, the proposal to only allow parties to introduce evidence relevant to a genuine

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dispute over a material fact would save time, and it would bring pre-election hearing procedures in line with post-election procedures and with summary judgment procedures in ULP and civil cases.

Requiring non-parties to submit a statement of position and the petitioner to respond to any issues raised would help frame any disputed material factual issues relative to the ultimate question: Is there a QCR? To have a QCR the petition must describe an appropriate unit.

Unlike disputes over the scope of the unit, voter eligibility issues or disputes aren't relevant to whether there is a QCR and don't need to be resolved pre-election. The vote and impound procedure allows individuals whose eligibility is disputed to cast challenge ballots and have their votes counted after the election if necessary, and case law has allowed the eligibility of up to 25 percent of the unit to be decided post election.

We support the proposal to remove from the rules the basis for the Board's statement in a 1995 decision that the hearing officer must permit full litigation of all eligibility issues in dispute prior to the direction of an election absent consent of all parties to defer litigation. The proposed 20

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percent rule would establish a bright line test that would provide clear notice for when voter eligibility issues would be resolved. I see my time is up, so I'll stop there.

MR. PEARCE: Mr. Hernandez, the example that you raised where the parties came to ultimate agreement on the status, what was that classification that was in dispute?

MR. HERNANDEZ: The classification was department heads.

MR. PEARCE: Ultimately were they agreed to be supervisors or non-supervisors?

MR. HERNANDEZ: They agreed to be supervisors.

MR. PEARCE: And initially the posture of the employer was that they were not supervisors and should be allowed to vote?

MR. HERNANDEZ: Correct.

MR. PEARCE: Now, in your experience as an organizer when you make a determination whether or not to pursue to hearing a supervisory issue, what factors do you take into consideration?

MR. HERNANDEZ: When it comes to supervisors we believe that they're in charge, taking into consideration what is their function,

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their regular duties and their interactions.

MR. PEARCE: I understand that. What do you take into consideration in deciding whether or not you want to pursue it to hearing or let the classification go?

MR. HERNANDEZ: Often we end up agreeing to whatever position the employer wants to take.

MR. PEARCE: And why do you do that?

MR. HERNANDEZ: Just to avoid any further delays in the process.

MR. PEARCE: When you agree to that do you have an opportunity to litigate that point after the election?

MR. HERNANDEZ: Not really.

MR. PEARCE: So you do it just to get to the point where you can have an election?

MR. HERNANDEZ: That's correct.

MR. JOHNSON: A question. How many department heads were at issue in your case?

MR. HERNANDEZ: There were about 40 to 50 department heads.

MR. JOHNSON: So 40 to 50 people. And this is for either of you. Would you have a position basically in terms of what a cut-off might be if it wasn't a strict 20 percent, if it was a 20

percent or X number, whatever X might be, the reason being, you know, 40 to 50 to people might be a very big chunk of people that would influence how employees would view a vote?

MR. FORD: Well, the 20 percent rule makes a lot of sense. I mean, they've got to come up with some number to have a clear rule that will put the parties on notice of what to expect and what not to expect. In this case it was a fairly large unit, so we're talking about probably 13 to 14 percent of the unit in this case.

MR. JOHNSON: But that's a large absolute number of people. I mean, the Warren Act, for example, says that you basically inform workers where it's 33 percent or 5,500, depending on what standard you're looking at. Would you be averse to us modifying the 20 percent principle so that, if it's over X number of people, then the hearing officer would be required to take evidence?

MR. FORD: I think having a percentage makes more sense, and the Board in adjudications has generally allowed for challenges where the number in dispute is as much as 25 percent.

MR. JOHNSON: Right. But when we're talking about an absolute number of employees, the

unit scope or its shape can be very different. If we're talking about a delta of 50 to 60 people, 70 to 80 people, something like that, wouldn't you agree a unit could look fundamentally different?

MR. FORD: Again, I think the percentage rather than the absolute number is what makes the most sense, and so we would probably oppose some number as opposed to a percentage.

MR. MISCIMARRA: Mr. Ford, to the extent that you have, for example, an assistant store manager who votes in an election, and if a union wants to include that person or those persons in the bargaining unit, would you agree that it's better if that person as a potential unit employee casts a vote in the election knowing that his or her vote's going to count and that they will be affected by the outcome of the election rather than having them vote not knowing those things?

MR. FORD: I think it's better for the unit, for the workers in general, to have an expeditious vote. Historically, there have been these kinds of issues that have come up. Both in stipulated cases and in directed cases it's often the case that there are, you know, any number of people whose eligibility is in question at the time

of the election.

MR. MISCIMARRA: But assuming that we come up with a way to have an expeditious election -- and I think all of the Board members are in agreement with the desired outcome and that we're looking for the best way to achieve that -- but if we were to arrive at a means by which we could have an expeditious election, do you agree it's certainly better for people to be casting votes in the election knowing up front that their vote's going to count and that they'll be bound by the outcome rather than having them vote and not knowing those things?

MR. FORD: I guess, depending on what we mean by expeditious, if those issues can be resolved in a very short amount of time, that would be a good solution.

MR. MISCIMARRA: And I'm not looking to lock you into a particular alternative. That's one of the things that we struggle with. But with respect to the 20 percent rule, if we came up with a different way to try to accomplish an expeditious election and/or streamline the pre-election hearing, are there some alternative ways, at this point without knowing what they are, that you could

potentially support that may be somewhat more refined than just a numerical 20 percent cutoff, or is that the only way that it could be done?

MR. FORD: Well, I can't think of any other ways to do it at this point. You know, I think we came into the rulemaking proceeding in 2011 with a fairly open mind on a lot of issues, and I think our comments reflect that, so we would consider any reasonable alternatives.

MR. MISCIMARRA: And the word "reasonable" I understand is sometimes in the eye of the beholder.

MR PEARCE: Thank you. Ms. Milito.

MS. MILITO: My name is Elizabeth Milito, and I'm here today on behalf of the National Federation of Independent Business. NFIB is the nation's leading small business advocacy organization, with a national membership of 350,000 independently owned and operated businesses. While there is no standard definition of small business, the typical NFIB member employs ten people and reports gross sales of about $500,000 a year.

NFIB's membership is a reflection of American small business. Currently, small businesses in this country employ nearly half of all

private sector employees. Small businesses pay 42 percent of total U.S. private payroll. Small businesses generated 63 percent of net new jobs over the past 20 years, and since the end of the recession small businesses have accounted for 60 percent of new jobs created.

In summary, small businesses are America's largest private employer. For this reason it's critically important that the Board understands small firms' unique business structure and the exceptional problems that the Board's proposed amendments to its election rules would place on the smallest but arguably most important employers in this country.

Small businesses face unique challenges that make compliance with the NLRA exceedingly difficult for even the most determined small business owner. In many small businesses 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, but it would first need to find such an advisor with whom to consult.

For this reason, NFIB is very concerned

about limiting the scope of pre-election hearing issues. The NPRM would limit the pre-election hearing to determine only whether a question concerning representation exists. This means that many issues of voter eligibility, including supervisor status, would be deferred to post-election procedures.

As a result, employees would vote in an election without knowing which employees will ultimately make up the bargaining unit, and some employees who vote might be found ineligible to be part of the bargaining unit. For small business, however, deferral of issues essentially means waiver and defeat. A small business simply cannot afford ongoing litigation and legal fees.

To ensure due process in representation cases Congress amended Section 9, requiring the Board to investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. Should the Board proceed with its proposed rule, NFIB believes that employee informed choice and due process notice and hearing required by Section 9 would be compromised, particularly for small employers lacking labor relations expertise and in-house legal departments.

And I will also add, too, that I know the Board has posed a question relating to whether or how the NLRB could provide assistance to unrepresented small businesses in complying with election procedures. I'm happy to address that issue now or, if you'd like, at a later time.

MR. PEARCE: Well, I think we'd better stick with the topic at hand. Now, wouldn't you agree, Ms. Milito, that if you're talking about a small business you're usually talking about a small bargaining unit and that the 20 percent rule would apply to a smaller number of people? Wouldn't you say so?

MS. MILITO: Yes. That's obviously true, yes.

MR. PEARCE: So in terms of the frequency of the utilization of that 20 percent rule, the size would impact how frequent that would be used, I would imagine. But that being said, when you have the ability to defer an issue until after the election, many an issue becomes mooted out and it may not be necessary to litigate it. Certainly, if your client reported back that they had the election and the union lost the issue of supervisory status and that becomes a moot issue, that would resolve a

lot of the costs on the part of the employer in litigating that point. Wouldn't you agree?

MS. MILITO: I would agree that the issue would be mooted out for a lot of small businesses, because I think it's just a matter of they're going to throw up their hands. As I said in my testimony, really it's going to concede defeat. I think Mr. Deakins pointed out very ably how in a small business you may have a manager who's clearly outside the bargaining unit, but maybe an assistant manager, is that individual in or out, and that could make a difference for the remaining five or six employees. So it is an important issue for that small business and is one to resolved at the outset because it could impact the decision of the other, as you pointed out, five to six employees and impact the entire business ultimately.

MR. PEARCE: And that's a decision that really wouldn't have to be made if the unit didn't win the election.

MS. MILITO: If they didn't win the election, but if they did win the election --

MR. PEARCE: Then the employer has the opportunity to litigate it.

MS. MILITO: And my point is that a small

business owner is not going to litigate things post election. It's just not going to happen. I've seen that firsthand. They're not going to have the resources, the money, the time to continue litigation. They will already have spent however much money retaining counsel to see them through the election.

MR. JOHNSON: If your average size is ten members of the employees and employers in your organization and we have a 20 percent rule and we're talking about that one assistant manager, even if we're awaiting the election results is it important or unimportant to your members to know whether they can communicate or utilize that manager as their representative in the ongoing campaign?

MS. MILITO: It's critically important to know. The only other mouthpiece is likely the business owner, too, and the manager is probably the first line kind of interface, if you will, and so that's why I said -- or the assistant manager if there's a manager and an assistant manager. So I think it's critically important to have those issues resolved, and it can make a huge difference for a small business owner to know that it's not just them, but they have the support of this person who

they saw as a manager.

MR. JOHNSON: I'm going to engage in some incredible flattery here, so excuse me. We sort of have the creme de la creme of the management side bar that comes to these meetings and present and talk about their best practices and whatnot. Typically, your members, the counsel that they hire for litigation of any form, do they generally tend to be members of this august group or not?

MS. MILITO: No. I say that with much respect. And I will give you a real life example. I had a call from a member last summer who had received -- it was a ULP, it was not an election petition. He had called his attorney. And this is what he said to me on the phone, "I called my attorney, and you know what my attorney told me? 'I don't do that kind of stuff.'"

This was from a little small town in Indiana. And I said, "Well, who should I call." And he said, "My attorney told me 'I haven't a clue,' I don't know anyone who does that stuff." And ultimately he did find somebody, but it did take several days. So it's just that finding a labor attorney can be difficult and can take some time.

MR. MISCIMARRA: I just have an

observation without any disrespect to people not here. I think this august group also includes the creme de la creme of the union side bar as well. I just want to express that observation.

MR. JOHNSON: And I would join in that statement.

(Laughter.)

MS. MILITO: And if I could just add, too, you know, just because there are attorneys not in this room, there are absolutely fantastic labor attorneys on both sides throughout the country. You know, it's just a matter of finding them, because it's not -- you know, you have more attorneys that do family law or criminal law, or, you know, "He set up my corporation" or, "I don't do that kind of labor stuff." It is a specialized field.

MR. PEARCE: Thank you very much. Mr. Fritts.

MR. FRITTS: Chairman Pearce, members of the Board, thank you. Good afternoon. As I said this morning, I'm here on behalf of the Coalition for a Democratic Workplace. CDW's position is that the proposed 20 percent rule is inappropriate and violates the Act. But I would like to hold aside those legal arguments for purposes of my remarks

today and focus instead on some practical questions raised by the 20 percent rule.

I didn't see anything in the ground rules that prohibits me from asking the Board questions, so I'm going to take the liberty of doing so, not with the expectation that the Board will answer the questions on the spot, but I do believe that they're questions --

MR. PEARCE: Or at all.

MR. FRITTS: Or at all.

MR. JOHNSON: I may hide under this structure.

(Laughter.)

MR. FRITTS: But I do think these are important questions for the Board to consider as it deliberates on the proposed rule.

The first set of questions relates to how the 20 percent rule would apply in the case of an election agreement. Under current procedures a regional director generally will not approve an election agreement if more than 10 percent of the proposed unit will be subject to challenge after the election. And so that raises the question as to whether the 20 percent rule would also change that standard with respect to election agreements or

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whether the standard for election agreements will be different.

If the standard is changed for election agreements so that an election agreement would be approved if up to 20 percent of the unit will be subject to challenge post election, that opens the door then to more post-election litigation even in cases when you have an election agreement.

The second set of questions relates to the practicalities of how a hearing officer would apply the 20 percent rule. The first question I have is: If at the outset of the hearing there are eligibility or inclusion questions that in total affect more than 20 percent of the proposed unit, how will the hearing officer decide which issue to take evidence on and which it will not? Will the hearing officer take evidence on all of those issues because in total they are more than 20 percent, or will the hearing officer take evidence on some of them to get it below 20 percent and then defer the rest? If the answer is yes to the latter, then how does the hearing officer decide which one will get below 20 percent and which one will be deferred? I think those are some practical questions in terms of how that rule would get applied.

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And then if there is an argument by the employer that the petition for a unit is inappropriate because it excludes certain employees, will the 20 percent be measured based on the larger unit that the employer contends is the only appropriate unit, or will it be 20 percent of the petition for a unit?

Third, the proposed rule doesn't clearly state how the 20 percent or if the 20 percent rule will apply to unit scope issues under Specialty Healthcare or any other standard. And let's take an example where a union files a petition for a unit of 50 employees. The employer contends there are eight employees in a different job classification who are excluded but should be included because they performed the same or similar functions under common supervision at the same location. And so the employer is arguing that the only appropriate unit is a unit of 58.

As I read the proposed rule, the employer would have the right to litigate those eight employees, whether they should be included, because that is a scope of unit issue, and the proposed rule states that the proposed unit must be found to be appropriate before the election. But this is not

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clearly stated in the proposed rule.

The rule also talks about offers of proof, and it's not clear the extent to which, even if the employer has the right to litigate those eight employees as an appropriate unit issue, whether the hearing officer could only take offers of proof on those issues or whether the employer would actually have the right to present evidence on that.

So if the Board does decide to adopt the 20 percent rule I think guidance is needed on these issues, and if I'm wrong and the proposed rule would preclude the employer from litigating that unit scope issue involving less than 20 percent, then the final rule should so state as well. CDW doesn't believe these issues should be deferred, but these are, I think, questions the Board should consider as it deliberates, as I said, on this rule. Thank you.

MS. SCHIFFER: Thank you. I appreciate those concerns. I do have a question, though. You mentioned in the beginning the application of the 20 percent rule to stips. If the parties have agreed to do that, haven't the parties basically decided that they are willing to defer those issues if it's a stip?

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MR. FRITTS: I've had the situation where the regional director will not approve the stip because there's more than 10 percent.

MS. SCHIFFER: But the parties wanted to do that?

MR. FRITTS: Yes.

MS. SCHIFFER: And so do you think the parties should be allowed to do that?

MR. FRITTS: I think in that situation -- I think it depends on the case. I think in some cases, if the parties agree, then I think the regional director should have some discretion to do that. Maybe there is a point at which that becomes excessive in the sense of --

MS. SCHIFFER: An agency issue.

MR. FRITTS: Right. Well, and it leads to too uncertainty in the election in terms of who's in and who's out and it leads to too much post-election litigation. So I'm not suggesting that that would be a discretion without limits, but whether you push the 10 percent to 15 percent or something like that, maybe there's some discretion there.

MR. MISCIMARRA: I have just a technical question. I found a number of your questions to be

helpful. I wish I knew the answers to all of them. The point of the Act is not merely to have elections, it's to have elections that give effect to employee sentiments regarding union representation, and that means that if employees select a union to have bargaining relationships.

To the extent that we adopt a rule that simply moves forward with the election and gets some of these issues wrong, including issues that are under 20 percent, what's the available means by which those issues could end up being resolved? And when do those get resolved if the election has taken place based on a kind of misapplied set of premises about some of these eligibility issues?

MR. FRITTS: Well, I think it depends on the outcome of the vote. If the vote is such that the margin is more than the 20 percent they may never be resolved, or there may be cases in which it is determinative and so it is resolved in post-election litigation. But at some point, depending on the margins, it may be in effect sort of deferred to the parties to then work that out either in bargaining or in possibly a subsequent UC proceeding, and we've addressed those in our comments.

MR. MISCIMARRA: If the certification is based on an election in which a small number of employees were improperly included or improperly excluded, what are the means by which that gets resolved and how long does that take?

MR. FRITTS: Well, it could take a while potentially. I suppose there are a number of different ways it could play out. If the employer is contending that that is an issue that affected the results of the election, if it's in effect something that taints the election result the employer may choose to refuse to bargain, have a technical 8(a)(5), and that may be ultimately tested in a Court of Appeals. If it was never litigated and of there's no evidence on it, then there's the question of what's the record in that certification tested case.

MR. MISCIMARRA: And if it turns out that the election in fact was based on premises that were just off and if the certification is tested in that way, how long does that take to resolve?

MR. FRITTS: Well, potentially, if you're talking about Court of Appeals litigation, you're looking at something that's measured in a year, two years. And then in all likelihood if the Court of

Appeals finds merit to that employer's argument the case would have to be remanded back to the Board to take evidence on whether the individual should have been included or excluded. You're probably talking about a process that could take a year, two years, or even more.

MS. SCHIFFER: Are you talking about a situation where a determination was made?

MR. FRITTS: I'm talking become a situation where a determination was not made.

MS. SCHIFFER: So people were not either included or excluded.

MR. FRITTS: No. I'm talking about a situation where they were allowed to vote subject to challenge, but the challenges based on the results of the election were not determinative, so there is no need to ever take evidence. So the employer's only recourse, then, is to refuse to bargain in the technical sense.

MR. PEARCE: Couldn't it be the case that, if a union decides to forego litigating a supervisory issue because it would have a negative impact on then being able to get to an election, the union cannot file a technical 8(a)(5)? Isn't that true?

MR. FRITTS: That's true.

MR. PEARCE: And they certainly have no forum to litigate post election that issue.

MR. FRITTS: That's true. Theoretically what the union could do is file a subsequent petition to represent individuals who are excluded if they believe they should have been included and litigate in a separate R-Case proceeding.

MR. PEARCE: Right, which creates more of an administrative process.

MR. FRITTS: True. But I think either way you're talking about more administrative process. If it's the employer's 8(a)(5) challenge or it's a UC proceeding to resolve it after the fact, either way, if you don't resolve the issue there's the potential for subsequent litigation.

MR. PEARCE: And the notice of proposed rulemaking provides for an administrative procedure for the issue in the event that the issue would be determinative of the results?

MR. FRITTS: If it's determinative, then there's a post-election process.

MR. PEARCE: All right. Thank you all. Next we'll hear from Gina Cooper, Arnold Perl, Jody Mauller and Doreen Davis. You may proceed.

MS. COOPER: Good afternoon. Thank you for the opportunity to be here and speak with you today. I am Gina Cooper. I am the director of professional and industrial organizing for the International Brotherhood of Electrical Workers AFL-CIO, and I've held that position since July of 2010. Prior to that and for the last 27 years I have worked in various capacities for the IBEW, representing and organizing workers in both the construction and the professional industrial industries throughout the United States and have participated in numerous NLRB proceedings.

In my current capacity I receive reports on organizing campaigns conducted by local unions affiliated with the IBEW throughout the country. I am therefore very familiar with how the NLRB's representation-case rules affect employees who want union representation.

I know that employers will testify here that nothing is broken and that no changes are needed. They will likely remind you that the unions won 63 percent of all requests for certification resolved in fiscal 2013. I saw that number mentioned in employer fliers, and I found that number startling because it does not fit at all with

my experience.

So I took some time and I looked it up. It turns out that the numbers aren't so good after all. In fiscal 2013 only 80,000 employees were deemed eligible even to vote in a Board election, and only some lesser percentage of those employees actually achieved representation, as the 63 percent number tells us.

I also checked out the number of unrepresented full-time employees in this country in 2013, and that number is 100 million or more. So what we're really talking about is that 80,000 employees out of a potential 100 million employees got to vote in 2013, and that percentage is so low I don't even know how to say it, but it is written .0008. As we said in our written comments, this cannot be what Congress had in mind when it passed the Wagner Act.

So how do we improve a process that clearly needs improving? One way is to stop the delay between the filing of a petition and the holding of an election. As everyone in this room is aware, the more delay the less likely workers are to achieve representation. The Board's proposal to defer litigation until after the election where 20

percent or fewer potential unit employees remain at issue promises to be one effective way to do this.

But the IBEW would like the Board to go further. We often encounter situations where the IBEW petitions for a physical production and maintenance unit, also called a P&M unit, which it would be fair to describe as the employees that work in an industrial setting who do the dirty work. The Board has held that P&M units in the utility industry are presumptively appropriate, yet time after time representation has been denied these P&M employees because their employer has insisted that their unit must also include every other statutorily eligible employee on the premises. This is what's known as a wall to wall unit.

Wall to wall units are not presumptively appropriate in any industry as far as the IBEW knows, and they are definitely not presumed to be an appropriate unit in a utility industry. But the IBEW has been forced to spend exorbitant amounts of time and money because the Board's present rules allow employers to litigate this wall to wall theory. This litigation drags on and on and can delay an election for years.

The IBEW therefore urges the Board to

adopt its proposed 20 percent rule. But the union also asks the Board to create an exception and permit the employer's proposed additions to a P&M unit to be litigated after the election even if the additional inclusions are more than 20 percent.

Therefore, the IBEW asks that you create this exception for situations where the unit sought is presumptively appropriate and the employer says that the unit has to be wall to wall. We feel that that is the best way for these workers to be assured of a fair and balanced election. Thank you.

MS. SCHIFFER: Thank you. I have a somewhat related issue. There has been some suggestion in the comments that employees make their decision to vote based on whether their team leader is going to be in the unit or out of the unit, and I wondered what your experience is with that.

MS. COOPER: My experience is that employees are voting for union representation and the unit issue never comes into their decision.

MR. JOHNSON: I have one quick follow-up. Thanks for being with us. Isn't part of what seems to be driving your concern really delays inherent to the Board itself in terms of getting out decisions on representation cases quickly? I mean, couldn't

we solve a lot of this just by fast tracking R-Cases, hiring more folks internally, and treating this the way we would treat, say, Section 10(l)?

MS. COOPER: No. I don't believe that would be the remedy.

MR. JOHNSON: Is there any part of this that you think the Board could do better internally and satisfy at least some of your concerns?

MS. COOPER: I would say that I'll be here tomorrow. If you give me the evening to think about it, I'll be glad to bring that back and take up another good ten minutes.

MR. JOHNSON: Sure. Just give me the secret signal to ask the same question again.

MS. COOPER: Will do.

(Laughter.)

MR. PEARCE: Thank you very much. Mr. Perl.

MR. PERL: Chairman Pearce and members of the Board, I appreciate the opportunity to be here to address the Board on behalf of the Tennessee Chamber of Commerce and Industry, which represents both large employers and small business owners throughout the state of Tennessee.

In the news release on this notice of

proposed rulemaking, the NPRM, Chairman Pearce, you're quoted as stating that such proposals are intended to improve the process for all parties in all cases. Regretfully, in our view, the Board's approach does not meet this high standard.

The NPRM proposes a bright line numerical rule requiring that questions concerning the eligibility of potential voters comprising no more than 20 percent of the overall unit be resolved post election, if necessary. We regard this approach as ill-advised and destructive to the interests of employers and will lead to even greater delays. Under the NPRM the disputed supervisory status of certain employees would not be resolved pre-election, and this uncertainty leaves employers more vulnerable to unfair labor practice findings based on the conduct of employees whose supervisory status prior to the election was in dispute. In our view, the supervisory status must continue to be litigated, 20 percent or even 10 percent, and not relegated to the challenge ballot procedure in post-election hearings.

A case in point is worth looking at. It's a case I personally handled many years ago. It's ITT Lighting Fixtures, beginning 249 NLRB 441,

1979. ITT is a poster child for how protracted litigation results when critical unit issues are not resolved by the Board pre-election. In ITT, following the filing of a union petition for election the company sought at a pre-election hearing the exclusion from the bargaining unit of its 33 group leaders on the basis that they were supervisors. At the hearing the hearing officer received considerable evidence on this issue which under the NPRM he would not, because the group leaders constituted approximately 10 percent of the unit.

However, the regional director chose not to make a determination but, instead, ordered that they vote by challenge ballot, and this left the employer in a difficult dilemma. The company's hands were tied because, as explained in the dissenting opinion in Bear National which is prominently mentioned in your NPRM, if the employer is wrong in its belief that the group leaders constituted statutory supervisors and restricted them from engaging in union activity it would trounce on the Section 7 rights of employees, and such conduct would be found to be unlawful and objectionable.

Following the election won by the union there existed some five years -- five years -- of subsequent litigation all the way to the United States Supreme Court. In the end, the election which the union won five years earlier was vacated and voided.

The anatomy of ITT Lighting Fixtures represents a clear and present danger of what can happen if the Board does not provide for the pre-election litigation and the resolution of vital supervisory issues. As correctly observed, in our judgment, by Members Miscimarra and Johnson, by deferring an appropriate hearing about the important issues like supervisory status elections will be accelerated, but in the end it would significantly lengthen the time that it takes to completely resolve election issues, causing added expense to the parties and to the government.

The reality is that administrative shortcuts in resolving vital issues pre-election in the name of streamlining the election process causes unfairness and adverse consequences to many bargains. Real world experience -- and those attorneys who here today on both sides have it -- demonstrates the fallacy of the Board majority's

premise that parties summarily use the pre-election process established under Section 9 of the Act merely to delay the conduct of an election through unnecessary litigation.

The bright line rule proposed by the Board that eligibility and inclusion questions affecting no more than 20 percent of eligible voters be resolved post election in our view is arbitrary, it's impractical, and it's antithetical to the self-professed high standards which this Board and prior boards has set for itself in the conduct of representational license.

MS. SCHIFFER: I was also litigating cases in 1979, including one with ITT. But your example I guess to me demonstrates that this in fact has been the Board's practice for 35 years, or at least based on your example, that for at least 35 years that there are issues that even when evidence is taken that the regional director does not resolve. And even if the regional director does resolve them there may be an appeal or request for review to the Board so that they're not finally determined typically until I assume in your case post election. Right?

MR. PERL: Well, I have two responses to

your question, Member Schiffer. The first is there was a record developed pre -- election in ITT Lighting. So when this case went up on a technical 8(a)(5) refusal to bargain the court had a record before it went to the Second Circuit twice.

MS. SCHIFFER: And the supervisory issue was resolved by the Board?

MR. PERL: The first decision of the Second Circuit remanded it to the Board. The Board, based on the record that had been established by the hearing officer, made a determination on the alleged supervisory status of the group leaders. The case went back to the Second Circuit, and this time it denied enforcement of the Board order and it vacated the election. The petitioner in that case filed a petition to the United States Supreme Court, and it was denied in a split decision.

The second response to your question is yes. For 35 years, even more, the Board has heard these kinds of challenges. They have taken evidence. But as the Chairman noted earlier, a regional director has the discretion, and I believe you brought this up, not to make a determination.

So our position is that not only should this issue be litigated, whether it's 5 percent, 10

percent or 20 percent, but the Board should follow the dissenting opinion in Bear National, Inc. and make determinations of these violations. If the goal is to improve the process for all parties in all cases and to expedite elections, accelerating the election on the front end but delaying it considerably for a matter of years on the back end is not in our view the expeditious resolution of representation questions.

MS. SCHIFFER: So you would propose that the Board not only not adopt the proposed 20 percent rule but that it in fact rescind the current practice.

MR. PERL: I would characterize it as modifying the current practice. Because in most cases in my experience, and I've been practicing first with the Board for four years at a regional office and then here in Washington as well as in private practice for over 40 years, and in over 90 percent of the cases. Regional directors if they hear a case through the hearing officer and take the evidence they will make a determination.

In the ITT election case the regional director erred by not making a determination because the record was there, and that could have saved

years of litigation had he done so.

MS. SCHIFFER: But my question is that you're suggesting that the Board undo its current practice.

MR. PERL: I'm suggesting that the Board follow the dissenting opinion in Bear National and first hear the case, take the issue, make a record and make a determination. It will save considerable litigation on the back end.

MR. JOHNSON: But here's what I don't understand. Do you acknowledge the concern as being realistic that if there is simply a handful of employees that might be at issue, that could be used as a stumbling block to either getting the stipulated election agreement when there should be one simply because the leverage enforcing an election and a delay may be too tempting?

MR. PERL: Well, I think that there are a lot of competing interests in leading to agreement on a stipulated election. I was involved in a case several years ago where only one individual was in dispute -- the unit consisted of approximately 40 employees -- one individual, because that was a pivotal individual. This individual was a claimed supervisor according to the company and he was

asserted to be an employee by the union. The individual was responsible for collecting union authorization cards and for leading the union drive. So here's one individual out of 40, but it was pivotal. The issue is whether there is a necessity to determine whether that individual is a statutory supervisor or rank and file employee, and whether it's one or one hundred in some cases depends on the facts of the case.

MR. JOHNSON: Aside from supervisory issues, would your view change if we're talking about unit placement of a relatively number of individuals?

MR. PERL: Yes. My view is different on unit placement of other individuals. I think that the supervisory status is the one category that must be litigated in each and every case where they're in dispute regardless of the percentage number, and I think issues of inclusion and exclusion in terms of the present system going back 35 years ago is less severe. However, under Specialty Healthcare now there is a different standard. I assume that goes to scope of unit and under the NPRM would be heard in each and every case, but if it's not, then those issues are vital as well.

MR. MISCIMARRA: Mr. Perl, thanks for mentioning this case as an example. You referred to it as a poster child. In terms of those particular issues that you're bringing to our attention, I'm looking here at the second appearance before the Second Circuit, which was in 1983 from 1979, so the case took four years to litigate. Is that right?

MR. PERL: That is correct.

MR. MISCIMARRA: One of the issues in the case was whether people were wrongfully included or excluded from the unit, but another issue in the case was whether or not those people may have inadvertently affected one way or the other the sentiments of other employees who were voting. Is that right?

MR. PERL: That was the basis, Member Miscimarra, of the objections filed to the election by the company and was the basis of the technical refusal to bargain.

MR. MISCIMARRA: So it's really a spillover. The percentage of people who are at issue is not necessarily indicative of the percentage of employees who are voting that could in some way inappropriately be influenced by what the disputed group is not doing or saying.

MR. PERL: Well, that is correct. And that's why the notion that this issue could be resolved through the challenge ballot procedure is just not realistic. I mean, there are other impacts of disputed supervisors on the conduct of the representation election. I truly believe this Board wants to get it right, and I bring this case to the Board's attention because I think it represents the challenge not only to practitioners and parties but to the Board.

How do you have an expedited procedure and what does that really mean? Should it be expedited only on the front end, or is it expedited through the totality of a representation process? Certainly, I don't think any Board member here today would agree that five years of litigation over this election is an expeditious way to resolve representation cases.

I think there is a challenge here, I applaud the Board for searching to improve the process, and I certainly accept the chairman's goal here that the process should be improved for all parties in all cases. And I think that's the standard. To me, the bright line standard is not 20 percent. The bright line standard is what the

chairman said, to improve the process for all parties in all cases. And the 20 percent rule in the approach recommended and taken in the NPRM clearly under any standard does not improve the process for employers or the employees.

MR. PEARCE: Thank you very much. We have two more speakers, so we need to move on. Mr. Mauller.

MR. MAULLER: Good afternoon, Mr. Chairman and fellow Board members. I'd like to thank you for the opportunity you've given me to speak here today. It is really an honor. First, let me introduce myself. I'm Jody Mauller, an organizer with the International Brotherhood of Boilermakers.

I come here today in support of many of the proposed rule changes, but I would like to speak specifically about rules related to matters litigated at the pre-election hearing. Although I'm not an attorney, I have had the opportunity to review how the time spent pre-election hearings by the parties impacts workers seeking to do what is central to the Act, and that is to vote on their desire regarding to be represented by a union.

Specifically, I'm here to speak in

support of the Board implementing the 20 percent rule. This is a rule that makes sense in the context of a campaign and an election, and as I understand it the rule would defer any issues of eligibility that affect fewer than 20 percent of the bargaining unit until after the workers have had the opportunity to vote. This rule would advance allowing workers to vote and to do so in a timely fashion.

In my experience, it is also difficult to the hear the frustration of workers awaiting the election. They are often frustrated with the process and the length of time it takes for an election to go forward. I have seen workers become discouraged, disengaged and repeatedly ask, "When do we get to vote." I am sure many of my colleagues here are familiar with addressing those frustrations and the difficulty of doing that, especially when the holdups are questions that relate to just a small percentage of workers and their eligibility to vote.

I think the fact that many workers have voiced these concerns is indicative of the need for change. Whether you are for the union or against, there is no reason to unnecessarily delay an

election from going forward. With the 20 percent rule, the focus of the election turns back to what is important, and that's giving workers an opportunity to vote regarding their desire to be represented by a union in a fair and timely manner.

Everyone here knows that the longer it takes to get to an election there's more potential for problems to arise during the critical period. I would submit that holding the election in a more timely manner, which this 20 percent rule would help achieve, would also help the Board, general counsel, regions and subregions more effectively utilize their resources.

Instead of spending days and sometimes weeks at pre-election hearings, litigating and putting on evidence regarding issues that affect only a small percentage of workers, elections could go forward and workers could vote subject to challenge. In conjunction with other rules this is a sensible approach. Why engage in days and weeks of litigation regarding eligibility and inclusion matters when the focus should be on the workers and their desire to be represented? I think everyone agrees that the focus of the election should be on the workers, and there is no question in my mind

that the 20 percent rule as well as other rules will help ensure that this remains the focus.

I've reviewed outlines regarding the rules, and I would agree with the assessment that the rules will help prevent this unnecessary and oftentimes wasteful litigation, and I believe pre-election hearings often result in significant and not unneeded delay. The opportunity to cause this delay, whether it is intentional or not, should be prevented, and the rules I believe help in this regard.

As mentioned by the AFL-CIO in its comments submitted to the Board, the proposals would not permit parties to introduce evidence concerning an issue that is not relevant to the statutory purpose of the hearing such as the eligibility or inclusion of small numbers of employees.

I recently had an experience where a significant portion of the pre-election hearing was spent taking evidence on the supervisory status of a small percentage of team leads. Certainly, had the 20 percent rule been in effect significant time and resources of both parties and the region could have been spared, and I'm convinced that the election in conjunction with other rules would have proceeded in

a more timely fashion instead of taking over 70 days. The supervisory issue could then have been addressed if necessary after the election went forward.

Overall, I believe the proposed rules can make a real difference going forward, and it makes sense to implement the new rules. Having elections scheduled at the earliest possible date ensures that workers have an opportunity to vote without significant delay, and the 20 percent deferral rule is one such rule that will help everyone focus on what is important, and that is the workers and giving them a fair and timely opportunity to vote on representation.

Again, I thank you for your time and consideration.

MR. JOHNSON: Thank you. Sorry about the air horn.

MS. SCHIFFER: I just have one question. In your experience you sort of started juxtaposing the litigation of the team leads with the opportunity to vote. Could you put those together for me and describe for me sort of the voters' interest in having the team leads issue resolved?

MR. MAULLER: I'm sorry. Maybe I

misunderstood your question. The team leads in this particular instance, if memory serves me correctly, the unit we petitioned was for 151 workers, the team leads I think were 12, so it amounted to about eight or nine percent. And I think that if we didn't have to spend time at the hearing discussing something that takes eight or nine percent, composing eight or nine percent of the proposed unit, we could have gotten to an election faster, and the employees or the workers there would have stayed engaged and possibly had a different outcome.

MS. SCHIFFER: Was it your experience with that that the workers' views about how they would vote on the election were dependent on the eligibility of the team leads?

MR. MAULLER: No, that wasn't. I think mostly the workers were just focused on that they want to be represented by a union. I think more of their frustration was on the fact of the length of time that it took to actually get to exercise their right to make that determination.

MR. MISCIMARRA: I just have one follow-up. What percentage of the unit employees who voted in that case did the team leads interact with during the campaign period?

MR. MAULLER: If I understand your question, all of them. They interacted directly with the workers on a daily basis.

MR. MISCIMARRA: Thank you.

MR. PEARCE: In your experience, have you elected not to take on a supervisory issue when presented during a pre-election matter?

MR. MAULLER: No, Mr. Chairman, not in my experience, not that I recall.

MR. PEARCE: Thank you. Ms. Davis.

MS. DAVIS: Chairman Pearce, Members Hirozawa, Miscimarra, Schiffer and Johnson, I'd like to thank you for having me here today. My name is Doreen Davis. I'm a partner at the Jones Day law firm, resident in the New York office. I too handled cases in 1979, since I've been practicing traditional labor law exclusively for 35 years.

Today I'm here representing the Retail Industry Leaders Association and to express their opposition to your notice of proposed rulemaking. The Retail Industry Leaders Association is a trade association of the world's largest and most innovative retail companies. Members include more than 200 retailers, product manufacturers and service suppliers, which account for more than $1.5

trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. I'm accompanied here today by Kelly Kolb, who is a member of the staff of RILA.

I'm going to try not to be too repetitious since we have these multiple panels all speaking about the same thing. First, I'm going to address the 20 percent rule, which I believe and which RILA believes is a solution in search of a problem. We've heard a lot of talk about supervisory status issues, which I'm going to speak to in a moment, because it is extremely important to the members of RILA.

But let us not forget that those are not the only individual eligibility issues that are being deferred potentially under the 20 percent rule. We have managerial status, we have independent contractor status, we have confidential employees, and, of particular interest of late, we have the issue of whether an individual is a student or an employee. These are all the types of issues that under the 20 percent rule there is a possibility would not be determined and would not be litigated.

In particular, on the supervisory issue for the retail employers, oftentimes the store manager is really the only on-the-ground person in the store who has any managerial authority, and in some cases the issue of whether or not they are truly supervisory employees or not comes up in these cases. And you can imagine what a difficult position that must put employers in if that issue is not determined, especially if they are the sole managerial employee in that store.

We've talked a little bit about the risks that are inherent in going forward in that situation where the supervisory status isn't determined. And there's a risk not only to the employers of course in having that manager be the communicator or not be the communicator, but there's also risk to the union in that situation in the event that that store manager, for example, is sympathetic to the union and perhaps helping them get cards signed or helping out in the campaign. Well, then the union also runs the risk of the election being overturned if they win it because of supervisory taint of some sort, so it's an issue that's not just something that presents a risk to employers but also presents risk to unions.

I posit to you that this rule may actually of course get to quicker elections. And although the rule does not specifically state that that is one of its purposes, implicitly many of the changes that are being proposed are designed to get to quicker elections. And I go back to a comment I heard Member Miscimarra make in the panel before this. I would think that the Board's goal should not be just to have an election or to have a quicker election.

The last time I checked, the preamble to the National Labor Relations Act said its purpose was to encourage collective bargaining. And by putting off these issues and submitting them to post-election litigation, I would say to you that I think that that is going to delay collective bargaining and delay first contracts, because this litigation is going to take time.

If there are determinative challenges, then it's going to be litigated in that context post election and bargaining is not going to start until that's determined. If there are non-determinative challenges, the notice of proposed rulemaking suggests that the issue be resolved in bargaining, which of course is going to delay the bargaining

when your first issue you're bargaining over is the scope of the bargaining unit and who's in and who's out. And the notice of proposed rulemaking also says if it can't be resolved there, then it can be resolved in a unit clarification petition, which also delays, in my judgment, getting to a first contract.

I would reiterate that the rule does not seem to be clear as to whether the scope of the unit questions under specialty healthcare can be litigated even if they do not constitute the requisite 20 percent, and I would encourage the Board to make that very clear. The limiting of the litigation impedes the employer's ability to develop the record, and it places extraordinary discretion on the regional office employees for whom I have tremendous respect, having started my career there. But to allow a hearing officer to make the decision whether or not to take evidence is making that hearing officer both judge and jury, and for these reasons we oppose the proposals.

MR. PEARCE: Questions?

MR. MISCIMARRA: I have one follow-up question. If we do have a quick election, which is advantageous for certain reasons, but the election

remains in dispute because of supervisory issues, and we've had a case that's been the subject of discussion that was in litigation for four years, is the employer permitted during that period of time, if the union prevailed, is the employer permitted to freely make changes in terms of the operation of the business during the period of time that the election outcome is in dispute?

MS. DAVIS: Absolutely not. It can't make any unilateral changes without bargaining with the union. If the employer does so, it's at risk of course for an unfair labor practice charge, which makes it very difficult to run a business in today's environment, especially in the retail space. The employers have to be facile and have to respond to new challenges, for example online shopping versus physical bricks and mortar stores. It makes it very difficult for businesses to operate when they are stymied in making changes.

MR. MISCIMARRA: So there are changes that actually affect the way retail employers do business more often than every four years?

MS. DAVIS: Yes, daily.

MR. PEARCE: But under our current rules, if an employer doesn't like the outcome of a unit

placement decision by the Board and elects to test cert by not bargaining it, does that add its own risk as well?

MS. DAVIS: Absolutely. But under the proposed rules the testing of the cert is going to be difficult when there is no underlying record that's been made. I would suggest that what's going to happen in some of the test certification cases where there's no record is there's going to be remand, and you're just going to have more and more time to get these issued resolved.

MR. JOHNSON: A quick follow-up on that. At what point do you see it becoming a due process problem or a 9(c)(1) problem, if at all, given the volume of what is going to be excluded from the record by a hearing officer?

MS. DAVIS: I think when the hearing officer makes a decision not to take evidence on a particular issue and says you're not allowed to introduce evidence, that's at the point it happens.

MS. SCHIFFER: You mentioned impact on the union from not having the supervisory issue resolved, but with respect to card signing the supervisory issue is never resolved at that point. Right?

MS. DAVIS: Well, not necessarily when the cards are being signed, that's true, but during the campaign if the --

MS. SCHIFFER: At some point in the campaign, maybe.

MS. DAVIS: Maybe.

MR. PEARCE: Thank you all very much. Our next seating involves Mark Spognardi, Michael Lotito, Gabrielle Semel, G. Roger King, Elizabeth Bunn and Maneesh Sharma. Greetings, everybody. Mr. Spognardi.

MR. SPOGNARDI: Thank you, Board members. My name is Mark Spognardi. I'm a partner at the law firm of Pautsch, Spognardi & Biaocchi in Chicago, Illinois. It's a great pleasure to be here with you today.

I started my career in labor law almost 30 years ago working as a staff counsel to two different Board members, not at the same time. I'm presenting the views of myself as a management side attorney, my firm, my clients and other concerned business people that I deal with on a day-to-day basis.

I want to focus my attention on the most important subject that I see which people have

addressed, and I'll try not to be redundant, but that is the necessity to have a pre-election hearing to determine the eligibility of somebody that may be a supervisor, a manager or a confidential employee. These issues, I believe, are the linchpin and critical to resolve as early as possible in order to preserve laboratory conditions so that employees can cast a free and informed secret ballot.

As you're well aware, the Act was passed encouraging unionization and collective bargaining, gave employees the right to organize, and gave them protections from employers taking reprisal and retaliation against them for exercising those Section 7 rights. In structuring the Act, Congress through the Taft-Hartley Act, the amendments, made it clear that supervisors are excluded from the protections of the Act. As the Supreme Court said in Bell Aerospace, a division of Textron, Congress also understood and the Board at the time understood that managers, confidential employees, are excluded from the protections of the Act. They cannot be organized. This is simply a basic management versus labor analysis. It is in essence a class conflict analysis, but it is the way that this Board and the National Labor Relations Act has been set up, and

it's worked well.

As the Supreme Court also recognized in Bell Aerospace and recognized in Yeshiva University, employers are entitled to the absolute loyalty of their supervisors, of their managers and of their confidential employees. Supervisors and the others, they're expected to act in the interest of the employer. They're agents of the employer. Their actions bind the employer. The statute for supervisors, Section 2(11), says explicitly they are people that hire, they fire, they reward, they discipline, they can make the employee's day, they can break the employee down. At the end of the day, though, the employer is entitled to their loyalty, and they have to be excluded.

This determination has to be made at the very beginning. In the effort to proceed with quicker elections I believe the unintended consequences will be even further delays after the election. If a person is a supervisor and they are not excluded from the unit they're going to be out soliciting cards or urging support for a union. It is a curse of employee rights, it taints the showing of interest, it subjects itself to administrative investigation and to dismissal of the petition by

the regional director without a hearing administratively.

Problems continue if you have a valid showing of interest and you're proceeding to an election and you don't resolve these linchpin issues immediately. If the disputed individual is actually a supervisor and aids and abets the organizing efforts it can amount to unfair labor practice of unlawful domination and assistance and destroys laboratory conditions.

On the other hand, if it's a straw boss or a lead, if they're actually a supervisor their comments and their actions, if they go beyond mere facts and opinions, they could be threats or promises or both, they could be unlawful, they have a binding effect on an employer, it could be grounds for objections, unfair labor practice and result in setting aside the election.

This all in my view can be avoided by having a hearing to decide eligibility where the parties cannot reach agreement. Great effort is put in the regions to have the parties try to reach agreement. Even where the parties do not reach agreement, in my experience in the regions I've worked in, which is primarily Region 13, having a

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hearing does not delay the election according to the Board's current time guidelines.

As the Board has acknowledged in its many opinions, determining these issues is a vexing problem. Section 9 of the Act requires a hearing, evidence has to be taken, and often there are no bright lines, but the consequences of rushing to an election without determining these linchpin issues I believe could result in further delay than is experienced now.

MR. PEARCE: You're out of time. You used as an example a supervisor potentially tainting an election by card solicitation and having supervisory status at the time.

MR. SPOGNARDI: Prior to the filing of the petition.

MR. PEARCE: Right. And of course in that example card solicitation by a 2(11) supervisor prior to the filing of a petition would have an effect on the filing of the petition if that circumstance becomes a ULP or is presented as an unfair labor practice or --

MR. SPOGNARDI: No. It's administratively handled. My experience is you contact the region. You say, "We have a petition

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that's been filed and we have evidence that it's tainted, we have evidence that the cards and the signatures were gathered by a supervisor." Then that evidence is looked at and investigated by the region, by the field staff, without a hearing, administratively looked at, and it can result in the regional director dismissing the petition administratively, and then the petitioner is free to later file an untainted petition, but there is no hearing in that circumstance.

MR. PEARCE: And is it your position that the NPRM would alter that part of the process?

MR. SPOGNARDI: No. My position is not that it would alter that part of the process. I would like to have a hearing on that issue, but that's not the way the Board has worked. As far as I know, as far back as I've practiced it's never worked that way. It's handled administratively. And showings of interest under Board rules or Board policy, I believe both, are not -- the showing of interest itself is not subject to hearing or litigation at the pre-election hearing.

The showing of interest is a determination made administratively by the regional director. The problem is later during the campaign

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period after the decision of direction is made or not made.

MR. PEARCE: I understand. But in terms of that particular example, there are processes in place, and as far as I understand there is no suggestion that that process would be tampered with.

MR. SPOGNARDI: Not by your proposed rule, no, not at all.

MR. MISCIMARRA: Mr. Spognardi, I just have one question, and I'll ask it one time, but I'll ask all of the members of this seating to address it, if they don't mind. If we found a way to address supervisor status, managerial employee status and confidential employee status before the election but we adjusted the Board's internal procedure so elections took place as quickly or more quickly than they occur now, would you support such an approach?

MR. JOHNSON: And I have an additional question for everybody on top of that question which Phil stole from me.

(Laughter.)

MR. SPOGNARDI: If you found an approach that worked for both parties, as the statute is supposed to do, I would not oppose that. What I

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think, though, here is that we have a situation where the rules that existed have worked. You might complain about delays, but in my experience there aren't significant delays. I know of no attorney who is successful in Chicago in choosing an issue to go to hearing to try to delay an election. They're all held within 42 days. It just doesn't happen where I come from. They don't let you get away with that.

And they know how to establish and shut down an issue on the record: "Oh, he knows how to fire somebody? We don't need any more evidence. Move on, counsel." In this instance I believe the rule has functioned fine, and we're going to deal with the law of unintended consequences of having many more delays on the back end.

MR. JOHNSON: I revoke my group question, but here's a piggyback question just for you. If these three exclusions are so important, confidential, managerial and supervisory, and we had a statement of position that was up front earlier than the hearing, depending on when the hearing is would you be opposed to the employer having to take a position on what positions were covered by those exclusions?

MR. SPOGNARDI: Well, if it forces the employer to box himself in, I would.
MR. JOHNSON: Okay. Assuming there is some opportunity to amend at some later point.
MR. SPOGNARDI: If there's procedure that's involved, that's something that can be examined. I don't see a delay in the process occurring that really resolves. I don't see any delays being caused by there being a lack of a written position statement up front outlining the issues. And in fact, my experience at the Board is that you are readily contacted by the Board agent and they ask you, "What are the issues, what are the issues."
MR. JOHNSON: I'm just talking about those three exclusions, because that has come up in prior testimony today.
MR. PEARCE: Thank you. Mr. Lotito.
MR. LOTITO: Thank you, Mr. Chairman and members of the Board. I'm Michael Lotito. I'm a shareholder at Littler, and I'm here today on behalf of the International Franchise Association. It has also submitted to the Board written comments on this issue.
I've given considerable thought to

perhaps what you're thinking about, and that is what more can be said about this particular aspect of the rule that already hasn't been said. And it's occurred to me in reflecting on that that there is a point of view that really cannot be overemphasized here today, and that is how would a new rule actually impact an employee involved in a representation-case matter.
I remember as a college student asking my employer one day why I could not vote in a labor Board election that was taking place at the store that I was working at. My employer told me that I was ineligible to vote because I only worked during the summer. He also said that I would not hear from the union or otherwise need to participate in the process because I couldn't vote. I knew exactly where I stood.
But what if that situation happened under the proposed rule? Assume for a moment we have a part-time employee working in a retail store. He approaches the assistant department manager, wondering why a union representative is calling on him at his home and sending him e-mails when that information is supposed to be confidential. The assistant manager explains that the information had

to be provided because the NLRB has brand new election rules.
The assistant manager also says there will be an election in two weeks. The employee might ask about the voting procedure. The assistant manager might say, "We do not know if you are or are not an eligible employee to vote because you came to us through a temp agency," at which point the employee might ask, "Well, who decides that and when," and the assistant manager might say, "We're really not sure."
Former acting general counsel Lafe Solomon issued Memorandum GC12-04 which is now withdrawn on April 26th, 2012, suggesting in response to the old new rule that joint employment issues need to be decided upon before the election between two semicolons, citing a couple of cases which I've read which I'm not sure stand for that proposition. I certainly hope the acting general counsel's position was correct. But to me, the proposed rule is not clear on this point.
Moreover, the Division of Advice is currently considering whether a joint employment relationship exists between a franchisor and a franchisee. The IFA in a letter dated October 29,

2013 to associate general counsel Barry Kearney vigorously reasserted that the traditional finding of separate businesses should continue. In short, the rule should make clear that issues about who is and who is not an employer must be litigated to conclusion, in my view, before an election is scheduled.
Along the same lines, the Board should make clear whether the status of an individual as an employee must be litigated prior to the election. The Northwestern case has already generated considerable controversy. Frankly, I think that this Board would have been subjected to tremendous criticism if the student athletes voted in an election before their status as employees was even decided upon by a region. Further, under the existing processes, Northwestern can file a request for review, and did so yesterday.
Under any new procedure will the request for review be permitted on an issue litigated before the litigation, or will that be abolished to expedite the holding the election, even though it may be unclear as to who the employer or even the employee is?
In sum, in my view any new rule should

clearly state that employee and employer status must be litigated to conclusion before the election occurs. The proposed rule may generate additional confusion. What if the employee goes to the assistant manager and asks her to attend a union meeting with him to get answers to some of these questions?

The assistant manager might say, "I don't know if I can go. They haven't figured out if I'm a statutory supervisor, whatever that means, or not. I'm voting subject to challenge, and I'm not sure what that means, either, because it's not clear if I'm in or out of the unit. If I go to the union meeting with you and they find out that I'm a supervisor, then I'm guilty of spying and the election might be set aside, so it's best for me not go, even though if they find ultimately that I'm an employee I have every right to be there."

The employee and the assistant manager share a new form of community of interest. I call it legal limbo, their status and their right to vote in the election, and in the assistant manager's case the right to attend either the union or the management meetings may not be decided upon until after the election takes place.

The ability to make an informed decision is the cornerstone of our election process. How is the part-time employee supposed to find out if he wants to support a union if he doesn't even know if the union will ultimately represent his interest? The same problem exists with the assistant manager.

You're hearing an awful lot from management representatives and from union representatives, but at the end of the day to me this really is not about unions or management, it's really about employees, and in my view the proposed rule does not necessarily further informed choice by those employees. Thank you very much.

MR. PEARCE: I'd like to request that the parties refrain from bringing up pending cases in the course of discussions so that it will enable us not to comment on things that we're not supposed to be commenting on.

MR. LOTITO: I appreciate that, and I'm sorry if it put you in an awkward position, Mr. Chairman. Ms. Semel.

MS. SEMEL: Good afternoon. My name is Gabrielle Semel, and I am district counsel for District 1 of the Communication Workers of America. I have represented CWA for close to 28 years, and

prior to that I worked as a field attorney in Region 2 of the NLRB for two years.

During the last 30 years I can safely say that I have participated in some manner in over a hundred representation cases. Based on that experience, I believe that the Board's R-Case procedures are outdated and easily manipulated.

Section 9(c) of the Act states that the Board must determine whether a question of representation exists. The language of the statute should guide the types of issues that are litigated in pre-election hearing. In my experience as both a hearing officer and as a union attorney, that is generally not the case. Rather, the pre-election hearing is used as the strategic chip by the employer to either drag out the process or to gain an advantage in terms of the composition of the bargaining unit. The pre-election hearing is rarely about genuine questions of representation.

A few years ago I led CWA's legal work regarding three representation petitions seeking to represent geographically defined technical units of T-Mobile USA. These cases collectively illustrate some of the ways in which the Board's current pre-election procedures are abused.

In the first petition CWA-TU, a part of CWA, sought to represent all field and switch technicians in the state of Connecticut, the second sought to represent the same titles on Long Island in New York, and the third the same titles in upstate New York.

CWA-TU is a joint project with Ver.Di, a German union representing telecommunication workers in Germany. T-Mobile USA sought and got a hearing in each case. The issues were repetitive, did not raise genuine questions of representation, wasted the resources of the agency, the union, the employer, dragged the process out for many months, frustrated the wishes of the employees involved, and were completely unnecessary.

In Connecticut the employers sought to include radio frequency engineers, all of whom had college degrees in engineering. They challenged the labor organization status of CWA-TU and challenged the authorization cards as not running to the party that filed the petition because they referred to TU affiliated with CWA and not CWA-TU.

None of these issues required a hearing as the facts were not in dispute. Nonetheless, a four day hearing was held. The regional director

found -- no surprise -- that the RF engineers were professionals and not appropriate in the unit. He further held that CWA-TU was a labor organization and under the Act administratively determined that the authorization cards supported the petition.

The employer raised the exact same issues in Buffalo, and a hearing on all three issues was then held in Buffalo again. The regional director in Buffalo ruled in the same manner as the regional director in Connecticut. If there was any justification for a hearing in Connecticut there certainly was none in Buffalo, but in both cases the hearings meant that the workers involved did not get to vote until months after the petition was filed.

On Long Island the employer claimed that the smallest appropriate unit was all of Long Island and four boroughs of New York City. This is a fairly large, very densely populated geographic area. The employer produced virtually no documentary evidence of regular interchange between New York and Long Island technicians and no evidence that the Long Island technicians were supervised by anyone other than their supervisors on Long Island.

The hearing, however, took seven days. The regional director found that the unit of

technicians on Long Island was an appropriate unit. However, the decision was not issued until nearly seven months after the petition was filed. This simply should not be. Even regarding the Long Island scope issue, the disputes were not really factual.

Had the proposed rules been in effect a few years ago all three cases would have been handled very differently. The regional directors would have been able to decide almost all the issues, if not all the issues, based on offers of proof, saving the resources of the agency and the parties while complying with the requirements of the Act, and the employees would have been able to vote in a timely manner.

I would like to make one last point about disputes regarding unit composition and why I believe these issues should be left to post-election resolution in most cases, as the new rules propose. Often employers seek to include job classification such as RF engineers or low level supervisors to gain a strategic advantage. The employer does not really want them in the unit for collective bargaining purposes but seeks to add potential no votes or, as in the T-Mobile case, to drag out the

process.

The issues are not genuine questions concerning representation but questions of strategy. After the election, if the workers elect union representation the parties are generally able to resolve these disputes usually without litigation, not on the basis of strategy but on the basis of what makes sense for collective bargaining purposes. Thank you.

MS. SCHIFFER: I'd like to ask if you can sort of elaborate on this resolution of the disputes post election and the impact on bargaining.

MS. SEMEL: The several cases that I have done where those things have been issues, if they could not reach agreement, and I think sometimes they could if actually offers of proof had been made, but if they could not, but after the vote is concluded and if the union wins, then they could actually discuss what these people do and whether or not it makes sense for them to be in the same unit.

In my experience, I think a lot of those issues have been resolved through the years. I've tried to think back through all the cases I've been involved in to think of specific cases, but usually they've been resolved. If they're not resolved

there are procedures for handling that, but in my experience most of the time, once the parties are no longer in an adversarial position, they can figure out whether or not these people are appropriate in the unit if what they're really talking about is reaching a collective bargaining relationship.

MR. PEARCE: In your experience, have you made decisions relative to taking on a supervisory issue in an R-Case proceeding, and what impact if any had that been on the pursuit of the election?

MS. SEMEL: We make these decisions all the time. In CWA in District 1, if we think that there is actually going to be an issue of supervisory status we do not include those people in the petition. The reason we do not include them in the petition is because we don't want to be in the position of having them be involved in an organizing campaign and tainting the process. That's a real issue for unions as well. We don't want to rely on them in any way, and so we do not -- we err on the side of caution.

But on the reverse, we have included people that we believe are low level supervisors because we don't want to go through the process of a hearing. So without naming cases, because I realize

the case I was about to mention is an ongoing case, although not an ongoing representation case, we agreed to a unit that included people that we thought were low level supervisors because the Board's procedures for hearings is so onerous that by the time you can get to an election often means that workers are frustrated and give up.

I'm going to talk tomorrow about exactly what happened with all of these three units, so I'm not going to talk about it here, but that is what happens. Workers get frustrated, they also get scared, and they give up.

MR. JOHNSON: A couple of quick questions. First, thanks for being here. The genuine issue of the disputed material facts standard in civil litigation or the FRCP is the subject of many, many decisions, some even going up to the Supreme Court, because it's not the easiest standard to apply.

From your perspective as a practitioner and leading labor lawyer at one of the leading unions in America, how are we going to impart to people in the regional offices here's what the standard means in the given nature of our cases to avoid having it crop up gain and again and again,

because this is something that district court judges blow all the time?

MS. SEMEL: First, I just want to say one thing about people in the regions. I don't think any of these problems have been caused by the people in the regions. I think the people in the regions work incredibly hard, and I have tremendous respect for the work they do. I don't think that is the problem. The problem really is the process and the fact that the process is easily open to manipulation. It was when I was a Board agent and a hearing officer, and it still is.

I personally think that there should be training. There should be training for people who will be hearing officers on how to look at these questions. And I believe that when these issues are complicated or are not easy to decide the regional director should make that decision.

And that's exactly what happens now. If you're at a conference regarding a representation issue or even a hearing and the hearing officer realizes that there is a complicated question, he or she will stop the proceeding and go and speak to the front office and get guidance.

In my experience at the Board, there is

no problem with getting the regional director's decision on an issue that is not clear. But on some of the issues, for example in the examples that I gave about were there any material facts at issue, the RF engineers, there were no material facts at issue. We would have all agreed they could have presented the job descriptions, and we would have agreed to them. They would have explained what the educational background of all the people was, and we would have agreed with them. That's a legal question. We didn't need a four day hearing on that question.

MR. JOHNSON: Some issues may be a little closer than that is all I'm suggesting.

MS. SEMEL: Without a doubt.

MR. JOHNSON: Then the follow-up to that is basically let's say you have a hearing officer that rules, "Look, there's no genuine issues here," the whole case goes away, gone, no opportunity for review. In effect, some commenters might argue that the hearing officer has now made a recommendation that has controlled the entire case. How do you respond to that?

MS. SEMEL: Well, I guess what you're asking seems to me very farfetched, to be really

honest. It's not my experience that that many questions are that complicated. In other words, experienced labor practitioners really do understand the standards for inclusion and exclusion of various job classifications. People know that. I don't think it's that big a problem, and I don't think that the rule should be decided on the exception. The rule should be decided based on what the Act is for and the representation of working people. They deserve to get a vote and not be hung up in sort of procedural questions all the time and not knowing what's going on.

But to your point, I think for the exceptions that there can be guidance to hearing officers that in these kinds of cases you must consult with the regional director so that the hearing officer is not the decision maker.

MR. PEARCE: We have to move on. Mr. King.

MR. KING: Chairman Pearce and members of the Board. My name is Roger King. I appear here today on behalf of the HR Policy Association, the leading HR spokesperson for large companies in this country from the chief human resource officer perspective. I also have the pleasure of appearing

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here this afternoon on behalf of the Society for Human Resources Management, and I have with me Nancy Hammer and Kelly Hastings that are in the audience.

Mr. Chairman, I would be less than candid if I said it's a pleasure for many of us to be here today. We are going back through what we thought was resolved in 2011 and thereafter, but we are here and we do appreciate the opportunity to share views and comments.

I think I've been involved in each of the Board's rulemaking initiatives over the years, including the healthcare rulemaking initiative, and I will say I commend the Board for the process you are applying today by going by topic. I think that's certainly an improvement over what we experienced in 2011, but Mr. Chairman, not at the standard that we had with respect to the healthcare amendments. I know you're going to hear later about that tomorrow from my partner, Curt Kirschner.

I want to stress at the outset a concern that many of us have. The Board clearly has the right to engage in rulemaking. There's no question about that. The statute clearly permits that. But I believe that's a very, very serious burden for this Board to carry, and they need to do so very

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thoughtfully and very carefully. You are dealing with delicate balances that have been established over the years between labor, management and employees. That's particularly the case here.

What's being proposed has many different ramifications throughout the Board's rules and regulations. Those have been carefully crafted over decades and have had the involvement of very experienced labor lawyers, management lawyers and employee participation from time to time.

And I think we all should be cognizant of a Supreme Court decision that really I think should set the tone for that proceeding. It's NLRB versus Action Automotive. There the Supreme Court clearly articulated that the Board should remain, and I'm quoting, wholly neutral with respect to the representation process. I believe that's exceedingly important for all of us to keep in mind.

With that said, we would have hoped, and I say "we," certainly the two parties I'm representing today and perhaps others, would have hoped that this Board would have reached a consensus as to the NPRM if you were going to proceed at all. This Board has an extremely high intellect level, great experience, perhaps one of the most

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experienced boards in the history of the agency, and we are still hopeful that you could come to some consensus, all five of you, before proceeding, if you proceed at all.

In the alternative, if that's not possible, perhaps you can then proceed on negotiated rulemaking. Get the stakeholders involved. Let's have some dialogue beyond what we're having today. We're dealing with important issues that affect labor, affect management, and, as noted, certainly affect employees.

With that said, I want to spend a few minutes on the hearing officer issue. We really haven't devoted a lot of time to that. We obviously have a Section 9(c) problem from our perspective. There is a statutory requirement for an appropriate hearing in each and every case, a full opportunity for all parties to litigate as they deem appropriate, not delay, not stall, but to litigate and establish a record. And it's also incumbent under 9(b) of the Act that requires the Board in each case, not the hearing officer in each case, not the regional director in each case, but the Board -- and I certainly would identify with remarks that people in the field of this agency are excellent,

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that they are trained professional, no question -- but ultimately the accountability for the issues that we're dealing with today rests with the five of you, not with career civil servants. And that's where it should be. You're subject to Senate review and Senate confirmation, and many of us have great concern about pushing this down to the regional officer level.

Finally, with respect to hearing officer determinations, I would gladly accept the Federal Rules of Civil Procedure, the genuine issue of material fact. That question's been asked a couple of different times. That's an exceedingly difficult standard. Article 3 judges have a difficult time getting that right. Supervisory status, that issue in healthcare has gone twice to the United States Supreme Court, and still there is not great clarity.

So to suggest these are just simple issues that could be easily dealt with by a hearing officer who may not even be a lawyer I think is not practical beyond the legal obstacles that I've mentioned.

That's something that has to be thought about. A hearing officer is going to be placed in an exceedingly difficult position making rulings.

Yes, they can go to the front office, they can seek guidance, but not on each and every issue. And if they don't permit briefs, and we haven't talked about that and I know that will be discussed later, that's an exceedingly difficult standard. Due process violations? Absolutely.

There is going to be a lot more litigation here, and we don't need to do it. What the Board is doing today day in and day out in holding elections in this country really is an example for the rest of the free world in many respects. What you do here you do well, and we don't need to change what we're doing today.

MR. PEARCE: Questions?

MR. KING: Did I get the answer to the question posed by Member Miscimarra?

MR. MISCIMARRA: I asked the question.

MR. KING: As noted by my colleague Doreen Davis, it's just not supervisory, managerial and confidential status. What about independent contractors? You talk about a difficult standard. We have various statutes that define who is and who is not an independent contractor from the IRS and beyond. It's not easy. How are we going to deal with that? What about students versus employees?

It's a difficult question. On managerial status you have a case, and we're not going to discuss it here, but that issue, managerial status, is important to consider.

So this is an area where thoughtful people should be able to articulate thoughtful ideas, thoughtful positions and reach an agreement. I would submit to you one of the real problems here is not having a minimum number of days between filing a petition and election. That would solve a lot of this.

Yes, there is maneuvering on both sides. We all know that. Good lawyers use procedures to their clients' advantage. You could call it delay. I don't agree with that. My union colleagues take every advantage of the blocking charge procedure. That's their right at this point.

So let's talk about what really the issue is at here. Is it jockeying back and forth on procedural rules? Should we have a minimum number of days between filing the petition and the election? Perhaps so. That might solve a lot of this.

But back to your question, I think those are significant issues. And to put them off after

the election, as has been articulated by Mr. Perl and others, is simply going to result in more litigation.

MR. JOHNSON: One follow-up to that, though. In your experience for independent contractor and sort of student as employee issues, isn't that something that applies to almost the entire bargaining unit? It's not a situation where you'll have like two or three people typically.

MR. KING: Member Johnson, I agree. I want to talk in a second on the next panel about the problems with the Board's challenge procedure process. That could affect a very significant number of potential voters. I don't think we've really paid enough attention to that issue. If you have 30, 20, 25 percent of a unit being uncertain on the independent contractor issue, that's a very significant issue that deserves attention pre election and not post election.

MS. SCHIFFER: What would your minimum time be?

MR. KING: I knew you were going to ask that question.

MS. SCHIFFER: I didn't want to disappoint.

MR. JOHNSON: And your maximum.

MR. KING: I don't have a minimum per se. I think what the Board is doing today is appropriate. We have the 38 to 42 target that's being met consistently. And I think, to further answer your question, it depends on the size of the unit and the number of issues that are involved in the unit hearing. If I were pressed, I think the legislation currently pending in Congress is a guide you might want to look at.

MR. PEARCE: Thank you. Ms. Bunn.

MS. BUNN: Thank you, and good afternoon. I just want to make a couple of points, because I think most of the speakers have addressed a variety of the sub-issues that are part of this overall panel.

All of them combined do two things, I think. They foster uniformity in the process and they eliminate unnecessary delay, not all delay, but unnecessary delay. And this to us has the salutary effect of reducing gamesmanship and, again, the unnecessary delay that's inherent in the current system.

So on both of those points why is that important? I think there are a couple of reasons.

One, employers take advantage of delay; not all employers, but too many employers. There's research, academic research that demonstrates this. I know Dr. Bronfenbrenner will be speaking tomorrow. There is also the book "Confessions of a Union Buster" in which Martin Levitt states that the beauty of such legal tactics, referring to bargaining unit challenges, quote, is that they are effective in damaging the union effort, and no matter which side prevails delay steals momentum from a union organizing drive, close quote. The longer the delay, the longer the union campaign persists. Unnecessary delay has real life consequences to employees.

But there is a second reason, and that has to do with eliminating frivolous and unnecessary litigation in order to wrest control back into the hands of the government, the Board, and taking some of the control of the timing of the election away from the employer. A Board election is intended to be an orderly democratic process by which the government ensures that employees have a right to choose to be represented or not. When the control over the timing of the election is tilted too much in favor of the employer, workers loose faith in the

process and democracy suffers.

I've been involved in a lot of organizing campaigns. In every single one in which I have been involved one of the very first questions, if not of the first question that a worker asks, is when will the election be held, and every time the organizer must painfully explain that the question cannot be answered, that it could be 30 days, it could be 90 days, and it could be years.

When the worker understandably asks, "Okay, what factors govern how long it's going to take," again, the organizer has to answer that it depends on the extent to which the employer wants to delay and what region the petition has been filed in.

The proposed rules would result in a more uniform answer to that question. It returns to the Board a greater control of the process while affording due process rights to the employer.

MR. SHARMA: I'm just going to speak very quickly. We've just got a couple of minutes, and I know the panel is already over time. I just had a couple of issues that I wanted to address. One is the selection of supervisory status question and questions declaring eligibility and inclusion and

exclusion for 20 percent or less of the unit.

The current rule is simply that those issues have to be litigated prior to the election but not decided, and often in cases the regional director defers the decision until after the election. Also, petitions for review are filed, so that question in those instances remains open even while the ballot takes place.

And as far as the tainting of the showing of interest goes, unions always deal with that issue because that issue exists throughout the campaign, throughout the collection of the cards, up until that question is finally determined. During the entire campaign period the union has to deal with that issue and they know how to deal with those issues.

As far as the offer of proof question, I just wanted to point to one of the findings within the survey I talked about earlier. 35 percent of the attorneys that responded to our survey said that they were involved in pre-election hearings where the hearing officer allowed the company to introduce evidence that, had the hearing officer taken offers proof, they likely would not have been able to introduce any of that evidence.

One of the examples that was provided to us was very similar to one that was provided earlier in which an employer raised the same issues in a pre-election hearing that it had lost in a number of different regions throughout the country. An offer of proof in that situation would have alerted the hearing officer and the regional director that the only issues that the company was looking to raise were issues that already had been cited by other regions.

And two other quick points I wanted to raise about our survey. One goes to the idea of unions stipulating to avoid litigation at hearing. 89 percent of attorneys who responded to our survey reported that their clients at some point had agreed to concessions that reach a stipulation in order to avoid unnecessary litigation. And one other thing was that 76 percent of attorneys who had been in the situation said they had been able to resolve eligibility issues post election through bargaining.

MR. PEARCE: Thank you.

MR. JOHNSON: Just two things, 30 seconds. You mentioned that the unions typically know how to deal with the issues of indeterminacy in terms of these exclusions, you know, confidential,

managerial, supervisory, things like that. How would you respond to the argument by some commenters, "Well, that's because you're the repeat players in here, you know how to do this from long practice," whereas you might have an employer who has no idea because they're not represented or they haven't been through enough representation campaigns?

MR. SHARMA: I think it's not necessarily that the unions are repeat players. They're just cautious. They understand what the implications might be. And again, and I think this goes back to the question or the issue that was discussed on the earlier panel, which is that employers do have access to resources and counsel to answer these questions quickly and much quicker than I think is being discussed here. And so I think employers can get those questions answered, to the best degree that they are going to be answered, I understand, but they can get counsel and advice on those issues quickly.

MR. JOHNSON: And one last thing. And I'm sorry. I've not done a line by line of your survey. I promise that I will. Did you do anything to control for confirmation bias?

MR. SHARMA: No. We admit that it was a survey that was put together quickly, and it was mostly to give you an idea of what practitioners are reporting that they are experiencing.

MR. JOHNSON: Thank you very much.

MR. PEARCE: We're way beyond time, so we'll recess for four minutes.

(Recess.)

MR. PEARCE: Thank you all, and I apologize for the abbreviated break. The next topic is Concluding statements, arguments and post-hearing briefs; Direction of Election with decision to follow. We have Mr. Kirschner, Ms. Sencer, Mr. Deakins and Mr. King. Once again, thank you all. Mr. Kirschner, can you proceed?

MR. KIRSCHNER: Good afternoon, Chairman Pearce and members of the Board. Again, my name is Curt Kirschner with Jones Day appearing on behalf of AHA, the American Hospital Association. The topics for this panel which you just described, concluding statements and post-hearing briefs and direction of election overlap in some fundamental respects with the topics from the prior panels.

If under the Board's proposed rules a hearing would be precluded, then obviously

post-hearing briefs and other matters related to the post-hearing process would be of limited utility. As a result, we believe that it's important to underscore the AHA's strongly held view that the NPRM's proposed blanket 20 percent rule regardless of the size of the unit or the issues in dispute would violate Section 9(c) and would assign due process to non-petitioning parties. Leaving scores of unresolved issues, especially supervisory status as the parties are directed to an election imposes an unfair and unrealistic burden on hearing officers, will create confusion among voters and increases both unfair labor practices and disputes in the workplace during an election campaign. These effects are especially problematic for employers in the healthcare field who must promote a tranquil healing patient care environment at all times.

Turning to the Board's specific proposal regarding the post hearing process, the proposed elimination of post hearing briefs will in our view erode the fair hearing process by limiting the parties' ability to articulate their position and explain applicable authority. Under the proposed amendments, at the close of the hearing parties will be permitted to file briefs only with the permission

of the hearing officer and within the time permitted by and subject to the limitations imposed by the hearing officer. Especially in conjunction with the proposed changes to expedite the hearing process, the parties will not know the facts at issue until the hearings occur.

Particularly in the healthcare field, with larger units and complex issues regarding supervisory status and other unit determination issues, parties should have the opportunity to brief in writing the legal authority regarding issues raised and facts introduced at the hearing.

For example, the role of charge nurses may vary between units at a hospital. The role of charge nurses as with respect to whether their supervisor may change varies based on what shift they work and with the number of other supervisors around. These issues will depend on the facts introduced at the hearing and should require and should allow briefing. The current timeline for submitting briefs is already extremely expedited relative to other litigation standards, generally only a week or two, and in our experience does not unduly delay the representation process.

The elimination of the matter of right to

file a post-hearing brief is also inconsistent with the limited role of hearing officers allowed under 9(c)(1) of the Act. The NPRM imposes substantial authority to the hearing officers to make myriad determinations, including whether and regarding what issues post-hearing briefing is allowed. In combination, those restrictions grant substantial and we believe excessive authority to hearing officers, and thus would be inconsistent with Section 9(c)(1).

Under the current rules, as has been stated before, hearings occur in only a small percentage of the cases. Over 90 percent of cases result in a stipulation, meaning that no representation hearing and thus no briefing is ever required. In light of how infrequently hearings currently occur under the existing procedures, the AHA does not believe that any of the proposed changes that are at issue in this panel's topics need to occur.

If a party does not believe that a post-hearing brief is necessary, then that party is free to offer an oral argument in conclusion of the hearing, but that should not preclude the other parties, however, from briefing the issues that were

raised during the hearing if that party feels that doing so would be helpful to clarifying the record and presenting their arguments.

In response to one of the issues posed by the Board, we do not believe that a direction of election should precede a decision. The direction of election obviously couldn't be issued until the basis of the decision had already been determined. Issuing a direction of election while the Board sits on the decision would keep the parties in the dark regarding the Board's rationale for its determination. This could lead to questions and even suspicions regarding the basis of the conclusions that are embodied in the direction of election.

Not issuing decisions until sometime before the election itself leaves the parties uninformed about the basis of the potential appeal to the Board, which of course implicates another set of proposed rule changes. Based on our experience, issuing the direction of election prior to decision would not likely save more than a brief period of time in the vast majority of cases, especially given that direction of elections could not be prepared until the basis of the decision has already been

made.

I see that I'm out of time, so I'll conclude there.

MR. PEARCE: You say that the filing of a post-hearing brief is a matter of right. What's your basis for saying that?

MR. KIRSCHNER: My understanding is that under the current rules the hearing officer routinely grants the party the right to file a post-hearing brief.

MR. PEARCE: I practiced before the Board and I was a hearing officer and I was 15 years in a regional office, and it's my understanding that that is a discretion imparted by the regional director, and although commonly granted, it is not clear to me that that is a right. If I'm incorrect I'd like some correction in that regard.

But that being said, if it is the regional director's call with respect to the legal determinations that are made based on the facts as laid out in the hearing, isn't it the current job of the hearing officer not to make a legal determination but to facilitate the development of the record?

MR. KIRSCHNER: That's correct, and

that's what's required by the Act. Our concern is that by having the hearing officer be able to make determinations about what the scope of the hearing should be, applying the summary judgment rule with respect to whether there is sufficient evidence to support an issue, enabling the hearing officer to determine whether and under what conditions and about what a briefing could be done, in combination all of those items together give such substantial authority to the hearing officer that we believe in effect that the hearing officer is essentially making a recommendation which is precluded by 9(c)(1).

MS. SCHIFFER: As you indicated, commonly the parties are allowed seven days to file briefs, and so that seven day period sort of ends up going by whether the parties file briefs or not.

MR. KIRSCHNER: Goes by, meaning prior to a direction of election?

MS. SCHIFFER: Right.

MR. KIRSCHNER: Well, I would think that it depends on the circumstances. I would think that the Board typically would want to receive the brief before issuing the direction of election.

MS. SCHIFFER: Right. That's what I'm

saying. There is no obligation on the parties to file briefs, and often the DDE waits the seven days or at least the seven days even if no briefs are received.

MR. KIRSCHNER: That is my understanding as well. I think that the issue here is whether the parties should have the ability following the hearing to take the time to brief certain legal issues that remain in contention. As indicated, most representation hearings get stipulated to, and so it may be that by the conclusion of the hearing that there aren't any live issues and they reach a stipulation at that point. But I agree, Member Schiffer, that there is typically that seven day period regardless of whether the parties are filing briefs or not.

MR. JOHNSON: Would you have a problem, then, with basically having a declaration of whether to file briefs that would then affect the timetable?

MR. KIRSCHNER: I think it would be helpful for the Board to know whether the parties intend to file briefs, because parties that are taking the time to file a brief would hope that someone would be reading it and considering it before making the decision, and so therefore having

a declaration about whether briefs would be filed or not would I think be rewarding to the parties to know that someone is actually going to read it and helpful to the Board to know whether they should be waiting for it or not.

MR. JOHNSON: What if somebody said, you know, "Mr. Kirschner, why wouldn't pre-hearing briefs serve the same purpose as post-hearing briefs?"

MR. KIRSCHNER: Particularly given the timetable for representation hearings, a pre-hearing brief would be problematic because the parties don't yet know what the true issues are going to be. It's not until you go through the hearing and you know whether there are certain issues, for example whether someone's in one bargaining unit or another, whether someone's a supervisor or not, you don't know until you've completed the hearing what the true final issues are going to be.

And it may be that through the course of the hearing you resolve a lot of issues that you thought were going to be open issues at the commencement of the hearing, so you only need to brief a couple of narrow issues that might still be very important. But I would think post-hearing

briefing would provide much more utility than pre-hearing briefing, given the lack of discovery and the timeline between the petition and the hearing.

MR. JOHNSON: What issues might be argued in other than oral argument form?

MR. KIRSCHNER: I think some of the supervisory status issues are particularly complicated as a fact based test, and you may have individuals who might have the same title but who perform different functions. You could have charge nurses who are on the floor on a unit during the day shift and they have their manager and director around at the same time. Conversely, the same charge nurse in terms of title could be on the night shift and no other managers are around, thereby effectively giving that nurse far more leeway with respect to the management and supervision of the nurses who are on the floor at that point.

So sometimes those very specific situations require briefing citations for the record and application of the complex and fact based tests that the Board has articulated for supervisory status.

MR. JOHNSON: What's the prevalence of

documentary evidence in the healthcare industry in these kinds of cases?

MR. KIRSCHNER: Well, all hospitals do need to comply with joint commission and other obligations and have written position descriptions. Hospitals generally have position descriptions. But in my experience, those position descriptions may not be fully descriptive of the duties that the employees fulfill relative to the test applied by the Board. So you write the position description not to determine whether they're a supervisor or in a technical or service bargaining unit, you write the position description for the purpose of running your hospital, and therefore the key elements of supervisory status for example may not be equally reflected in that job description.

MS. SCHIFFER: I may not be remembering correctly, but did you tell us that most hearings you've been involved with lasted a day?

MR. KIRSCHNER: That was not me.

MS. SCHIFFER: I believe there have been comments that for most hearings the time is about a day. My question to you is if there was an opportunity to have a brief break to sort of collect thoughts, would that make a difference in having an

oral argument at the conclusion of the hearing?

MR. KIRSCHNER: In my experience, and perhaps it is me, if I were orally arguing a case and I haven't had the time to reflect fully on all of the facts and evidence that comes in, I am going to try to make sure that I argue and touch on each and every issue that potentially might be raised. If you have some time to review the transcript and focus on your arguments you actually may in writing brief fewer issues, but I think also more effectively.

MS. SCHIFFER: That actually was not my experience at the regional level, but I see the logic.

MR. PEARCE: Thank you. Ms. Sencer.

MS. SENCER: The current system basically built in two weeks of unnecessary delay in most cases. When asked if briefing is allowed the regional director usually says yes, and that would generally be seven days. And I'll say opposing counsel because it's rarely union counsel that's asking for it in these cases, but opposing counsel says, "Can I get an extra week," and, depending on the length of the transcript, that extra week is granted. That's before the regional director even

then gets started working on the DDE. Once the DDE is issued, it has 25 days built into it before we have the election scheduled.

So simply by going to a hearing that's going to need a decision to be issued we've added 39 days into the process, which in some ways accounts for these numbers from the Board's website that indicate that if there is a contested case it's generally around 65 or 66 days until we get to election from the date the petition is filed. But really, only all but the most complicated cases really don't need this kind of briefing.

I hear what Mr. Kirschner is saying, and I understand that people would like to be able to brief all of these out each and every time. But when it comes down to it, the supervisory status that he's talking about he himself has litigated many, many times, I have litigated many, many times, and the standards are written out very clearly in the Board's procedures in the outline on representation handling. So there is a list. You have to know which issues you have to hit because that guidance has already been provided. And since hopefully the reader of the record is reading the record, they will see that testimony without us

needing to provide those actual citations because presumably the entirety of the record is going to be read by whoever is writing this decision. From that point of view, the oral argument is not a particularly high standard to be reached in this.

Coupled with a statement of position which basically would form the outline for management side's closing argument or their closing brief later on and the narrowing of issues through the hearing, there's really not that much left to be argued and not that much left to be briefed. And when you only have a few issues and they're the same kind of issues that come up regularly, there's really no reason to add this extra time in simply to allow for a closing argument that, frankly, winds up rehashing the opening argument and in many cases the closing summary provided by management.

I frequently will argue my cases orally, and I do it for a lot of reasons. One of them is because if you have workers in the room, they like to know that it's being resolved and that you understood their issues. The unions like it for that reason as well. I presume management would like it for those reasons as well, that their counsel understood the issues that they had with the

unit.

But we do it orally. The representatives of the employer give an oral closing also at the same time because -- I don't know why. Maybe they don't want to be outdone or maybe they feel the same way for their client. But whatever the reason may be, they give an oral closing.

And then they give a written brief afterwards, sometimes up to like 30 pages after a one day hearing, that rehashes all of the background of what the employer does and every tiny little bit of testimony and cites to the record extensively. I don't think it's necessary, and it leads to unwarranted delay. It adds to the work of the regional director when they finally get around to writing the decision because there's more information for them to go through that may not actually help to make the decision, which, in these closed cases, is based on the testimony of the individuals and not the arguments of counsel anyway.

Regarding this issue on the direction of election and decision, we know in some cases what the decision is going to be. I had a case where the petition was filed in late January. The employer asked for the extension and got an extension for a

week for the pre-election hearing. The employer then said, "I'm not going to be available for that so I'm not going to show up, but I'm not going to stip, either." The union had to put on a hearing with no one on the other side because under the current rules the region was not allowed to simply take it as an offer of proof. We were then provided the opportunity if we wanted it to write a closing argument. We declined. We did an oral closing based on the witnesses that we had presented. And we pretty much knew what this unit was going to be. It was a single classification. It was a presumptively appropriate unit.

It took about three and a half weeks after the week that was given for us to do the closing and to provide a closing argument for the regional director to issue a decision. As a result, in a case where the employer did not show up, it still took 67 days to get to election. That to me is not reasonable. It's somewhere between a contested and an uncontested case, but there is no reason why the decision couldn't wait and the direction of election issued earlier. We knew who was going to be able to vote.

The region, when we asked them about it,

simply said it was taking time to tweak the decision, that the people who they needed to consult and who were going back and forth to the regional director who was writing the decision weren't available at all of those times in between, and as a result the employees are the ones who suffered and had to wait.

MR. PEARCE: Thank you. Questions.

MR. MISCIMARRA: Ms. Sencer, our task as an agency is to try to, I think, do three things. One is we want to be prompt, we want to have the correct outcome, and we also want to do what the statute says we have to do, all three salutary objectives. The question I have -- and for a moment I'll just exclude the extension issue because we could address that separately and I'll exclude the 25 day deferral.

If we're talking about the seven day post-hearing briefing and our statute says the hearing officer is not allowed to decide issues -- and curiously, it even says hearing officers at least in pre-election cases are not even permitted to make recommendations, so we're stuck with a record of some kind and the regional director has to make the decision.

Without the post-hearing brief, exactly how do you think -- I'm asking you to interpret our own proposed rule -- how would our proposed rule work? And is it really worth it to dispense with a post-hearing brief? I think that just leaves the alternative of every regional director in every case having to just read a cold record without the recommendation of someone else and decide based on that.

So it strikes me, if we want to be prompt and get to the right result and do what the statute says, isn't a post-hearing brief, if it takes seven days in which both sides can file, isn't that just better than just throwing all of these cold records at the poor regional director who has to just then decide the cases?

MS. SENCER: Well, I think nothing prohibits oral argument on this in that it does change the nature of the information that's provided to the regional director. Second, the way that I read the proposed rule, there's nothing that limits the employer's ability, other than maybe their time constraints, from filing a pre-hearing or providing at the date of hearing a post-hearing brief that they would provide as an offer of proof that would

go into the record that would highlight some of these technical difficulties or specific legal issues that are being looked at.

If I can, I want to address this issue of the hearing officer. In the regions that I practice in, whenever we have a dispute about whether or not something should go into the record we get paused, the hearing officer leaves the room to consult with someone in the back, and they come back and they say, "The regional director says this is what's going to happen." So those decisions are not being entrusted to the hearing officer. They're being made to the regional director after the presentation by the advocates to the hearing officer.

MR. MISCIMARRA: But would you agree the statute requires the regional director to make a decision based on the record?

MS. SENCER: Yes, and that's where that whole issue about offers of proof comes in.

MR. PEARCE: Have you had experience where post-hearing briefs are not filed?

MS. SENCER: I don't recall any cases where the employer has chosen not to file a post-hearing brief. I know that I have only in very few cases filed post-hearing briefs, and those are

not your run-of-the-mill supervisory status or community of interest cases but more like the ones that I was talking about this morning, the contracting and expanding unit kind of cases where you have to do some analysis as to how many people there actually are based now on how many people there are going to be and what those percentages look like, those kinds of cases. But the way that I read the proposed rule, there wouldn't be any limitation on the regional director in those cases choosing that closing briefs are important and necessary and issuing that for those cases those kinds of arguments can be provided after the fact.

MR. PEARCE: So let me understand you. Did you say that in the majority of your cases you don't file a post-hearing brief?

MS. SENCER: That is correct.

MR. PEARCE: Has it been your experience that the regional director has not been able to discern what the petitioner's legal position is relative to --

MS. SENCER: I think that the regional director is able to determine what our legal position is because we're asked at the end of the hearing to state what our position is for the

appropriate unit and given an opportunity to do an oral closing on the record where I refer to the leading cases on whatever the issue is that we're discussing.

MS. SCHIFFER: That was my question as well. Do you feel your position was misunderstood or compromised because you didn't file a written brief?

MS. SENCER: I don't think so, because I think that the readers of the record are fairly careful in making sure to go back to determine what it is that they're looking at and getting beyond the -- I don't want to say "exaggeration" or "hyperbole," but it kind of is. I'm counsel. Right? We're hired to be the advocates. Their job is to read it and determine what actually is going on regardless of how I characterize the evidence or how someone else characterizes the evidence.

MS. SCHIFFER: I'd like to get back just briefly to the decision and direction of election. Do you feel that the fairness of the election would be compromised if the decision came out later?

MS. SENCER: I don't think so. And I'm going to go back also in this case to the issues about arbitration. Arbitrators issue bench

decisions with more complete written decisions to follow, and that actually provides more certainty to the parties because they know faster what's going to happen and everyone knows what to prepare for next. Even if they might not know the rationale, they know where that decision is.

MR. JOHNSON: A couple things on the briefing piece of it. Let's just assume -- and put yourself in the shoes of the management attorney for a moment. They have the sort of twelve factor supervisory 2(11) test, they have the burden of proof, they have to show specific examples of the authority existing, they have to show responsibly to direct that there will be some consequences, they have to show discretion, and it can't be a conclusory showing. And let's say you have four or five of those employees at issue and you're going through it one at a time because there are different supervisors and you throw a few other issues in.

I realize -- and I have great admiration for union attorneys because typically you walk in with very little preparation, very little access to the documents, only talking to witnesses one or two times before an arbitration and you can pull it all together, but when you have a document heavy case

where you have the burden of proof and you have all these different prongs of tests, is it really fair to expect an attorney to walk in and be able to build a record and make a convincing case to anybody?

MS. SENCER: I'm going to say yes.

MR. JOHNSON: I thought you'd say yes.

(Laughter.)

MS. SENCER: There is no point in time when the evidence is fresher than what you've just heard it. That is the moment when you've heard all of this. And most attorneys who do oral closings, during the course of a hearing they say, "Oh, this is what he said, I'm going to put that down in this spot right here because that's going into my closing as a point that I want to highlight because it really shows how it addresses points two, three and four of the supervisory status test."

MR. JOHNSON: But what if you have to have 20 or 30 documents you have to talk about regarding interchange between locations, community of interest factors, things like that? Can you really have all that spiralling out in your head so that then it just emerges like Athena, "Boom, here I am, perfect brief, perfect argument?"

MS. SENCER: There is a tradeoff between perfection and speed in some of these cases, but I'm not sure that perfection is what's necessary. Perfection is what delays us. And perfection in writing the brief is not the same thing as getting it right on the decision. Getting it right on the decision, the regional director has the time that they need from the record to pull all of that together. The job of the advocate is to highlight those issues so that the regional director knows what they're looking for in the record.

MR. JOHNSON: But isn't there a correlation between quality and due process?

MS. SENCER: Not necessarily.

MS. SCHIFFER: And whose documents are they?

MS. SENCER: They're always the employer's documents in those cases. The union doesn't have those documents.

MR. PEARCE: And whose burden is it if it's a supervisory issue to establish what is being asserted?

MS. SENCER: Most frequently the employer. Every once in a while the employer will state it the other way and say our unit is

incorrect, and then we have to defend our unit. But most frequently it's the other way around and the employer says the argument is overly broad.

MR. PEARCE: Thank you. Mr. Deakins.

MR. DEAKINS: Thank you. I just have a few comments to make. I do think that the proposed rule has aptly been described by the minority view as "election now, hearing later," which means a lot of essential issues do not even receive potential pre-election consideration by the Board. And I think there is a very serious legal question as to whether this rule will be considered ultimately. It almost invites employers to file litigation to set aside these rules.

I think the approach clearly violates Section 9(c), and the legislative history shows that if you go back to Senator Taft's statements in 1948, he said, in describing the pre-election hearing, quote: It is the function of hearings in representation cases to determine whether an election may properly be held at the time, and, if so, to decide questions of unit and eligibility to vote.

And in the 1978 discussions in Congress, Congress again said that pre-election hearings must

address all election issues, including issues of voter eligibility, and they rejected proposed amendments that would have implemented shortened pre-election periods without hearings on unit scope and voter eligibility issues. I also think that the rule, to the extent that it gives the hearing officer discretion to make decisions, is clearly in violation of the statute.

The hearing officer's role, as I've always understood it, is to simply create a record, and that's it. He has no authority to do anything else. So I really feel like the Board is getting too close to the edge of the law in some of the things it's doing. I think it's almost inviting litigation.

I wanted to make only one final comment on post-hearing briefs. The real advantage is that if you are able to file briefs you have a written transcript of the record, and that's not something you can have on an oral argument. I think that's a very important thing.

And one final note. The comment that this is like an arbitrator issuing a decision and saying, "I'll send my opinion to you later," that's not anything like what we're talking about here.

What we're taking about here is directing an election and making a decision later. It's not a matter of, "This is my decision and I'll write you an opinion later about it." There is no decision. It's simply a direction of election with something to come later. Thank you.

MR. JOHNSON: Just one quick thing. What if it's just one or two issues that are really separating the parties? Do you have a problem with having oral argument at that point?

MR. DEAKINS: A record is still helpful. And it seems to me that it's important, at least certainly from an appellate standpoint, to be able to argue in a written brief what's in the written record, so yes, I would say in all cases, which as I understand is the existing practice of the Board today.

MR. MISCIMARRA: Mr. Deakins, regarding something I had mentioned earlier, we have this current practice which is seven days, and for the time being I'll exclude the possibility of an extension, but there is also a potential issue of a request for review to the Board. If we were to preserve the current practice with respect to post-hearing briefing which provides a roadmap to

some degree for the only permissible decision maker, that is, the regional director to actually base his or her decision on the record, and if we took the equivalent amount of time and found a way to squeeze it out of ur internal procedures for evaluating requests for review, is that an approach that you would find to be objectionable as to this particular issue?

MR. DEAKINS: It would not be objectionable to me, no. You're not taking away any privileges that the employer has.

MR. HIROZAWA: I would ask you to think back to the representation cases that you've handled through a decision. In how many of them do you think that you would have been unable to adequately point out the relevant evidence and the legal arguments in a closing statement?

MR. DEAKINS: Well, I would say in most of them. In a case where you have competing witnesses at least, I think it would always be the case because you've got to look at all of those testimonies together and try to figure out where to come between all those witnesses.

MR. HIROZAWA: Thank you.

MR. PEARCE: Thank you very much. Mr.

King.

MR. KING: Thank you, Chairman Pearce. Again, I'm appearing here on behalf of the HR Policy Association and SHRM.

With respect to briefing, it's been my experience that briefs are helpful to the region, the regional director making the ultimate decision, also helpful to the Board, and further helpful to have a more complete record. Beyond that, supervisory issues, as Mr. Johnson just mentioned, can be very fact intensive. I mentioned the fact that twice the Supreme Court in this country has had to deal with Section 2(11) issues that are not necessarily easy to address in closing argument or, indeed, even with appropriate briefing.

Further, I would cite multi-site voting unit cases where, as the Board is well aware, the party articulating the position that the only appropriate unit is a multi-site unit must overcome the single site presumption. That is not easily accomplished in a closing argument.

Finally, with respect to briefing, the Board's decision in Specialty Healthcare, if it stands, imposes a considerable burden on a party that is contesting the sought after unit that wishes

to add, or perhaps subtract, and that's an open issue, employees with respect to the unit. That is the accretion test. It's an exceedingly high standard and very fact intensive. So briefing has a positive impact on the determination process.

With respect to the hearing officer recommendation, and we touched upon this but I don't know that we really drilled into it, the statute's quite clear that the hearing cannot make recommendations. But if the hearing officer is deciding whether 20 percent, putting aside the math issues that Jonathan Fritts articulated, the hearing officer in making those kinds of determinations, I would submit to you, is making a recommendation.

You clearly have a statutory problem. Under the proposed rules you have pushed the hearing officer into a recommendation process whether you acknowledge it or not, and I think if this matter goes to a judicial proceeding the Board is going to have a great deal of difficulty defending its position on the recommendation issue.

I want to close by talking about the Board's challenge ballot procedure process, a process that's troubled me for some time. In our statement at pages 10, 11 and 12 we get into this a

bit.

We went back and asked the Board under a FOIA request how often the challenge ballot procedure has been utilized, frankly not that frequently, and in most cases a very small number of potential voters. I think that's good, because if you think about the challenge ballot procedure it's flawed in many respects.

We cite in our paper studies in the voting rights movement, studies in analyses where procedures similar to what happens in a challenge ballot proceeding is looked on with a great deal of disgust and angst in the general election process.

Stop and think about it. You have an individual that may not be interested in voting in the first instance. You try to explain perhaps to that individual that his or her vote's going to be challenged, and they may proceed to the vote and maybe they won't. They go into a room that's foreign to them, and then if they proceed to the table to vote either the Board agent and/or the employer representative or union representative challenges this person, and at that point they're wondering, "Why am I here, what's going on?" Think about the civil rights movement and some of the

challenges in this country. Very repugnant.
At any rate, let's assume that our voter continues to proceed to cast a vote, goes to the curtain, pulls the curtain, passes the ballot and comes back. His or her ballot then is placed in a special envelope with his or her name on it. And the individual at this point is wondering, "What is going on here," even though you've tried to explain the process in the first instance. "Is someone going to know how I voted, why are they taking my name, why is this going in a special envelope?"
This whole process is rotten with potential abuse, and we could cite common studies o the general voting process itself. I think the Board was well advised the last time they went through this process to drop the so-called 20 percent rule. I would strongly urge you to do it this time. If you continue to use this as a linchpin either to defer voting unit issues post election, I would strongly then urge you to look at the whole challenge ballot voting procedure.
I cite in our presentation one recent Board election where well over 12 percent of the voting unit was subject to challenge, and I know from the election some employees never voted. But

even if this process goes exceptionally well, explaining to voters that the challenge ballot process is like this, this and this, you have people waiting in this long line, this takes time, and if it's up to 20 percent it will take a lot of time, and they may not ever vote. I submit to you this will decrease voter turnout, and it's repugnant to our whole voting process in this country. If you do continue to use the challenge ballot procedure for this rule, I would submit that challenges ought to be resolved prior, not in front of a voter, that voter ought not to be subject to this type of potential abuse, that there ought to be a cap on the number of challenges that can be presented, and, frankly, the challenge ballot procedure should have a number on the ballot, not the employee's name, but a number that could go into this election in much greater detail.
I just submit to the Board that using the challenge ballot procedure to remedy post-election issues is not good for anyone, particularly the employee. Thank you.
MS. SCHIFFER: I have a question. I read your comments about the challenge ballots, and I basically have this question about it. The Board

has always had the challenge ballot, I don't know if forever and ever, but for decades has had a challenge ballot procedure. Right?
MR. KING: Yes.
MS. SCHIFFER: And do you think it would be useful in connection with the proposed rules if the notice of election actually set forth who would be eligible, who may be unresolved, and challenge sort of what the challenge ballot process is so that people would know when they went in that this was part of the voting process and that this is the way it works?
MR. KING: Member Schiffer, I think that would be helpful. I would go further if we go down this route that only the Board agent could be the challenging party, if you will. I would not permit the employer or union to challenge based on some anecdotal evidence, as I have experienced.
What I didn't mention is that sometimes a challenged voter will go back to his or her department or unit and say, "They're challenging people, you don't want to go in," and you chill the environment that way. So there could be reforms, I agree, but the data from the Board from 2011, 2012 and 2013 shows a very infrequent use of the

challenge ballot procedure, and expanding it to 20 percent I think is just flat wrong.
MS. SCHIFFER: The data you're relying on, those are determinative challenges?
MR. KING: They are challenges, Member Schiffer, that were made. I don't know if they were determinative or not. The average number of challenge ballots is only 4.5 per election, and most of them were five or fewer employees, but I don't know the answer to that question.
MS. SCHIFFER: I wondered about that, too, when I read that as well.
MR. JOHNSON: You're talking about pages 10 and 11 of your 2014 comments. Right?
MR. KING: Yes, Member Johnson.
MR. JOHNSON: I didn't quite catch, and I know you were trying to get through a lot of material there in the comments, but what really is going to be the incremental delay that you predict if suddenly we have a much higher frequency of challenge ballots beyond an average 4.5 an election or whatever your statistics say?
MR. KING: The points we were making at pages 10, 11 and 12 do not speak to the so-called delay issue. They spoke to the chilling of

participation and the potential lowering of voter turnout and the concerns associated therewith. There may very well be increased litigation as a result of the voter challenge process. That has been spoken to by a number of my colleagues, but it was more a procedural concern about how, Member Johnson, this process works and how it's detrimental to employee free choice.

MR. JOHNSON: You'd just mentioned longer post-election proceedings, and I was trying to figure out what you meant.

MR. KING: Well, my point there, and I know where you are in the paper, my point is there that there may very well be increased litigation on the issue of who was challenged and who was not. And you've heard this before. If the number of challenge ballots is not dispositive or determinative of the outcome of the election and the unit is successful, the status of the individuals challenged will not be resolved by the Board in the first instance, and you'll have to resolve that issue either at the collective bargaining table or through a unit clarification proceeding. That's what we meant by incremental litigation.

MR. HIROZAWA: I'd like to go back to the

main topic, specifically the closing statements in post hearing briefs. I understand that there are very significant policy considerations that will have to be grappled with to figure out what's going to produce the best decision making process.

But as a matter of law, if it's the regional director that makes all these determinations, is there any legal problem with the proposed changes concerning closing statements and post hearing briefs?

MR. KING: Member Hirozawa, I think there is to this extent: if the hearing officer has made recommendations/determinations, that is an issue whether it's addressed in briefing or not. But the issue ultimately on briefing, is it helpful or not, I think's that's a policy decision. I would concur with you. Ultimately I think, though, that the Board and the parties are well advanced in their decision making to have the benefit of that briefing.

I read Board cases almost daily and I think I stay on top of the law, but for me at the end of a representation proceeding to be able to articulate in closing argument all the relevant cases, particularly in a community of interest test,

that's a challenge I think for any practitioner. So I do think briefing does have a legitimate place.

The final answer to your question is that there has been some discussion here today about the Federal Rules of Civil Procedure. I know you practiced for many years in the courts and you have private practice experience. I think you would have to concede that there briefing is permitted, and I think we can draw some valuable experience from the Federal Rules of Civil Procedure here.

MR. PEARCE: Thank you all.

(Recess.)

MR. PEARCE: Okay. The seating now will be with regard to D and G, Board review, to address whether and how to amend the process for Board review of the decision and direction of election. Seated would be Brian Petruska and Curt Kirschner. Mr. Petruska, you may proceed.

MR. PETRUSKA: Thank you, Chairman Pearce, Members Hirozawa, Johnson, Miscimarra and Schiffer. My name is Brian Petruska. I am counsel to the LIUNA Mid-Atlantic regional organizing coalition. We are a coalition of laborers' district councils located in six states stretching from Pennsylvania to North Carolina. The coalition is

the organizing arm for the Laborers International Union in those states. My office is in Reston, Virginia, and I've primarily practiced before Region 5.

I'd first like to address why the proposed amendments are necessary. I was surprised to see quite a number of comments from business organizations questioning the needs for these amendments, and I was surprised because, in my opinion, the Board's representation election program faces nothing short of a crisis.

In 2009 the Board conducted approximately 1,700 representation elections, and that number represented the fewest since 1940, but that comparison isn't fair because the elections in 1940 involved nearly 600,000 workers, whereas only 96,000 workers were involved in 2009. I hardly need to point out that the U.S. workforce is now three times larger than it was in 1940.

Moreover, the Board floats adrift of its core mission. Approximately 90 percent of the Board's caseload consists of ULP filings, with only 10 percent directed to elections. This is a profound inversion of the Board's purpose. The National Labor Relations Act is wholly different

from Title VII and the other civil rights influenced statutes. It does not create a private right of action for the purpose of providing individual recovery. Rather, its purpose is, in the words of the Act, to encourage the practice and procedure of collective bargaining.

The way the Board encourages collective bargaining is centrally by holding these representation elections, and the Board is currently failing in that mission. It is only reasonable for this agency to question why, with so many workers now compared to then, so few take part in representation elections. It is only reasonable for this agency to ask what can it do to make the process more accessible. The proposed rulemaking is a modest step in the direction of making the election process swifter, less litigious and more fair. In light of the historic decrease in the utilization of its representation apparatus, not taking these steps would be an abdication of the agency's responsibilities.

Which brings me to the proposed rulemaking. What is at the heart of this rulemaking? There are many parts, but central to it is the elimination of an interlocutory review. In

the annals of jurisprudence, few things are more settled than the conclusion that an interlocutory review is wasteful, that it causes delay and produces piecemeal litigation. Interlocutory reviews are generally considered anachronistic, and their elimination usually is considered reform.

The specific facts here support the Board's current proposal to eliminate in review of direction of election the interlocutory review. From 1973 to 2009 requests for review were filed in only 1.2 percent of cases on average -- this is RC cases -- resulting in the modification or reversal of case outcomes in only 7/10 of a percent of RC cases, and yet this level of review has a median period of delay averaged over 29 years of 257 days, so over eight months.

As an aside, I currently have an election in which ballots have been impounded since last July due to a request for review. It does not make sense to prolong cases by a factor of 600 percent in order to adjust the outcome of 7/10 of a percent of cases. Particularly in light f the Board's serious backlog, the agency can and should take reasonable steps to reduce redundant litigation.

A final point. My written comments point

out that the utilization of the request for due process historically correlates strongly with the incidence of illegal discharge and illegal intimidation and unfair labor practices. From 1990 to 2009 the correlation is very high, nearly a one-to-one ratio. I do not suggest this correlation provides a basis for eliminating this review, but it is a factor that should support the decision to eliminate what is otherwise a redundant and potentially wasteful procedure.

At bottom, those who oppose the elimination of the interlocutory request for review do so on the grounds of inertia, that an object at rest should stay at rest. You're left with this argument because the process has little to recommend itself on its own merits. If it had never existed, no one would see fit to establish it. If it were eliminated, no subsequent Board is likely to see fit to restore it. The proposed rulemaking has it right on the merits with respect to this step, and the current interlocutory request for review should be eliminated as proposed. Thank you.

MR. MISCIMARRA: Mr. Petruska, thanks for being with us today. You know, one way to eliminate the need for Board review would be to go back to the

early '60s delegation of representation cases to regional directors, because if we'd decided all of those then there wouldn't be any need for review. But as opposed to inertia, as I said before, we want to get to the right outcome promptly and do it in a way that's consistent with the statute.

The statute says that the parties have the right to seek Board review of, quote, any action of regional directors, including requests that we review pre-election party motions for a stay in the election. So what do we do with that to the extent, as the proposed rule indicates, that it purports to accomplish the elimination of that review prior to the election?

MR. PETRUSKA: The proposed rulemaking does state that it will permit a review upon request, discretionary in circumstances, and I believe I would look for a standard where the review might otherwise escape review. That's the federal standard for interlocutory reviews in general. I believe there's a separate exception in federal cases. But generally the standard is that to get to an appeals court in the middle of a case you have to be able to show that the case might otherwise evade final review. I don't see anything in this proposed

rulemaking that differs from that.
I do think that the parties can have their rights preserved to raise an issue they need to raise, and it doesn't have to be done before the end of the case. It doesn't have to be done in the middle of the case. I do think it would be important to make sure that the process does not eliminate the ability to raise an issue.
But consolidating it to the end of the process, which is how I understand the proposed rulemaking, I think, given all the factors, this is the proper course in terms of prudent husbanding of resources and dealing with -- I mean, this Board has had a lot of issues with the two person Board, lots of things that have made its docket, I imagine, quite long, and consolidating litigation is a good step to help redress that problem.
MR. MISCIMARRA: Thank you.
MR. JOHNSON: Why should there be a presumption that an election was regularly conducted if we basically moved virtually all review of it to the back end after it's taken place?
MR. PETRUSKA: Whether an election would always occur? Is that --
MR. JOHNSON: No. Why should we have a

presumption that an election was regularly conducted and the result should stand as is if we're basically moving all of our review of it to the back end?
MR. PETRUSKA: I'm not sure that is the presumption, and I'm not sure that having an interlocutory review rejects that presumption. There is still the discretionary review at the end of the proposed rulemaking. If in fact the election has been improvidently held the Board can address it at that time. It will receive the papers and be able to make a full determination based upon the filings, and I don't think that reflects a presumption.
MR. JOHNSON: What proposals, if any, would you have, though, to make sure that there was no delay on the back end of the process?
MR. PETRUSKA: Can you specify where?
MR. JOHNSON: Well, basically the way that I take it is that you're not thrilled about having to wait a very long time while a request for review is pending. So we'd basically pull that piece and put it to the end of the process, wherever it may end up, and who knows what the final rule may ultimately end up looking like. Should there be anything where we self-regulate in terms of

timetables in this regulation to get out decisions on elections, election requests for review?
MR. PETRUSKA: You're saying under the current procedure or under the proposed rule?
MR. JOHNSON: The proposed rule, the modification.
MR. PETRUSKA: Could you repeat the question?
MR. JOHNSON: Sure. It seems to me that one of the main problems you have is delay. It also seems to me that part of the problem for the delay is essentially that the Board is sitting on this. And my question is: Should, as part of this NPRM, we attempt some self-regulation in terms of turning around decisions on these issues regardless of where they end up in the process?
MR. PETRUSKA: Like a mandatory dismissal after it sits for a period of time?
MR. JOHNSON: Right, or perhaps going the other way, like a mandatory grant of review if it sat for a certain period of time.
MR. PETRUSKA: That process wouldn't make sense to me. I don't see much to recommend that.
MR. JOHNSON: Because?
MR. PETRUSKA: An automatic either grant

or denial of it? If it automatically grants to review, then you're just going to have a larger backlog, so it makes the problem worse.
MR. JOHNSON: Well, that probably isn't the only reform that would be necessary to speed things up. Do you have a concern that we would be slow on the back end of all of this process if essentially our review is at the back after the election has already happened, or is that not concerning to you?
MR. PETRUSKA: Well, I suppose it's possible. I think in general that one of the merits of the proposed rulemaking is that by having the election process play out you do let the election itself play a role in narrowing and potentially eliminating litigation. One thing I point out in my comments is that currently around 95 percent of cases don't involve determinative challenges. I'm presuming that you have a ratio like that.
Letting the election determine eligibility issues is a smart thing to do because you're going to eliminate most of them. Similarly, here, once you have the election outcome the parties will know what the initial determination of the election was, and it may be that people who had a

gripe somewhere in the process liked the election result, and so that's going to eliminate that litigation because they won the election even though they didn't like the process. I think that by consolidating and narrowing you probably do reduce the overall amount of litigation rather than enlarge it.

MR. JOHNSON: I think that's a plausible thesis, but would that be the only source of your way that we institutionally solve the delay problem, just by issues dropping out because we go through and hold an election?

MR. PETRUSKA: I know that the Board can delegate to three person panels to divvy up the caseload. You have a five member Board now for the first time in a long time, so that's obviously a smart way to do it. I don't see much of an alternative to going through and dealing with the cases you have, but I do think that the proposed rulemaking is a smart step in terms of letting the election process do a lot of the heavy lifting of reducing litigation and also keeping that litigation from being dealt with repeatedly in the process.

MS. SCHIFFER: In the example you gave did the Board grant the review?

MR. PETRUSKA: No. It's still pending.

MS. SCHIFFER: So the request for review is still pending. And could you comment on the delay in cases where employers, if there are any, on the impact of the proposed rule change in cases where employers do not request review?

MR. PETRUSKA: Comment on the effect of it?

MS. SCHIFFER: The proposed rule would eliminate the 25 day waiting period, so could you specifically comment on that?

MR. PETRUSKA: Well, when looking at all the different steps, the proposed rulemaking, as I look at it, clears up obstacles to conducting elections expeditiously, and the biggest time period it sweeps away is the minimum 25 days in scheduling the election. I mean, it's foreseeable that if you have a stipulated election you could do that one or two weeks later. Now, of course with a stipulated election it's going to be agreed to, the date gets agreed to, but there would be no presumption -- there's no other reason not to hold it in a week. The employer has no other reason not to hold it in a week, so you could hold it a week after stipulation or you could hold it two weeks after stipulation,

and so that does a great deal to expedite the election process by eliminating the formality of the 25 day waiting period.

MR. PEARCE: Thank you very much. Mr. Kirschner.

MR. KIRSCHNER: Thank you again for this opportunity to address you at this time with respect to the NPRM changes with respect to Board review.

There are two significant sets of changes that the Board is proposing with respect to Board review. The first deals with further limiting Board review prior to the election, also referred to as an interlocutory review, in place of the current discretionary standard. The second is with respect to changing the Board's post-election review to a discretionary standard. In our view, neither change is warranted or appropriate under the law; and moreover, neither change we think would have any substantive impact on expediting elections, but, rather, would only truly end up impairing the fairness of the election process.

With respect to the pre-election Board review, the NPRM's proposal to eliminate the current discretionary review in place of an extremely limited special permission standard apparently -- it

is not entirely clear from the NPRM -- but apparently would effectively preclude pre-election review by members of the Board rendered by hearing officers and regional directories.

This is especially concerning, given the enhanced discretion that is provided to the regional directors and hearing officers elsewhere in the NPRM. This delegation of authority we believe is inconsistent with the 1959 amendments to the Act, in particular Section 3(b), which enables the Board to delegate matters to a regional director subject to the right of the parties to seek Board review of any action by the regional director, including requests to stay elections.

In this way a Board proceeding, because of Section 3(b) and other components of the Act, is different than the way in which federal court litigation proceeds. There is nothing like Section 3(b) with respect to the role of circuit courts and district courts, and for that reason I think that the analogy to federal court litigation is flawed with respect to this particular issue.

Pre-election decisions currently subject to the Board's discretionary review include many critical issues such as unit scope, supervisory

status and voter eligibility. Particularly in the healthcare field with large units and complex determinations of supervisory status, discretionary Board review of such pre-election issues serves the purposes of the Act by enabling the Board to take action when necessary to avoid obvious errors being made by the regional directors. Although the great majority of regional directors and their staff are performing their jobs admirably, errors do sometimes occur.

Maintaining the Board's ability to step in prior to the election, when it concludes that it should do so, helps avoid unnecessary litigation and subsequently re-run elections after disputes are resolved. Limiting the Board's discretionary review to the special permission standard is not likely to have any substantive benefits to the process. The Board rarely grants such review, as already noted, issuing them only in relatively rare cases to avoid situations in which the Board would likely need to re-run the election if it were to occur.

Moreover, the pendency of the request for review does not substantively interfere with the issuance of a direction of election. The Board's internal procedures for reviewing the request for

review are the Board's internal procedures, and you can modify those. Therefore, eliminating this discretionary review would not in our view by itself expedite election, but would in certain circumstances allow elections to be conducted that inevitably would only need to be re-run.

With respect to the post-election review process, the Board seeks to make a major substantive change by leaving this review entirely to the Board's discretion. In the view of many employers, the Board by doing so would be merely attempting to avoid statutory obligation to review and correct disputes under its jurisdiction.

As a preliminary matter, it should be noted that this proposed change only affects post-election procedures so it doesn't affect when elections are conducted. It's obvious, based on the process currently in place, that parties in Board proceedings would much prefer to have an opportunity for Board review, as demonstrated by the number of stipulated election agreements rather than consent election agreements. The proposed rule change is also especially problematic given the extremely broad discretion elsewhere in the NPRM that enables hearing officers and regional directors to hear many

issues that we believe would make it more likely that the Board should actually conduct a review in the case.

Finally, this proposed change is only likely to delay the commencement of true bargaining relationships. If the Board decides not to review a post-election dispute the appealing party is likely to feel that it has not had a real chance at a real review of this dispute. This will, in our view and in our concern, promote the use of technical 8(a)(5) violations so that the Board and perhaps a court later will be required to review the dispute.

In these types of cases, the employer is essentially required to engage in activity that they know will be considered by the Board to constitute an unfair labor practice charge in order to obtain review of an issue that presumably could have been resolved during a representation process. But the entire technical 8(a)(5) process is problematic, it's extremely slow, it exacerbates disputes within the workplace, and it delays bargaining between the parties.

For hospital employers especially, the technical 8(a)(5) process can be problematic. Hospitals need to preserve, as I've stated before, a

tranquil healing environment throughout its care of patients. The longer disputes exist within the litigation process, the more disruptive that environment is going to be. As leaders in their communities, hospitals are generally reticent to be seen as violating the law even for technical reasons.

Moreover, many hospitals are sometimes evaluated based on lack of legal violations. For example, a hospital's Magnet status, a recognition program operated by the American Nurses Credentialing Center, or a hospital's accreditation by the Joint Commission could be questioned by having unresolved violations of the NLRA even if they are considered, in our parlance, technical violations. For all these reasons, the Board should not limit further its review of disputes either prior to or after an election. Thank you.

MR. MISCIMARRA: Mr. Kirschner, 3(b) indicates that any action of the regional director is subject to a party's potential request for review. In the proposed rule it kind of interprets that, under the special permission standard, a new narrower special permission standard, as meaning the Board would consider pre-election requests for

review if they would otherwise evade the review.
And this is in the category of me asking what our own proposed rules mean. Have you given any thought to any examples of what that language means in the representation election context? What kinds of issues do we have that might otherwise evade review and therefore still be subject to pre-election review under that new standard? And I'm not suggesting that you should be able to come up with examples, because I haven't quite figured that out, but I was wondering if you have.
MR. KIRSCHNER: Well, I've thought about it, and I have two areas of concern. First of all, the evading review standard needs to be looked at with respect to the other component of your proposed change, which is the discretionary review of the post-election process, so would it be evading review if in fact the mandatory review right now post election becomes discretionary. That's one particular issue.
I also do not understand, having read the Board's rules, exactly how a special permission standard varies from the existing discretionary review standard. Looking at the percentage of cases in which review is granted and how small it is, I'm

not sure how it could get much smaller and still be some sort of review.
It almost appeared to me that the Board acknowledged that 3(b) required some type of review, and so therefore it established on its face the special permission standard. But it also was doing so by trying to even limit further the standards that currently exist, which seems to me to be just an apparent attempt to cover the statute by saying, "Yes, we have some review, but it's so extremely limited that in essence we're never going to grant it."
If there is true review still possible, I don't understand why the Board needs to change the current standard if you could still have discretionary review and make its discretion of course whether to grant the review or not and thereby obviously still complying with Section 3(b).
MR. PEARCE: Thank you. Our last seating is with regard to blocking charges, and that would be Melinda Hensel and Arnold Perl, both of whom have testified before.
MS. HENSEL: Thank you for having me, Mr. Chairman. I can make this real short and easy. I don't support any changes really at all to the

Board's blocking policies. I think what exists works very well.
I'd like to start off and say that I would oppose any criticism of the union viewpoint in regards to the delay that, as we've heard, is a result of blocking charges. The delay in those cases is completely separate and apart from the delay that we're talking about in the other elements of the proposed rulemaking.
Blocking charges are called blocking charges for a reason. It's because bad conduct has occurred which does in fact require a delay in the process in order that employees may be able to freely and fairly exercise their rights. Trying to compare the two, like I said, the litigation issues pre-election and what occurs in blocking delays, is not an apples to apples comparison whatsoever, and so I would reject any criticism of our position as regards to we accept the delay that does occur in blocking charges.
In the summary you requested comments on various aspects of the blocking charge; first, should the regional director require an offer of proof when these charges are filed. I would not object to the submission of such an offer. However,

I would object to the regional director making a decision on the conduct of the election or even proceeding with the hearing based solely on that offer of proof because we are dealing in those cases with ULP charges, and there are credibility issues to be determined before one can decide if the charge has merit. I don't think you can make those determinations solely off of an offer of proof, but certainly it would assist to define the parameter of the charge and how particularly egregious the conduct was.
In that regard, blocking charges in my experience are very typically investigated rather quickly. The case handling manual gives the regional director very broad discretion to decide how he or she is going to deal with the charges. I recall one instance where we filed the charge. It was maybe three or four days before the election. We got the call the next day saying that, "You will be here with all of your witnesses, you will not leave until every witness has given a statement, and we will issue a decision on the merits in advance of the election and make a decision as to whether or not it's going to proceed." We did that. We presented witnesses from 8 a.m. until 1 a.m., and

the regional director did in fact issue his decision the next day. So the discretion that's provided for in the case handling manual is exercised by the regions, and I just don't see any need to change the way it's exercised.

There were questions about whether or not an R-Case hearing should proceed in the event of the filing of blocking charges. Again, I believe that the case handling manual already sufficiently handles those questions that you've posed. In a type one case the regional director can decide to proceed. Commonly, in a type two case, because it might result in the dismissal of the petition, it will be held in abeyance pending. I think that that's a fair resolution of those two different types of cases.

I suppose my objection to proceeding to hearing in a type one case is we may find ourselves in a position where, if the conduct has been sufficiently egregious, we're going to have trouble gathering the witnesses that we need even to present our unit issues or exclusion issues. I have been in that circumstance where the witnesses really don't want to come forward because they've been sufficiently brainwashed by the employer, and it's

been very difficult to present that case.

However, I would say to the extent that we are able to dispose of administrative issues it's worthwhile to do so. That way, once the charge is resolved you can get yourself to election much faster. And again -- I see my time is up -- the difficulty there, though, is if the resolution of the charge ends up taking an especially lengthy time, and that can happen, you may get to the point where it is finally resolved and find that your unit is completely changed and you really need to go back through those procedures again. So it's a tossup as to whether or not it's a waste of Board resources to continue the process while you have a blocking charge pending.

MR. PEARCE: Some might argue or some have argued that a blocking charge is a mischievous tool, particularly when the petition is used for decertification. How do you respond to that?

MS. HENSEL: I agree that all charges can be mischievous tools, not just blocking charges. Employers have been known to file charges relating to the solicitation of cards in an attempt to block and delay. Sometimes when you've got an election with two rival unions involved one files charges

against the other related to bad conduct in an attempt to delay to have a longer period of time to get their voice out there. I can't say that it's never done.

But at the same time, I think for the most part our regional directors are quite good at seeing through the smoke, that they make typically good decisions on those charges, and that they do give a lot of thought to what the effect of the employees has been when making their decision as to whether or not to proceed.

MR. MISCIMARRA: Ms. Hensel, I want to just preface this by saying that I really appreciate your contribution. And this applies to the speakers throughout the day today. I think people have been very thoughtful and very reflective and also very civil in terms of talking about these issues that have generated such strong feelings on all sides.

With respect to blocking charges, this is an area that's interesting because all five members are very interested in comments on the blocking charge doctrine. I have a mechanics question and then more of a philosophical query.

The mechanics question is: If you have a blocking charge that remains unresolved for some

period of time, and then if the blocking charge clears, if the underlying ULP is subject to a resolution or there's ultimately an election, if an election takes place in months or in some cases years later, does it make sense to have a different election eligibility date and then a different Excelsior list as compared to what may have been an original Excelsior list that then becomes stale? What are your thoughts about that?

MS. HENSEL: I think in some cases, depending on the length of time that's passed and whether or not the unit has changed substantially, it might be required. I actually don't like agreeing with that, but I agree that it might be required.

If the unit hasn't changed all that much, and I don't know if there is a percentage of employee turnover you would ascribe to that, then I think it would be fair to go back to that original eligibility date because I don't think that a party should benefit by virtue of its own bad conduct, and the change in the unit description or the composition may actually end up benefiting that party.

MR. MISCIMARRA: It could go the other

way, too.
MS. HENSEL: It could. This is one of those -- it's very -- I don't think you can predict.
MR. MISCIMARRA: My other more general question is: Would you agree that there is at least some tension? From the employer's side, employers are suggesting in many of the contributions where we've received comments, that we have this process for representation elections and that there are these issues that are real issues that at least warrant resolution.
The proposed rule kind of resolves that by saying, "We want to resolve these issues, but we really need an election quickly, and then we can resolve the issues." And then the blocking charge doctrine, there are these issues that really are serious issues that require resolution, but with respect to blocking charges we actually say, "Well, no, the election can wait."
And I'm not asking you to embrace the idea that we should just abandon the blocking charge doctrine. But would you agree at least that the issues themselves raise kind of an interesting tension because in both cases you have some legal issues that require resolution, that in one case

we're saying that going to the election quickly doesn't matter, and then with respect to the blocking charges, if we stick with current doctrine, that at least with respect to many of them we're saying that actually the resolution of the charges is more important than proceeding to an election quickly?
MS. HENSEL: I would go back to the fact blocking charges are filed when the person or the entity filing doesn't feel like that there is a fair opportunity for an election anymore, and that's why it makes sense to stop the process and try to remedy the harm that's been caused. If employees have been told, "No, we're closing down and you guys will never work again if you do this," do you believe that it's possible to have a fair election? I don't. I don't think that it's possible. And the employees need assurances from the government that that contact was unlawful, that they're not allowed to do that, that they're not allowed to say that, and that you need to see this notice posting for 60 days before we can let you go vote to make sure that you understand that that's the case.
MR. MISCIMARRA: I appreciate the response. Of course, in both cases the alleged

legal issues are unresolved at the time, which kind of begs the question of when should the resolution take place.
MS. HENSEL: Especially in type one cases the union or whoever files does have the option of filing a request to proceed, and in my experience when we do that they're typically honored. That requires the party filing the request to think long and hard and really know its bargaining unit as to what has occurred. In that regard, there were requests for comments about whether or not the election should have been and then the ballots should just be impounded. Again, this is a tough topic. There are instances where that might be a fine solution, but I don't think it's a good solution for all instances or even most.
MR. MISCIMARRA: Thank you.
MR. JOHNSON: If I can just jump in. First off, thank you both personally in our last sitting of the day, and thank all of the speakers. We went a little bit long, but everybody made invaluable contributions, and I appreciate everybody having come out and contributing.
I would also like to say that I fully accept the good faith behind the unions' and labor

movement's position that blocking charges are an important and in some cases necessary part of the process in that just because there is an election that may be pending, that doesn't mean, "Hey, anything goes," and I think we're all sort of unified on that.
I guess my question is: To the extent that we wanted to put sort of a quasi 10(j) standard of if it's irremediable conduct without a postponement, that in our regulations on blocking charges and get out of this sort of type one/type two arena, would that be the phraseology that would make sense to you, "irremediable without postponement on an election?"
MS. HENSEL: I suppose I could wrap my arms around that. Again, it's another one of those sort of vague Board phrases that's always subject to interpretation. How would you define that phrase?
MR. JOHNSON: Right. Well, that basically we're not going to have laboratory conditions without -- a postponement without putting the election and basically the petition in abeyance because of maybe a decertification petition, for example, in my example.
MS. HENSEL: I haven't really considered

such a thing. Can I think about that a little bit?
MR. JOHNSON: Of course. The comments period is over with, but I'll let you think about it.
MS. HENSEL: Thank you.
MR. PEARCE: Thank you. Mr. Perl.
MR. PERL: Thank you very much. The NPRM's attempt to focus on identifying and minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation properly puts the spotlight on the Board's blocking charge policy. In fact, the Board's blocking charge doctrine has been in the spotlight for the last 20 years.
Let me explain. The Board, when it dealt with this in the last rulemaking procedure, explained in 2011, when it issued its final rules under the NPRM without making any changes to the discredited blocking charge policy, that the policy was not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petitioner.
20 years ago in 1994, then Board Chairman William Gould created the National Labor Relations Board Advisory Panel, comprised of both union and

employer panels, consisting of 50 practitioners, 25 from the union side and 25 of us from the management side. The stated purpose of the advisory panel was to provide input to the Board, to achieve efficient and equitable reforms, and to implement the objectives of the Act and its procedures.
Interestingly, one of the issues on the advisory panel's agenda was in fact this Board's blocking charge policy. Many of us serving on the advisory panel then advocated that the Board eliminate the blocking charge policy due to the fact that it was subject to outright manipulation as was asked by the chairman. Although I believe the advisory panel made a number of significant contributions to the Board, one of the items that remain without change is the blocking charge doctrine.
Now, the Board's blocking charge policy should be eliminated once and for all. This is perhaps the easiest of all the issues appearing in the NPRM that the five member Board could agree on. This is in keeping with the Board's declaration that no party should use the unfair labor practice procedure to unnecessarily delay the conduct of the election. In those cases where pre-election unfair

labor practice charges are filed by a party, instead of blocking the holding of the election or implementing any of the other possible changes mentioned in the NPRM, the Board should simply consolidate the charges with any post-election objections which may be filed by said party.
Deferring such matters to post-election challenges, as stated by Member Miscimarra, would follow the approach taken by the Board majority's proposal in the NPRM to defer until after the election resolution of issues affecting voter eligibility. And if the charges are sufficiently serious -- Member Johnson alluded to the 10(j) procedure. That seems to be a procedure that's used more often today than previously, and would seem very appropriate to deal with outrageous unfair labor practices without the need and necessity or advisability of cancelling or postponing an election.
In sum -- and this is on a more macro basis -- I think the blocking charge policy is one of those areas, like the 25 day rule you were just discussing eliminating in the request for review procedure, that the Board could and should as a matter of policy deal with, because you're targeting

specific problem areas rather than an overall reformulation of representation policies that's contained in the notice of proposed rulemaking.
I think under a narrow approach the Board could properly deal with these kinds of issues and make appropriate incremental improvements to its excellent overall record in the conduct of representation elections without sacrificing the employer's right of free speech or the employee's right of free choice.
I personally dealt with the blocking charge policy, and the memories remain today, where two unions in the hotel industry had five petitions at the same time. Our election was to go first. This was down at the Walt Disney World property, and the union did not want to have on its record that it lost the first of these five elections, fearing that it appeared that they would not prevail. So instead of having the election held, two weeks before the election the two unions, the joint petitioners, filed blocking charge policies, and the regional director blocked the election. And I remember coming up to Washington and filing a special appeal, urging the Board to overrule the regional director and conduct the election, which the Board in that

case did.
But not every party is represented by counsel that would take advantage of some of the other Board procedures to do that. And I think the blocking charge policy is the only area I can think of that -- and I respectfully heard the prior speaker here representing the viewpoint of labor -- that in our view this is the only area where one party can totally manipulate the Board's processes, and I think it's totally inconsistent with the purposes of the Act and the administration of the Act by a very distinguished Board.
MR. PEARCE: Thank you. Questions.
MS. SCHIFFER: I have a question. If I understand you correctly, you're suggesting that ULP charges never block an election because they're used by unions for the purpose of delay.
MR. PERL: That they can be used too often for purpose of delay. Nothing is a hundred percent absolute.
MS. SCHIFFER: And do you think that that should be the same standard when we evaluate whether employers file post-hearing briefs or whether a party be able to even participate in the election process, for example? I mean, at each step of the

way should we be guided by whether employers can use that process for the purpose of delay?
MR. PERL: Well, I think you're looking at specific factual information. I was not on the panel for the post-hearing briefs. I was sitting here and I was listening to the discussion. But I think this is an apples and oranges situation, Member Schiffer. We're all attorneys here, we all want to do an excellent job representing our client, whoever they may be, and I think the employer view on post-hearing briefs is that it serves a very useful service, especially in complex cases, to effectively formulate the arguments based on the facts of the case and present that to the regional director for his determination.
Blocking charge policy is totally different. This is a tactic. It's not a strategy. It's a tactic that can be used and has been used too often. I still remember that experience down at Walt Disney World.
MS. SCHIFFER: Sure, you do. And there have been comments filed with us about employers purposefully using other Board processes for delay. So my question is: Should that be the basis for our deciding?

MR. PERL: I think the basis for the Board's determination in this procedure should be going back to what the chairman said is the goal, what the NPRM is intended to do, that it is intended to be fair to all parties in all cases. Now, perhaps that's just aspirational, but I believe it's something more than that, because the present system, it works.
Maybe it doesn't work as well as some would hope. But when you look at weighing the considerations here, if something works fairly well currently, having elections go from petition to election in the shortest period almost in the history of the Board, there are certain areas that interfere with the efficient and effective representation process, and one is the blocking charge.
It was identified in 1994 in the advisory panel as one of the potential problems in the efficient administration of the representation process. It was dealt with again in 2011 under the first Board looking at it under the proposed rulemaking, and now it's on the agenda once again by this Board.
At some point the Board really should

come to grips with the fact that this stands out there like a sore thumb and deal with it effectively. I think it's quite different from what you might be alluding to. Is it really a tactic of employers in a pre-election to want in a pre-election hearing the opportunity to litigate the supervisory status of individuals in dispute where that has an effect on potential unfair labor practices by employers when it doesn't get resolved, when disputed supervisors affect the conduct of other employees in the unit, and where the employer is caught in the horns of a dilemma? That's not the blocking charge policy at all.
MS. SCHIFFER: Well, my question was: Should that be a factor in our decision on the proposed rule, whether parties use it as a tactic or delay? You're suggesting that should be a factor in our decision on the blocking charge. Should that be a factor in our decision on other issues that we are presented with?
MR. PERL: I think the blocking charge policy is different. The blocking charge policy almost --
MS. SCHIFFER: So you think with the blocking charge it should be, but not with the other

issues we're looking at.
MR. PERL: Because on the other issues I don't think that one could say that --
MS. SCHIFFER: People have said that. We have comments that do say that.
MR. PERL: Well, anyone who has asserted that going to a pre-election hearing creates unnecessary litigation for the sole purpose of delaying an election hasn't gone through some of the experiences of attorneys that have appeared before you for the last 30, 40 or even 50 years.
MS. SCHIFFER: So they're just wrong. My second question, and you brought this up at the beginning when you mentioned a fair process: Is it a good use of Board resources in your view to go ahead with an election where there is evidence that no fair election can be held?
MR. PERL: I think it is, because when you look at the rationale of what the panel majority has said in the notice of proposed rulemaking, some of these issues are going to wash out. It may not be necessary to resolve them post election. The unions now are winning over 60 percent of all elections. They file unfair labor practice charges, you've eliminated the blocking charge doctrine, the

petition results in going to an election and the union wins. The asserted or claimed unfair labor practice charges that have been filed are more readily resolved at that point than it is on the front end pre-election, because if unfair labor practice charges are filed pre-election most likely they're going to be litigated. If they're deferred, as you have been done on all these other issues post election, there's perhaps a much greater likelihood they will never get litigated.
MS. SCHIFFER: Thank you.
MR. PEARCE: I'd like to clarify. Mr. Perl, you've made a statement about Ms. Hensel representing the view of labor. We have no view of labor. My understanding is that this is the testimony of individuals except where they're making clear that they're testifying on behalf of an entity that they're representing. Is that correct, Ms. Hensel?
MS. HENSEL: That is correct.
MR. PEARCE: Thank you. With that, we have completed our speakers of the day. I want to thank everybody for coming, to thank all the speakers for their thoughtful comments, and I'd particularly like to thank these esteemed attorneys

in this seating for having to hang out and wait while the hours passed. I hope it wasn't too much of an inconvenience. We will start tomorrow at 9:30 a.m., and I hope everybody has a pleasant evening. We stand in recess.
(Meeting adjourned at 6:07 p.m.)

District of Columbia
To wit:
I, Keith A. Wilkerson, a Notary Public of the District of Columbia, do hereby certify that the that these proceedings were recorded stenographically by me and that this transcript is a true record of the proceedings.
I further certify that I am not of Counsel to any of the parties, nor an employee of Counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.
As witness my hand and Notarial Seal this 23rd of April 2014.

Keith A. Wilkerson,
Notary Public
My commission expires:
November 12, 2014

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