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NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, and 103

RIN 3142-AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board (the Board) has decided to issue this final rule for the purpose of carrying out the provisions of the National Labor Relations Act which "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology. In various ways, these amendments provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.

DATES: This rule will be effective on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, DC 20570, (202) 273-3737 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board administers the National Labor Relations Act, which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and their employer are unable to agree whether the employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to resolve the question of representation. As explained in the NPRM, the Supreme Court has repeatedly recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226 (1940); see also *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 37 (1942).

Representation case procedures are set forth in the statute, in Board regulations,

and in Board caselaw.[1] In addition, the Board's General Counsel has prepared a non-binding Casehandling Manual describing representation case procedures in detail.[2]

The Act itself sets forth only the basic steps for resolving a question of representation.[3] These are as follows. First, a petition is filed by an employee, a labor organization, or an employer. Second, if there is reasonable cause, an appropriate hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers are authorized to conduct pre-election hearings, but may not make recommendations as to the result. Third, if there is a question of representation, an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified. The statute also permits the Board to delegate its authority to NLRB regional directors. The statute provides that, upon request, the Board may review any action of the regional director; however, such requests do not stay regional proceedings unless specifically ordered by the Board.

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. "[T]he Board must adopt policies and

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[1] The Board's binding rules of procedure are found primarily in 29 CFR part 102, subpart C. Additional rules created by adjudication are found throughout the corpus of Board decisional law. See, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 770, 777, 779 (1969).

[2] NLRB Casehandling Manual (Part Two) Representation Proceedings. The relevant sections of the Casehandling Manual are Sections 11000 through 11886. Unless otherwise noted, all references to the Casehandling Manual are to the August 2007 edition, which predated the NPRMs.

[3] A question of representation is often referred to as a "question concerning representation." See, e.g., Casehandling Manual Section 11084.

promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *A.J. Tower Co.*, 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel[4] and the agency's regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency.

But the Board's experience has also revealed problems—particularly in fully litigated cases—which cannot be solved without changing current practices and rules. For example, pre-election litigation has at times been disordered, hampered by surprise and frivolous disputes, and side-tracked by testimony about matters that need not be decided at that time. Additionally, the process for Board review of regional director actions has resulted in unnecessary delays. Moreover, some rules have become outdated as a result of changes in communications technology and practice. The final rule addresses these and other problems as discussed below.

II. List of Amendments

This list provides a concise statement of the various ways the final rule changes or codifies current practice, and the general reasoning in support. It is not "an elaborate analysis of [the] rules or of the detailed considerations upon which they are based;" rather, it "is designed to enable the public to obtain a general idea of the purpose of, and a

[4] The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

statement of the basic justification for, the rules."[5] As this list shows, the amendments provide targeted solutions to discrete, specifically identified problems.[6] All of these matters are discussed in greater detail below, along with responses to the comments.

1. Representation petitions may be filed with the Board electronically. The prior rules required hard-copy or facsimile filing, which should not be necessary under contemporary litigation practice and technological advancements.
2. Representation petitions (and related documents) must be served by the petitioner, which will afford the other parties the earliest possible notice of the petition. The Board's prior rules did not require the petitioner to serve a copy of its petition on the other parties.
3. At the same time the petition is filed with the Board, the petitioner must also provide evidence that employees support the petition (the "showing of interest"). Petitioner must also provide the name and contact information of its representative. The prior rules gave the petitioner 48 hours after the petition to file the showing of interest. This delay is unnecessary.
4. When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow. Under prior practice, such notice was voluntary (and less detailed). The

[5] S. Rep. No. 752, at 225 (1945).

[6] In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made, except as expressly noted in the more detailed discussion of the particular sections below. For this reason, the amendments are severable.

employees will benefit from a uniform notice practice, which provides them, equally and at an earlier date, with meaningful information about the petition, the Board's election procedures and their rights, and employers will benefit from more detailed Board guidance about compliance.

5. The pre-election hearing will generally be scheduled to open 8 days from notice of the hearing. This largely codifies best practices in some regions, where hearings were routinely scheduled to open in 7 days to 10 days. However, practice was not uniform among regions, with some scheduling hearings for 10 to 12 days, and actually opening hearings in 13 to 15 days, or even longer. The rule brings all regions in line with best practices.
6. The pre-election hearing will continue from day to day until completed, absent extraordinary circumstances. Prior practice did not address the standard for granting lengthy continuances, and sometimes continuances unnecessarily delayed the hearing.
7. Non-petitioning parties are required to state a position responding to the petition in writing 1 day before the pre-election hearing is set to open. The statement must identify the issues they wish to litigate before the election; litigation inconsistent with the statement will not be permitted. Timely amendments to the statement may be made on a showing of good cause. The employer must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit. The statement must also identify the party's representative for purposes of the proceeding. Prior practice requested

parties to state positions and provide a list of employees and job classifications before the hearing, but did not require production of such information prior to the hearing. Prior best practices required parties to take positions on the issues orally at the hearing. But practice was not uniform, and in some cases hearing officers have permitted parties to remain silent on their position or to take shifting positions during the hearing, unnecessarily impeding the litigation. Finally, our experience has demonstrated that clear communication about the specific employees involved generally facilitates election agreements or results in more orderly litigation.

8. At the start of the hearing, the petitioner is required to respond on the record to the issues raised by the other parties in their statements of position. Litigation inconsistent with the response will not be permitted. If there is a dispute between the parties, the hearing officer has discretion to ask each party to describe what evidence it has in support of its position, i.e. make an offer of proof. This codifies current best practices, ensuring greater uniformity and orderly litigation.
9. The purpose of the pre-election hearing, to determine whether there is a "question of representation," 29 U.S.C. 159, is clearly identified. Prior rules did not expressly state the purpose of the hearing and, as discussed in item ten below, sometimes litigation on collateral issues resulted in substantial waste of resources.
10. Once the issues are presented, the regional director will decide which, if any, voter eligibility questions should be litigated before an election is held. These

decisions will be made bearing in mind the purpose of the hearing. Generally, only evidence that is relevant to a question that will be decided may be introduced at the pre-election hearing. Prior rules required, e.g., litigation of any voter eligibility issues that any party wished to litigate, even if the regional director was not going to be deciding that question, and even if the particular voter eligibility question was not necessary to resolving the existence of a question of representation. This practice has resulted in unnecessary litigation. Once it is clear that an issue need not be decided, and will not be decided, no evidence need be introduced on the matter.

11. The hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants permission to file such a brief. Prior rules permitted parties to file briefs which were often unnecessary and delayed the regional director's decision in many cases.
12. The regional director must decide the matter, and may not *sua sponte* transfer it to the Board. The prior transfer procedure was little used, ill advised, and a source of delay; Board decisions are generally improved by obtaining the initial decision of the regional director.
13. Absent waiver, a party may request Board review of action of a regional director delegated under Section 3(b) of the Act. Requests will only be granted for compelling reasons. Requests may be filed any time during the proceeding, or within 14 days after a final disposition of the case by the regional director. The prior rules included a variety of means for asking for Board review, including a "request for review" which only applied to the

direction of election; a complex set of interlocking mechanisms for post-election review which varied depending upon the type of procedure chosen by the regional director or the form of election agreement; and a catchall "special permission to appeal." Review of the direction of the election had to be sought before the election, even though the vote itself might moot the appeal. The final rule improves the process for Board review by giving parties an option to wait and see whether election results will moot a request for review that prior rules required to be filed before the election, and recognizes that Board review is not necessary in most cases. This will best serve Congress's purpose of ensuring that the regional director can promptly resolve disputes unless there is reason to interrupt proceedings in a particular case.

14. A request for review will not operate as a stay unless specifically ordered by the Board. Stays and/or requests for expedited consideration will only be granted when necessary. The prior rules included an automatic stay of the count of ballots ("impounding the ballots") in any case where a request was either granted or pending before the Board at the time of the election. A stay should not be routine, but should be an extraordinary form of relief.
15. Elections will no longer be automatically stayed in anticipation of requests for review. The prior rules generally required the election which followed a Decision and Direction of Election to be held between 25 and 30 days after the direction of election. The stated purpose of this requirement was to permit requests for review to be ruled on by the Board in the interim. This delay served little purpose, as few requests were filed, and only a very small fraction

of these requests were granted. Even where a request was granted, the 25-30 day waiting period in the prior rules did nothing to prevent unnecessary elections as the vote was generally held as scheduled notwithstanding the grant of the request.

16. The regional director will ordinarily specify in the direction of election the election details, such as the date, time, place, and type of election and the payroll period for eligibility. Parties will take positions on these matters in writing in the statement of position and on the record before the close of the hearing. Under prior practice, election details were typically addressed after the direction of election was issued, which required further consultation about matters that could easily have been resolved earlier.
17. The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.
18. The regional director will ordinarily transmit the notice of election at the same time as the direction of election. Both may be transmitted electronically. Previously, the notice was transmitted by mail after the direction of election.
19. If the employer customarily communicates with its employees electronically, it must distribute all election notices to employees electronically, in addition to posting paper notices at the workplace. Prior rules required only paper notices. This change recognizes that modern technology has transformed

many workplaces into virtual environments where paper notices are less effective.

20. Within 2 business days of the direction of election, employers must electronically transmit to the other parties and the regional director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations. The list may only be used for certain purposes. Prior caselaw gave employers 7 days to produce a list of names and home addresses and send it to the Board, which then served the list on the parties. In addition to simplifying and expediting service by cutting out the middle man, the amendments update the rules to leverage the ways in which modern technology has transformed communications, recordkeeping and record transmission. For instance, the changes make information that is routinely maintained in electronic form more quickly available to the parties. Recognizing the potential sensitivity of the information, however, the rules also restrict its use in order to guard against potential abuse.
21. When a charge is filed alleging the commission of unfair labor practices that could compromise the fairness of the election, the regional director has discretion to delay (or "block") the election until the issue can be resolved. Any party seeking to block the election must simultaneously file an offer of proof and promptly make witnesses available. This rule largely codifies what

had been best practice while adding an offer-of-proof requirement that will expedite investigation and help weed out meritless or abusive blocking charges.

22. After the election, parties have 7 days to file both objections and offers of proof in support. Objections, but not offers, must be served by the objector on other parties. Prior rules gave 7 days for objections but 14 days for evidence in support of the objections. The change is made because unsupported objections should not be filed, and 7 days is typically adequate for the parties to marshal their evidence.
23. If necessary, a post-election hearing on challenges and/or objections will be scheduled to open 21 days after the tally of ballots or as soon as practicable thereafter. Prior rules set no timeline for opening the hearing, and this rule will give adequate time for the region to weed out unsupported and frivolous objections while making the process more transparent and uniform.
24. In every case, the regional director will be required to issue a final decision. Where applicable, the regional director's decision will be subject to requests for review under the procedure described in item 13 above. The prior rules were unduly complex, and frequently did not involve a final regional director decision. Regional directors can and should issue final decisions because they are delegated authority to do so pursuant to Section 3(b) and the Board's rules, and are in the best position to initially assess the facts. Where necessary, Board decisions on review are improved by first obtaining the final decision of the regional director.

25. Finally, the rule eliminates a number of redundancies and consolidates and reorganizes the regulations so that they may be more easily understood.

III. The Rulemaking Process

As the NPRM explains, the Board has amended its representation case procedures repeatedly over the years as part of a continuing effort to improve the process and eliminate unnecessary delays. Indeed, the Board has amended its representation case procedures more than three dozen times without prior notice or request for public comment.

In fact, the Board has seldom acted through notice-and-comment rulemaking on any subject. The Board typically makes substantive policy determinations in the course of adjudication rather than through rulemaking, although this practice has occasionally drawn the ire of academic commentators and the courts.[7]

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[7] See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. REV. 347, 351-52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 589-90, 593-98 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 414-17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63, 84 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27-42 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 730-34 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260, 269-72 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 LAB. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 LAB. L.J. 105 (1981); see also *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 295 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 770, 777, 779, 783 n.2 (1969). The Portland Cement Association (PCA)

The Board has thus asked for public comments on few proposed rules of any kind. A review of prior Board rulemaking procedures reveals that, until this proceeding commenced, the Board had not held a public hearing attended by all Board members for at least half a century.[8]

A. Procedural History of this Rule

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking. The Notice provided 60 days for comments and 14 additional days for reply comments. The Board issued press releases about the proposals and placed summaries, answers to frequently asked questions, and other more detailed information on its Web site (*www.nlrb.gov*). The Board held a public hearing during the comment period, on July 18 and 19, 2011, where the Board members heard commentary and asked questions of the speakers.

On November 30, 2011, the Board members engaged in public deliberations and a vote about whether to draft and issue a final rule, and, on December 22, 2011, a final rule issued. 76 FR 80138. A federal court later held that the Board had lacked a quorum in issuing the final rule. See *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28-30 (D.D.C. May 14, 2012). However, because the court did not reach the merits,

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contends, as it did in another recent Board rulemaking, that the Board should place these and other law review articles discussed in the NPRM online for the public to read for free on *regulations.gov*. Just as the Board replied in that prior rulemaking, 76 FR 54014, the Board has placed these articles in the hard copy docket, but has not uploaded these articles to the electronic docket because such an action could violate copyright laws. It should also be noted that these materials are generally available in libraries.

[8] In the rulemaking proceedings that resulted in adoption of rules defining appropriate units in acute care hospitals, the Board directed an administrative law judge to hold a series of public hearings to take evidence concerning the proposed rules, but no Board members participated in the hearings.

the court also "emphasize[d] that its ruling need not necessarily spell the end of the final rule for all time * * *. [N]othing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so."

The Board then issued a proposed rule on February 6, 2014 under the same docket number as the prior NPRM and containing the same proposals. 79 FR 7318 et seq. The Board again issued press releases and placed supporting documents on its website. This was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.* The purpose of this NPRM was to give a properly constituted quorum of the Board a "legally appropriate, administratively efficient, and demonstrably fair process for considering all the issues and comments raised in the prior proceeding, while giving an opportunity for any additional commentary." *Id.* at 7335.

The Board provided 60 additional days for the submission of any new comments, and 7 days for replies. The Board advised commenters that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7319. During the reply period, on April 10 and 11, 2014, the Board held another public hearing, at which the Board members again heard commentary and asked questions of the speakers.

In sum, the Board has accepted comments on these proposals for a total of 141 days, and held a total of 4 days of oral hearings with live questioning by Board members. Tens of thousands of people have submitted comments on the proposals, and Board members have heard over one thousand transcript pages of oral commentary.

The sole purpose of these procedures was to give the Board the benefit of the views of the public. To be clear, none of this process was required by law: the Board has

never engaged in notice and comment rulemaking on representation case procedures, and all of the proposed changes could have been made without notice and comment—in part by adjudication, and in part by simply promulgating a final rule.[9]

Nonetheless, a number of comments have criticized the Board's process, both in 2011 and again in 2014. At bottom, the claim is that the process was inadequate to meaningfully engage with the public, and that the Board already had its mind made up. We disagree.

1. Advanced NPRMs and Consultation Under E.O. 13563

The 2011 comment of the Chamber of Commerce of the United States of America (the Chamber) provides a representative example of criticism of the 2011 pre-NPRM process. The Chamber believes that the Board missed "an opportunity to explore whether a consensus could have been reached" on the rule among stakeholder groups through forums such as the American Bar Association's Labor and Employment Law Section. The Chamber concedes that stakeholders "have widely divergent views," but argues that a consensus on at least some changes might have been reached. The Chamber suggests that the Board should withdraw the NPRM and publish a more open-ended Advanced Notice of Proposed Rulemaking.

The Chamber cites Executive Order 13563 Section 2(c) ("Improving Regulation and Regulatory Review"), 76 FR 51735, as support. Section 2(c) of the Executive Order states that "[b]efore issuing a proposed regulation, each agency, where feasible and

[9] The rule is primarily procedural as defined in 5 U.S.C. 553(b)(B), and therefore exempt from notice and comment. To the extent portions of the rule are substantive—for example, relating to information in the voter lists—these changes could have been made by adjudication, which is also exempt from notice and comment. *Wyman Gordon*, *supra*.

appropriate, shall seek the views of those who are likely to be affected * * *." *Id.* In the NPRM, the Board explained the decision to issue a set of specific proposals, rather than a more open-ended Advanced NPRM, by stating that "public participation would be more orderly and meaningful if it was based on * * * specific proposals." 76 FR 36829. The Chamber incorrectly suggests the Board conceded that it violated the Executive Order, and questions whether the comment process actually was more orderly or meaningful. Some other comments suggest that the Board should have engaged in negotiated rulemaking, or that the pre-NPRM process was insufficiently transparent.[10]

These arguments were repeated by the Chamber and a number of other commenters in 2014, most notably the American Hospital Association (AHA II)[11] and their counsel at the public hearing, (Testimony of Curt Kirschner II) who contended that the Board should have issued an Advanced NPRM or consulted with stakeholders before reissuing the NPRM in February 2014.

An agency generally has discretion over its pre-NPRM procedures, including whether to use advanced NPRMs, negotiated rulemaking, or other pre-NPRM consultation. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 543-44 (1978). Moreover, as recognized by the AHA, the Board is not directly subject to Executive Order 13563, nor is its language pertaining to pre-

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[10] See, e.g., joint comment of HR Policy Association and Society for Human Resource Management (collectively, SHRM); Greater Easley Chamber of Commerce; Georgia Association of Manufacturers (GAM).

[11] The preamble to the final rule uses the roman numeral II to signify that a cited comment was received during the second notice and comment period in 2014. Comments cited without the roman numeral II were received during the first notice and comment period in 2011.

NPRM procedures mandatory in any event.

As explained in both NPRMs, in this instance, the Board concluded that beginning the process of public comment by issuing NPRMs would be the most effective method of proceeding. The Board continues to believe that following the notice-and-comment procedures set forth in the Administrative Procedure Act (APA)—and thereby giving formal notice of specific proposals to all members of the public at the same time in the Federal Register and permitting all members of the public to comment on those proposals through the same procedures and during the same time periods—was the fairest and soundest method of proceeding.

The contents of the comments themselves have also demonstrated the doubtfulness of the Chamber's suggestion that a broad consensus might have been reached through a different process. As the Chamber concedes, the labor-management bar is polarized on many of the relevant issues. Given the degree of polarization reflected at both the public hearings and in the comments—notwithstanding the 3 intervening years for members of the bar to consider and consult on possible improvements—consensus seems unlikely.

Nor would an Advanced NPRM have been an improvement on the present process. Indeed, in this proceeding the Board has already benefited from something similar to the iterative commenting process of an Advanced NPRM. From the 2011 hearing, to the 2011 comment period, to the 2011 reply period, to the 2014 comment period, to the 2014 hearing and reply period, the commenters have had the opportunity to consider and respond to each other's views on many occasions. And, in contrast to the typical Advanced NPRM, the specificity of the proposals in the NPRM encouraged many

commenters to focus on important details. With the benefit of this repeated cross analysis and close attention to detail, the Board has modified its proposals in a number of significant respects in this final rule. We see no merit in the speculative retrospective claim that something better might have been achieved by another process.

In sum, the Board's pre-NPRM process was lawful and appropriate.

2. The 2014 NPRM

A variety of inconsistent claims were made by commenters about the significance of the Board's reissuing the NPRM in 2014. Some argued that the Board should have considered the 2011 comments before reissuing the NPRM.[12] By contrast, some said that the Board had considered and implicitly rejected the 2011 comments, and that this rejection required re-submitting the same comments again, or that it suggested that a final rule identical to the NPRM was a *fait accompli*.[13] Some faulted the Board for not addressing the prior final rule of December of 2011.[14]

These arguments are misplaced, and many are predicated on an unsupportable and mistaken interpretation of the NPRM. In early 2014, the recently appointed and confirmed Board members had a choice to make. Significant public effort had been expended in commenting on a proposed rule that—according to one court—the Board had not yet lawfully acted on. Thus, the questions posed by the NPRM remained

[12] See, e.g., Chamber II; International Franchising Association (IFA) II; AHA II. Along the same lines, some argued that the Board should have clarified the proposals in light of questions raised in the 2011 comments. See, e.g., Association of the Nonwoven Fabrics Industry (INDA) II.

[13] See, e.g., Association of Equipment Manufacturers (AEM) II; INDA II.

[14] See, e.g., Senator Lamar Alexander and 17 Republican Senators (Senator Alexander and Republican Senators) II.

unanswered by the Board. As years had passed since the comment period had closed, the new Board members were interested to know whether the public had anything further to say about the proposals.

That is why the Board reissued the NPRM and reopened the comment period. This process allowed the new Board members an opportunity to consider new comments and old comments together in a single proceeding.

This is reasonable. To consider and analyze all the material submitted in the 2011 final rule—without considering whether anyone's views might have changed in the intervening years—and only then issuing a new proposed rule, would have been substantially less efficient. Where possible, it is far better, in the Board's judgment, to respond to the comments once, rather than twice.

The 2014 NPRM reflected absolutely no Board judgment about the 2011 comments. As the Board explained in the NPRM, the purpose was simply to re-raise, not resolve, the questions posed and to allow the Board to make its decisions about the final rule in light of all the comments received.

The AHA claimed that the Board was "hiding the ball from the public regarding its current views of what should be changed, in light of the comments previously received and its analysis of those comments. The implication of the Board's reissuance of the same NPRM is that the public comment process is, from the Board's perspective, largely perfunctory." AHA II.

This statement misses the point. There was no ball to hide. The Board reissued the NPRM because it wanted to hear yet again from the public before forming its views. This manifests a greater respect for the public comment process. As Member Hirozawa said in

responding to this point at the public hearing:

> Curt, if it makes you feel any better, we don't know where we're headed, either. There are a lot of difficult decisions that are going to have to be made, a lot of questions where there are significant considerations on both sides, and there will be a lot of discussion among the members during the coming period of time * * *. But in terms of the views of the public, I think that I speak for all five of the members here that we all consider them very important and [an] essential part of this process.

A similar point applies to the Board's consideration of the December 2011 final rule. Of course, the court held that the rule itself is a legal nullity; without the requisite vote (in the court's analysis), the Board never took action. Although the various statements associated with that publication are important, and represent the carefully considered views of three individual Board members (two of whom are no longer on the Board), it would be strange, to say the least, if the Board were somehow bound to consider and respond to this non-action before it could issue a proposed rule. Indeed, although the Board has considered those views in issuing the present final rule, their function here is persuasive, not authoritative.

In sum, the Board's decision to consider the 2011 comments, 2011 hearing testimony, 2011 final rule, and 2012 Board Member statements, together and at the same time as the 2014 comments and 2014 hearing testimony, is not only a reasonable manner of proceeding, but clearly the fairest and most efficient manner of proceeding given the procedural posture of this matter as it stood in early 2014.

3. The Length, Timing, and Location of the Hearings

In 2011, the Board members held a 2-day public hearing in Washington, DC, approximately halfway through the initial comment period, i.e., about 1 month after publication of the NPRM and 1 month before the initial comment period closed. All

Board members heard 5-minute statements from speakers representing diverse organizations and groups, and then actively questioned the speakers for an additional period of time. This hearing was not legally required.

Then, in 2014, the Board members held another 2-day public hearing in Washington, DC, in the week after the close of the 2014 initial comment period, i.e., during the reply period.[15] The Board first solicited requests to speak, and instructed requesters to clearly identify the particular proposed changes and issues they wished to address, and to summarize the statements they wished to make. This process enabled the Board to schedule the speakers addressing similar issues to speak in adjacent time slots. Everyone who requested to speak was given an opportunity to address the Board, and, as time allowed, those who wished to speak about multiple issues were given an opportunity to address the Board more than once.

The AHA compares this proceeding to the hospital unit rulemaking and essentially argues that the Board should have held 14 days of hearings instead of 4. AHA II.

Agencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience, e.g., what rulemaking procedures are helpful and what procedures are simply wasteful, nor adopt

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[15] After each public hearing in 2011 and 2014, the transcripts containing each speaker's testimony along with any Board questioning of the speaker were made part of the record of the rulemaking. Any such testimony discussed in this final rule is cited as follows: "Testimony of [name of speaker] on behalf of [name or organization, if any]." As with the written comments, the roman numeral II follows testimony citations from the 2014 comment period.

procedures suited to the precise question at stake.[16] This learning process is shown in the changing nature of the hearings used by the Board from the hospital rulemaking, to the 2011 hearing, to the 2014 hearing. At each phase the hearing process became more meaningful and efficient.

This point was recognized by counsel for the AHA itself, who "commend[ed] the Board on this public hearing process," particularly in comparison to the 2011 hearing, and described the exchange with Board members as "gratifying," "valuable," and "productive." Kirschner II. The Board agrees. The 5 minutes that speakers were given on each issue was supplemented by substantial time for questioning and the opportunity for written comments. Some speakers gave 2,000 words or more of well-informed testimony during their allotted time. The Board found that the speakers provided informed, thorough, and thoughtful analysis, and the back-and-forth dialogue with the Board members demonstrated the familiarity of the speakers with the proposals. Again, there was no such dialogue with Board members in the hospital rulemaking hearings—regardless of their length—simply because the Board members did not participate in those hearings.[17]

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[16] As one scholar noted, the hospital unit rulemaking could be described as "procedural overkill," see Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L. J. 274, 319 (1991).

[17] In light of the extensive process provided in 2014, comments arguing that the 2011 process was "rushed" or gave "an inadequate opportunity for stakeholders to address the merits of the rules" are no longer salient. See National Association of Manufacturers (NAM). The parties have had a total of 141 days to comment on both NPRMs, (74 with respect to the 2011 NPRM and 67 for the 2014 NPRM), and to consider the proposals and data in submitting their comments. Some have published law review articles in the interim, and it is quite clear that the topics have remained relevant questions of public concern during this period. See Joseph P. Mastrosimone, *Limiting Information in the*

The Board believes that the hearings exceeded the requirements of the APA and were fair, appropriate, and useful. Holding the hearings in Washington, DC, was appropriate because many of the Board's major stakeholders are either headquartered in Washington or are represented by counsel in the city or who frequently appear in the city.

Both hearings were properly noticed and appropriately timed. The two hearings served two different functions. The first hearing was scheduled half-way through the first comment period. This gave the public time to develop their positions before the hearing, while also allowing the public to get a preview of the arguments at issue, so that written comments could be framed more responsively. The subsequent written comments were more informed, thoughtful, and technically sophisticated as a result, and many commenters in 2011, such as the Chamber, took the opportunity to cite extensively from the hearing transcripts for support and to respond to arguments made at the hearing. The Board believes the chosen sequence—the hearing followed by the close of the initial comment period and then the reply period—produced more meaningful public comments in 2011.

In 2014, of course, all of the 2011 comments were available for the public to engage, as was the transcript of the 2011 hearing. Thus the second hearing served a different purpose, and was therefore scheduled at a different time. By scheduling the hearing after the close of the comment period, but during the reply period, the Board members were able to engage with the speakers deeply and in detail on the substance of both their 2011 and 2014 comments, while giving time for speakers who wished to

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Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech, 52 Washburn L. J. 473, 501-06 (2013).

supplement or clarify their remarks after the hearing the ability to do so with additional written comments to the record.

In sum, the Board believes that the four days of public hearings, attended by all Board members, was highly valuable, was of an appropriate length, and was held at appropriate times and in appropriate locations.

4. The Length and Timing of the Comment Periods

The Board provided an initial comment period of 60 days beginning June 22, 2011, followed by a reply comment period of 14 days that ended on September 6, 2011. The Board then provided an additional comment period of 60 days beginning February 6, 2014, followed by a reply comment period of 7 days that ended on April 14, 2014.

The APA provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. The agency has discretion to provide still shorter periods, and is simply "encouraged to provide an appropriate explanation for doing so." Administrative Conference of the United States (ACUS), Recommendation 2011-2 at 3 (June 16, 2011).

Yet, in 2011, many commenters criticized the length of the comment period. The Council on Labor Law Equality (COLLE) described the NLRB's comment period as "the bare-minimum 60-day[s]," and SHRM characterized the comment period as "hurried, abridged and clandestine."

It would be reasonable to expect that these arguments would not be repeated in 2014, considering that the public had a cumulative total of 141 days in which to submit comments. Yet they were from time to time, most notably by the Chamber II, AHA II,

and NAM II.[18]

Although the desire for additional time to gather support and develop arguments is understandable, agencies must set some end to the comment period: "Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently." ACUS 2011-2 at 3.

The Montana Chamber of Commerce—though opposing the rule—stated that the NPRM provided "a very reasonable time frame to allow ample comments and statements from all interested parties, whether they are supportive of these sweeping changes or not." And a supportive comment noted that the Board was providing far more time for comments than required by law. Chairman Tom Harkin of the Senate Committee on Health, Education, Labor and Pensions, Senior Democratic Member George Miller of the House Committee on Education and the Workforce, and Democratic Senators and

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[18] In each of its reply comments, the Chamber also complained that the reply period was too short to read and respond to all of the comments. But the purpose of the reply period was not to afford interested parties an opportunity to read and reply to *all* of the comments submitted, but to provide an opportunity to read the most significant comments and respond to the arguments raised in them. This the Chamber and others did quite successfully. For example, in 2011 the Service Employees International Union (SEIU) cited and replied to over twenty unique, detailed, and lengthy comments submitted by other parties. Others, such as the Association of Corporate Counsel (ACC), took the opportunity to focus on elaborating one particular issue of special importance. Both approaches were quite helpful, and served the purpose for which the Board afforded the reply period.

A lengthy additional reply period in this context would have served little purpose, particularly after a post-comment hearing in which the parties and the Board had the opportunity to engage with and reply to the comments in great detail. All of which is in addition to the fact that neither the APA nor any other law requires *any* opportunity to reply to public comments.

Members of the House of Representatives (Chairman Harkin, Senior Member Miller and Congressional Democrats) at 5.

The tens of thousands of comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the rulemaking process.

5. Post-Rulemaking Procedures and Review

One comment urges the Board to "incorporate[] plans for retrospective review" into the rule pursuant to Executive Orders 13,563 and 13,579. Sofie E. Miller. Executive Order 13,563, however, is directed to executive branch agencies, not independent agencies, which are only encouraged, by Executive Order 13,579, to comply with Executive Order 13,563. Moreover, both of the aforementioned Executive Orders apply only to "significant" regulatory actions, as defined by Section 3(f) of EO 12,866. This rulemaking does not fall into any of the definitions of a "significant regulatory action" set forth in Section 3(f). Nevertheless, the Board developed and disseminated a preliminary plan for retrospective review of significant regulations in May 2011 (http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/NationalLaborRelationsBoardPreliminaryRegulatoryReformPlan.pdf). In addition, the Board will continue its longstanding practice of incrementally evaluating and improving its processes going forward.

IV. Comments on General Issues

Before turning to comments on specific provisions of the final rule, the Board addresses a number of general issues: (a) the Board's rulemaking authority; (b) the need to amend the regulations generally; (c) the opportunity for free debate under the

regulations; and (d) the effects on employee representation and the economy.

A. Board Authority to Promulgate Representation-Case Procedure Rules

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board "shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations as may be necessary to carry out the provisions of this Act." In addition, Section 9(c), 29 U.S.C. 159 (c)(1), specifically contemplates rules concerning representation case procedures, stating that elections will be held "in accordance with such regulations as may be prescribed by the Board."

The Board's well-established rulemaking authority is recognized by comments both opposing and supporting the proposed rule. For example, NAM states that "it is undisputed that the Board has the authority to promulgate rules and regulations," and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) states that "[t]he NLRB has specific and express statutory authority to engage in rule-making to regulate its election process."

The Supreme Court unanimously held in *American Hospital Association v. NLRB,* 499 U.S. 606, 609-10 (1991), that the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984); *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is

exclusive and complete. *See NLRB v. Bell Aerospace Co.,*416 U.S. 267, 290 n.21 (1974); *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 142 (1971).

In *A.J. Tower,* 329 U.S. at 330, the Supreme Court noted that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees." The Act enshrines a democratic framework for employee choice and, within that framework, charges the Board to "promulgate rules and regulations in order that employees' votes may be recorded *accurately, efficiently and speedily." Id.* at 331 (emphasis added). "[T]he determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion." *Id.* at 333. As the Eleventh Circuit stated:

> We draw two lessons from *A.J. Tower:* (1) the Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower,* the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. NLRB, 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above, the final rule is based upon just such concerns. Some comments allege that the Board

lacks authority to issue these rules.[19] As discussed, the Supreme Court's interpretation of Section 6 clearly forecloses this argument.

The Board also received dueling comments from two different groups of members of Congress on this topic: one group claimed that the changes would "fundamentally alter the balance of employee, employer and union rights that Congress so carefully crafted and that only Congress can change;" the other group claimed that the changes are "commonsense and balanced" and "a positive step toward fixing a broken system" and are consistent with "the NLRB['s] broad authority under the NLRA to promulgate election regulations." Compare Senator Alexander and Republican Senators; with Chairman Harkin, Senior Member Miller and Congressional Democrats.

The Act delegated to the Board the authority to craft its procedures in a manner that, in the Board's expert judgment, will best serve the purposes of the Act. Various members of Congress may have divergent views, but Article I of the Constitution prescribes the method that Congress must use to enact its policies, and the Act as written gives the Board broad authority in this area. Here the Board is acting pursuant to its clear regulatory authority to change its own representation case procedures in a manner that will better serve the purposes and text of the Act—a question about which the Board remains the congressionally delegated expert authority.

In sum, the Board clearly has authority to amend its election rules.

B. The Need for the Final Rule

The Board's experience demonstrates that although the fundamentals are sound,

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[19] See, e.g., Testimony of Harold Weinrich on behalf of Jackson Lewis LLP; ACC; American Trucking Associations II.

many of the technical details of representation case procedures suffer from a variety of deficiencies. Especially as to contested cases, current procedures result in duplicative, unnecessary and costly litigation. Simplifying, streamlining and, in some cases, bolstering these procedures will reduce unnecessary barriers to the fair and expeditious resolution of representation disputes and result in more fair and accurate elections. The rule also codifies best practices to ensure that our procedures are more transparent and uniform across regions. Changes to the representation case procedures are also necessary to update and modernize the Board's processes in order to gain the advantages of and make effective use of new technology, especially affecting communications and document retrieval and transmission. These changes will enhance the ability of the Board to fulfill its statutory mission.

Some comments received in response to the Board's NPRM argue that the Board failed to present sufficient justification for the proposed amendments. For example, SHRM asserts that the Board "failed to articulate a legitimate justification for the significant changes set forth in the NPRM" and that the proposed amendments are therefore arbitrary and capricious.[20] Numerous comments contend generally that there is no need for revision of the Board's representation procedures because, as argued by NAM, there is no evidence contradicting the Board's own data showing that the present time frames for processing representation cases are among the most expeditious in the Board's history, and further that the Board currently meets its own internal time targets

[20] See also SHRM; Klein, Dub & Holleb (Klein) II.

for processing representation cases.[21] As one speaker stated "the Board is just looking to solve a problem that doesn't exist" and "the NPRM has failed to identify a single problem to which the proposed solution is responsive." Testimony of Kara Maciel on behalf of National Grocers Association (NGA) II. See also Testimony of Ross Freidman on behalf of CDW II ("the proposed rules are in large part a solution in search of a problem").

These arguments appear to rest on a number of mistaken assumptions. (1) The sole purpose of the rule is to have faster representation proceedings; but (2) those proceedings are (generally) fast enough already; and, in any event, (3) the changes do not identify or address the true sources of delay. We will address each of these assumptions in turn.

1. The Amendments Address Efficiency, Fair and Accurate Voting, Transparency, Uniformity, and Adapting to New Technology; Speed is Not the Sole or Principal Purpose

First, the focus on speed fails to consider all the reasons for which the various amendments are being made. Many of the changes have little to do with the timing of procedures. Indeed, there is no single problem that this rule addresses: rather, as summarized in the list of changes above, there are a host of discrete problems addressed by a host of discrete amendments. We will amplify the particular rationale for each change in the discussion of specific sections below. However, in light of the common misconception that the rule is focused on speed, we will briefly describe other important

[21] This point was also advanced by the AHA; American Council on Education (ACE); COLLE; CDW; Associated Oregon Industries; National Marine Manufacturers Association (NMMA); The Bluegrass Institute; and the Chamber.

principles of sound administration at issue.

Efficiency: The importance of efficiency should be self-evident. If a particular procedure serves no purpose, or is unduly complex or wasteful, that is reason enough to change it, regardless of whether it also causes delay. Thus, for example, rules that permit unnecessary litigation, circuitous service of documents and mandatory interlocutory appeals are plainly inefficient and should be changed.

Fair and Accurate Voting: This rationale gets to the heart of Section 9, and is always under consideration in any revision of representation case procedures. Here, for example, the Board provides employees with notice of the petition for election sooner in the process, and provides more detailed, meaningful notices about the unit at issue, and the voting itself, throughout the process. The notices are also transmitted more effectively. As explained further below, the amendments provide a better process for identifying voters properly subject to challenge, which should reduce the number of ballots improperly commingled with unit ballots by oversight, or improperly challenged out of ignorance. These changes will all provide better guarantees of a fair voting process.

Transparency and Uniformity: Transparency allows the public to understand the process and uniformity allows the parties to form reasonable expectations. These two related principles also ensure that the protection of statutory rights does not vary arbitrarily from case to case or region to region. Again, these basic procedural principles should be beyond cavil. Cf. *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012) (written sentencing guidelines "increase transparency [and] uniformity"). These are adequate reasons to ensure that Board best practices are written into the regulations

where appropriate, even if they do not address delay. Thus, for example, describing the best-practices hearing date in the rules will promote uniformity and transparency.

Changed Technology: Society changes rapidly, and new technology can quickly make old rules obsolete. Of particular relevance here, communications technologies developed in the last half-century have changed the way litigation, workplace relationships, and representation campaigns function. As the Supreme Court has stated in another context, "the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board," and we would be remiss in leaving unchanged procedures which are predicated on out-of-date facts or assumptions, even where there is no consequent delay. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Thus, for example, providing for electronic documents, filing, and transmission as well as updating the forms of employee contact information are important adaptations to changed technological circumstances. In addition, the Board is mindful that changes in technology have also raised concerns about privacy, and the final rule addresses those concerns.

In sum, timeliness is one of many reasons proffered for the amendments; some changes clearly reduce unnecessary delays; for other changes, timeliness is only a collateral benefit and by no means a primary purpose; and sometimes it plays no role whatsoever. The need for the rule cannot be assessed without grappling with these specific, articulated reasons underlying each of the amendments.

2. The Board Can and Should Address Delays in the Current Rules

The second premise is also flawed: nothing in the statute, the General Counsel's current time targets, or any other source establishes that current procedures are "fast enough."

Section 9 is animated by the essential principle that representation cases should be resolved quickly and fairly. "[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946). As the Supreme Court noted, discussing Section 9(d), the policy in favor of speedy representation procedures "was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration." *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964). Senator Taft stated that the Act should not "permit dilatory tactics in representation proceedings." *Id.* In discussing the APA, Congress again exempted representation cases because of the "exceptional need for expedition."[22] Finally, the purpose of Congress in 1959 in permitting delegation of representation case proceedings to regional directors under Section 3(b) was to "'speed the work of the Board.'" *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-142 (quoting legislative history). Congress did not define any "time targets" for elections; indeed, in fashioning the LMRDA, Congress considered and expressly rejected a proposed amendment to the statute which would have imposed a 30-day minimum speed limit on the time from petition to election.[23]

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[22] Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945). It is for this reason that 5 U.S.C. 554(a)(6) specifically exempts representation cases from even the minimal requirements of the APA.

[23] Various legislative efforts to impose particular timelines on Board elections have failed repeatedly over the decades. See, e.g., 124 Cong. Rec. 7652-54 (1978) (side-by-side comparison of House and Senate versions of one proposal, accompanied by analysis and criticism by Senator Jesse Helms); "National Labor Relations Fair Elections Act" H.R.4800 (1990), 101st Cong, 2d Session; H.R. 503, 102nd Cong., 1st Session (1991); H.R. 689, 103rd Cong., 1st Session (1993); "Labor Relations Representative Amendment Act" S. 1529, 103rd Cong., 1st Session (1993); S. 778, 104th Cong., 1st Session (1995).

In short, every time Congress has amended laws governing representation cases, it has reaffirmed the importance of speed. This is essential both to the effectuation of Section 7 rights of employees, and to the preservation of labor peace.[24]

The timeliness concerns of Congress in 1935, 1947 and 1959 remain salient today, as the comments show. Unduly lengthy campaigns cause voter participation to drop. Testimony of Glenn Rothner II; Testimony of Gabrielle Semel on behalf of CWA II. "[D]elay can create a sense of futility among workers." Testimony of Brian Petruska on behalf of Laborer's International Union of North America Mid-Atlantic Regional Organizing Coalition (LIUNA MAROC) II; see also Testimony of Jody Mauller on behalf of the International Brotherhood of Boilermakers (IBB) II. As one employee testified at the hearing, significant delay in the NLRB's process causes employees to think that there is nothing the government can do to protect them. Testimony of Donna Miller II. This is precisely what Congress was worried about: that employees would think the NLRA's procedures were ineffectual and be tempted to take disruptive action instead. *Boire, supra*. The purpose of the Act is to protect with federal power the free exercise of Section 7 and Section 9 rights. In one organizer's experience, most workers want elections faster than current procedures permit regardless of where the workers stand on the union. Testimony of Martin Hernandez on behalf of UFCW II.

To be clear, the problems caused by delay have nothing to do with employer

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[24] The importance of prompt resolutions of questions of representation is heightened by their perishable nature. "[U]nlike court judgments, [they] do not bind the parties for all time." *Manhattan Center Studios, Inc.,* 357 NLRB No. 139, slip op. at 5 (2011). "In the absence of employer unfair labor practices, a Board certification of a representative will bar a new election for only 1 year if no contract is agreed to, and for no more than an additional 3 years if an agreement is reached." *Id.*

speech.[25] As discussed *infra*, the statute encourages free debate, and neither Congress nor the Board in this rulemaking has cited limiting debate as a reason for speed. It is not the speech, but the delay itself which causes the ills identified by Congress and the Board. Nor is the problem with delay related to unfair labor practices. Though many commenters and academics have argued that lengthy campaigns encourage unfair labor practices,[26] this is not a reason that either Congress or the Board have cited in amending representation procedures in pursuit of timely elections and it does not underlie the final rule.

As shown, delay itself is the problem this rule addresses—not employer speech or unfair labor practices—and eliminating unnecessary delay is therefore unquestionably a valid reason to amend these regulations. In recognition of this fundamental principle, the Board has noted "the Act's policy of expeditiously resolving questions concerning representation."[27] "In * * * representation proceedings under Section 9," the Board has observed, "time is of the essence if Board processes are to be effective."[28] Indeed, the

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[25] Some have claimed that the Board has a secret mission "to restrict, as far as possible, the participation of employers in the union organizing campaign and representation election process." E.g., COLLE II at 4-5. No credible evidence has ever been mustered in support of this claim by any of its proponents, and the Board expressly affirms that limiting debate is not a reason for any of the amendments.

[26] See John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. (summarizing their study, "New Data: NLRB Process Fails to Ensure a Fair Vote,"). See also SEIU; National Employment Law Project (NELP); and Senior Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce (Senior Member Miller and Democratic House Members) (citing Logan, Johanson, and Lamare study).

[27] See, e.g., *Northeastern University*, 261 NLRB 1001, 1002 (1982), *enforced*, 707 F.2d 15 (1st Cir. 1983).

[28] *Tropicana Products, Inc*., 122 NLRB 121, 123 (1958).

Board's Casehandling Manual stresses that "[t]he expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations."[29]

Many comments argue that current procedures are fast enough because they meet the Board's time targets. The reliance on current time targets is mistaken. For decades the Board has continually strived to process representation cases more expeditiously, and the targets have accordingly been adjusted downward over time. 79 FR 7319-20. [30] Under the commenters' reasoning, in any given year when the agency was meeting its then-applicable time targets, the agency should have left well enough alone and should not have engaged in any analysis about how the process might be improved. This is clearly wrong. Past improvements do not and should not preclude the Board's consideration and adoption of further improvements.

The Chamber responds by claiming "[t]he Board cannot set goals regarding acceptable times for elections and then, without justification, disregard those benchmarks. Presumably some rational approach has been taken to develop the benchmarks over the years." Chamber II.

There is a rational approach: the General Counsel sets benchmarks by trying to

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[29] Pt. 2, Representation Proceedings, Section 11000.

[30] The amendments the Board has chosen to adopt represent a continuation of this incremental process, rather than a radical departure from Board practice as asserted by, for example, the Coalition for a Democratic Workplace (CDW) and Associated Builders and Contractors (ABC). ABC II asserts that the proposals are far more radical than the Board admits, but their contention is stated as *ipse dixit* and remains unsupported. See also AHA II (proposed rules are a "very radical departure" from December 2011 final rule).

figure out what would be possible—in spite of structural delays identified under the rules—if the regions did their very best work. Thus, meeting those benchmarks shows only that the regions are doing the best they can in spite of the rules, not that the rules are incapable of improvement. That the Board seeks to, and does, meet those targets in most instances is irrelevant to whether additional improvements should be made by amending the rules.

In addition to the time targets, some commenters point to a number of other extrinsic facts which they claim are "strong evidence that the present system works fairly for all parties." Testimony of Arnold Perl on behalf of the Tennessee Chamber of Commerce (TN Chamber) II. For example, they cite the rate of union success in elections as evidence that the current procedures are fair and not in need of revision. Associated General Contractors of America (AGC); Skripko II. From the Board's perspective, this argument is close to tautological. The purpose of the election is to find out what the employees want; if we knew this a priori, the election would be unnecessary. Whether the union win rate is 75% or 25% tells us nothing about whether the elections were fair. Either result might accurately reflect the employees' free choice. The results are therefore unhelpful in determining whether representation case procedures are fulfilling their statutory purpose as fully and efficiently as possible. On that question, we must look to the procedures themselves, and to the policies and purposes of the statute.

Many comments acknowledge that the expeditious resolution of questions of representation is a central purpose of the Act, but argue that the Board did not consider

other statutory policies in proposing the amendments.[31] In fact, the Board did do so, both in proposing amendments to its rules in the NPRM and in issuing this final rule. As discussed, the Board considered the statute as a whole, as well as the various policies underlying its enactment and amendment. Specifically, the Board considered the statutory requirement that the pre-election hearing be an "appropriate hearing" and the parties' constitutional, statutory, and regulatory rights in relation to the hearing. As explained in detail below, the final rule makes the hearing more, not less, "appropriate" to its statutory purpose. The final rule also fully respects the procedural rights of the parties. In fact, it permits the parties to fully exercise their procedural rights more efficiently and with less burden and expense. The final rule promotes a more informed electorate by providing an improved process for informing the unit about election procedures, the appropriate unit for bargaining and the voting procedure for individuals who may properly vote subject to challenge. Similarly, the Board considered employees' statutory right under Section 7 to "bargain collectively through representatives of their own choosing" and "to refrain from any or all such activities." 29 U.S.C. 157. As explained in detail below, the amendments adopted in the final rule do not establish inflexible time deadlines or mandate that elections be conducted in a set number of days after the filing of a petition. Further, the amendments honor free speech rights; they do not in any manner alter existing regulation of parties' campaign conduct or restrict freedom of speech. In this connection, the Board has carefully considered the possibility that the amendments might reduce the time between the filing of the petition and the election so as to threaten the communication,

[31] See, e.g., Assisted Living Foundation of America (ALFA); COLLE; SHRM; Seyfarth Shaw.

association, and deliberation needed by employees in order to truly exercise freedom of choice. It has concluded the amendments pose no such risk, as more fully explained below.

In sum, the Board is charged by Congress with eliminating unnecessary delays, and nothing about the current process suggests that it is "fast enough" such that no further improvements are justifiable.

3. The Amendments Which are Intended to Address Delay Will in Fact Do So

Finally, the commenters are also mistaken in claiming that the Board has not identified the subset of cases where unnecessary delay is prevalent, and has not designed rules responsive to the particular delays identified. Again, many of the changes address other purposes, but where delay is at issue, the Board clearly identifies problems, and the amendments supply sensible and reasonable solutions. Most of the changes apply to only a very small subset of Board cases, and those cases are the very ones most likely to suffer inordinate delays.

For example, it is quite clear from the Board's statistics that fully litigated cases—that is, cases in which the parties are unable to stipulate about pre-election issues—generally take almost twice as long to get to an election. The median for all cases is 38 days, whereas the median for this particular subset of cases is closer to 70 in most years. Clearly, these cases suffer a delay in the time it takes to hold elections.

The Board has identified the primary sources of this delay, and the amendments address them. Under current rules a delay of 25 to 30 days is automatically imposed between the direction of election and the election. There can be absolutely no question that eliminating this waiting period addresses a very significant source of delay that is

unique to this subset of demonstrably slower cases.

Other changes to pre-election litigation—such as the 8 to 10 day hearing opening, the standard for continuance, the provision of oral argument rather than briefing, the date to provide voter lists, etc.—will also address less substantial sources of delay in this same small subset of cases. And it is important to bear in mind that many of these changes are aimed at other goals, such as efficiency, uniformity, and adapting to modern technology, and that timeliness is often only a collateral benefit.

Other comments acknowledge that the Board's procedures have been subject to misuse in some cases, but suggest that such cases were rare and do not form an adequate basis for the Board's proposals. The National Retail Federation (NRF) and Printing Industries of America, Inc. (PIA), for example, suggest that the rules should be amended only to address the more egregious cases. Relatedly, many comments cite the high rate of voluntary election agreements (reached in over 90 percent of cases), which obviate the need for pre-election hearings, as evidence that the representation case procedures are working well in the overwhelming majority of cases.

In a way, this argument accords with the Board's own sense of the final rule: many of the amendments are minor changes to the procedure used in the small subset of litigated cases where the problem of delay is demonstrably more severe. The lack of greater ambitions does not mean that the rule is unjustified; rather it means that the amendments provide targeted solutions to specifically identified problems.

In addition, as discussed below, it must be noted that changes to litigation procedures can be significant in framing the circumstances for entering stipulations in all

cases.[32] Under the former rules, the regional director lacked discretion to limit the presentation of evidence to that relevant to the existence of a question of representation. Thus, the possibility of using unnecessary litigation to gain strategic advantage existed in every case. That specter, sometimes articulated as an express threat according to some comments,[33] had the effect of detrimentally affecting negotiations of pre-election agreements.[34]

Finally, many comments argue that the proposed amendments did not address the most serious causes of delay in Board proceedings. Some comments point to delay in the Board's own adjudication of cases.[35] Other comments point to the Board's blocking charge policy.[36]

The Board is aware that, in too many instances, it has taken too long to decide both representation and unfair labor practice cases. This was a problem in 1959 when Section 3(b) was enacted, and, though the situation is much improved, it remains a problem today. Part of this problem is being addressed by the amendments—namely, by codifying the text of Section 3(b), and by the requirement that regional directors issue a

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[32] As another example, consider the new Statement of Position requirement, which assists both parties in making more informed decisions about stipulations. Knowing the issues in dispute will help the parties reach agreement.

[33] See American Federation of Teachers (AFT); International Brotherhood of Electrical Workers (IBEW); LIUNA.

[34] Comments by the United Food and Commercial Workers International Union (UFCW), LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements.

[35] See, e.g., NAM; PIA.

[36] See, e.g., AHA; PIA; SHRM; Chamber; CDW; Professor Samuel Estreicher.

final decision on the hearing officer's post-election recommendations. Giving the Board an authoritative and well-reasoned regional director's decision to consider whenever an appeal is taken will enhance the Board's decision-making on appeals and permit it to deny them where appropriate. To the extent that purely internal Board inefficiencies create additional unnecessary delays, these are not enshrined in the current rules and therefore need not be addressed by rulemaking.

As for the Board's blocking charge policy, the NPRM specifically asked for comments on various proposed revisions. As discussed below, the Board received extensive commentary, particularly in 2014, regarding this matter, and has decided to make changes which will address delay by expediting decision-making on blocking charges.

Of course, an administrative agency, like a legislative body, is not required to address all procedural or substantive problems at the same time. It need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 487 (1970). Rather, the Board "may select one phase of one field and apply a remedy there, neglecting the others." *FCC v. Beach Communications,* 508 U.S. 307, 316 (1993) (quoting *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)). "[T]he reform may take one step at a time." *Id.* [37]

[37] These same principles have been applied to administrative action. See, e.g., *United Hosp. v. Thompson*, 383 F.3d 728, 733 (8th Cir. 2008) (the equal protection clause does not require the government to attack every aspect of the problem or refrain from regulating at all); *Great American Houseboat Co. v. U.S.*, 780 F.2d 741, 749 (9th Cir. 1986) (same). The AHA acknowledges this fact, but states that "[w]hile this is true, the fact that the Board is declining to revise one of the biggest hurdles to timely elections [blocking charge policy], and at the same time proposing extensive revisions to other aspects of the process that have not proven to hold up elections * * * leaves the Board

In short, as to those aspects of the final rule where the Board has based its amendments on limiting delays, it has in fact identified the delay at issue specifically, and has crafted amendments rationally designed to address the delay.

C. The Opportunity for Free Speech and Debate

Many comments filed by employers and employer organizations argue that the proposed rule changes in the NPRM would drastically shorten the time between the filing of petitions and elections and thereby effectively reduce employers' opportunity to communicate with their employees concerning whether they should choose to be represented for purposes of collective bargaining. These comments make both legal and policy arguments based on that claim. The Board also considered the matter extensively at the public hearing in 2014, asking questions and taking approximately 175 transcript pages of testimony on this specific issue from a wide variety of speakers with different views.

The Board has concluded that the final rule will facilitate employees' free choice of representative while advancing the statutory objective of promptly resolving questions of representation, and will not impinge on anyone's free speech rights or any statutory mandate or policy. The amendments do not establish any rigid timeline for the conduct of the election itself. Indeed, the Board rejects requests that we set minimum or maximum

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open to questions about its motives in issuing the NPRM." AHA II at 27. Of course, the Board is revising its blocking charge policy, and it is unclear why AHA was under the impression that this matter would not be addressed when the Board specifically proposed a number of potential options in the NPRM and invited comments. And the claim that the other changes do not address delay is equally faulty because, as previously stated, many of the changes have nothing to do with delay, while those that are intended to address delay are in fact related to proven sources of delay.

time limits in which all elections must occur.[38] The election date will continue to vary from case to case. In selecting the election date under the rules, the regional director will continue to consider, among other factors,[39] the desires of the parties, which may include their opportunity for meaningful speech about the election.

1. NLRA Section 8(c) and the First Amendment

Many employer comments contend that the rule changes reflected in the NPRM would be inconsistent with Section 8(c) of the Act[40] and the First Amendment.[41] But neither the proposed rule nor the final rule imposes any restrictions on the speech of any party.

Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. 158(c). On its face, Section 8(c)'s stated purpose is to prevent speech from "constitut[ing] or be[ing] evidence of an unfair labor practice." Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in

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[38] The Board declines to adopt a suggestion by one commenter, which urged that the election be held within 15 days of the final voter list. See Testimony of Hernandez on behalf of UFCW II. Likewise, the Board declines to set the election date to be the same day the petition is filed, as another commenter urged. See Testimony of Thomas Meiklejohn II. The Board also rejects a suggestion by the dissent to impose 60 days as a maximum period before holding the election.

[39] See Casehandling Manual Section 11302.1.

[40] See, e.g., SHRM; Sheppard, Mullin, Richter & Hampton LLP (Sheppard Mullin); and the National Retail Federation (NRF).

[41] See, e.g., National Grocer's Association (NGA); Waste Connections; ALFA.

representation proceedings. See, e.g., *Hahn Property Management Corp.*, 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.*, 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 fn. 11 (1962). Because the final rule, which addresses representation case procedures, does not in any way permit the Board to use speech or its dissemination as evidence of an unfair labor practice, the literal language of Section 8(c) is not implicated. Compare *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013) (invalidating Board rule that required employers to permanently post a prescribed notice of employee rights "upon pain of being held to have committed an unfair labor practice"), with *id.* at 959 n.19 (concluding that a Board rule requiring employers to post an election notice immediately before a representation election "does not implicate § 8(c)" because violation of that rule does not carry the prospect of unfair labor practice liability).

Nor does the final rule run afoul of the First Amendment. Aside from the accurate statement that speech about unions is protected by the First Amendment,[42] the comments do not appear to argue (except in the most abbreviated fashion)[43] that the proposed amendments would violate the First Amendment. In any event, neither the proposed nor the final rule restricts speech. The rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the current rules, employers remain free to express their views on unionization, both before and after the petition is filed, so long as they refrain from threats, coercion, or

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[42] *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945).

[43] See, e.g., AEM II; INDA II; Knife River II.

objectionable interference.[44] As the Supreme Court stated in 1941, "The employer * * * is as free now as ever to take any side it may choose on this controversial issue." *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941). Likewise, the rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party.

The comments do not contend that employers will be prevented from expressing their opinions on unionization, but only that, because there may be less time between petition and election in some cases, employers will have fewer opportunities to express their opinions before the Board concludes its investigation under Section 9. 29 U.S.C. 159. The Board recognizes that "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (plurality opinion)). But the rule does not violate this constitutional principle because employers will continue to have ample meaningful opportunities to express their views both before and after a petition is filed, as discussed below.[45]

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[44] In this regard, the Board agrees with comments stating that the rule does not restrict, let alone prohibit, any form of expression or any particular message. See LIUNA MAROC II; AFL-CIO Reply II.

[45] Some comments draw comparisons to political elections, which typically occur at regularly set intervals, but the Board does not find these comparisons to be apt. See Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 Washburn L. J. 473, 501-06 (2013); U.S. Poultry & Egg Association, the National Chicken Council, and the National Turkey Federation (U.S. Poultry) II. Although they share certain common features, such as the

2. The Final Rule Accords with the Statutory Policy in Favor of Free Debate

Although it is clear that the proposed amendments implicate neither the First Amendment nor the literal language of Section 8(c) of the Act, many comments nevertheless suggest that the amendments would leave employers with too little time to effectively inform their employees about the choice whether to be represented by a union.[46] They contend that the consequences of a union vote are long-lasting and could significantly affect employees' livelihoods and careers, and therefore ensuring that employees have sufficient time to hear from all sides is critical to the statutory objective of ensuring employee free choice.[47] Comments in favor of the amendments contend, on the other hand, that employers can and do communicate their views on unions to employees even before a petition has been filed and will continue to have sufficient time to do so after filing under the proposed amendment.

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secret ballot, political elections and representation elections are still quite different. Most notably, as discussed above, Congress has consistently expressed a clear purpose of limiting obstructions to commerce by holding union organizing elections quickly, *Boire v. Greyhound Corp.*, 376 U.S. 473, 478 (1964) (quoting legislative history)—a consideration which is unique to elections held in the labor relations context. Another significant difference is the existence of an employment relationship between the electorate and one of the parties to the representation case proceeding; this changes the election in countless ways, from the various parties' relative ease of access to the electorate, to the reasonable implications which can be drawn from employer-specific conduct—none of which finds any parallel in modern political elections. The Board therefore declines to borrow campaign timing principles from the political election context wholesale.

[46] See Chamber; COLLE; SHRM; Seyfarth Shaw; Sheppard Mullin; Baker & McKenzie; John Deere Water; PIA; Senator Alexander and Republican Senators II; Diamond Transportation; Testimony of Peter Kirsanow on behalf of NAM II.

[47] See NGA; Retail Industry Leaders Association (RILA); Society of Independent Gasoline Marketers of America (SIGMA); Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators (Ranking Member Enzi and Republican Senators); National Meat Association; NAM II.

There is a clear statutory policy in favor of free debate and these amendments recognize, and are fully consistent with that policy.

a. Chamber of Commerce v. Brown

The Supreme Court recognized in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), that the enactment of Section 8(c) embodies a general "congressional intent to encourage free debate on issues dividing labor and management." *Id.* at 67 (quoting *Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966) (a defamation case)). The Court further recognized that such debate contemplates advocacy by both labor and management, noting that the inclusion in Section 7 of the right to refrain from joining a union "implies an underlying right to receive information opposing unionization." *Id.* at 68.[48] The Court relied on these features of the Act to invalidate, on preemption grounds, a California law that prohibited the use of state funds to encourage or discourage employees from seeking union representation. As the Court found, "California's policy judgment that partisan employer speech necessarily 'interfere[s] with an employee's choice about whether to join or to be represented by a labor union'" was in direct conflict with national labor policy as reflected by the foregoing provisions of the Act. *Id.* at 69.

As recognized by the Court in *Brown* the Act encourages free debate by

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[48] This is not to suggest, of course, that employers are required to engage in any campaign speech at all, or to contest evidence of majority status; employers are free to decide whether to express their views on unionization—pro or con or neutral—if done without threat of reprisal or force or promise of benefit. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974); cf. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d at 956-59 (discussing the employer's right to remain silent). See also *NLRB v. Creative Food Design LTD.*, 852 F.2d 1295, 1297, 1299 (D.C. Cir. 1988) ("an employer's voluntary recognition of a majority union also remains 'a favored element of national labor policy'.") (citation omitted).

employers, labor organizations and employees during representation proceedings. But ultimately, it is up to employees to evaluate the campaign information with which they are presented, as Board precedent recognizes. See *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962) ("[T]he employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative"); *Handy Andy, Inc.*, 228 NLRB 447, 456 (1977) (declining to withhold certification from unions with records of discriminatory practices); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 131-32 (1982) (relaxing the Board's misrepresentation standard on the ground that more reliance on the vigorous campaigning by the parties would reduce dilatory post-election litigation). These decisions confirm that the Act presupposes that all parties to a representation proceeding will have a meaningful opportunity to speak.

But a meaningful opportunity to speak does not mean an unlimited opportunity to speak. As in the First Amendment context, there is no fundamental right for parties to "publicize their views 'whenever and however and wherever they please.'" *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014).

The election must be held sometime; therefore, the resource of time to campaign is an inherently limited one.[49] This is particularly significant where, as discussed above,

[49] In this way time is fundamentally different from other speech resources; by necessity, the government must impose some kind of cap on time. Money, by contrast, is a speech resource with no such inherent cap. This distinction must be taken into account in reading cases such as *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014); *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 898 (2010); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), which involve regulation of campaign spending. Compare NGA II (eliding this distinction in relying on *McCutcheon*) with Testimony of Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II (discussing this

the Act also embodies a very strong countervailing policy in favor of holding elections "efficiently and speedily."[50] In short, the Board is not required to wait for the parties to exhaust all opportunities for speech before holding an election, so long as the opportunity they have is a meaningful one.

As discussed below, the Board concludes that these amendments will not deprive employers of a meaningful opportunity to participate in election campaigns. Many employers are aware of the campaign before the petition is filed, and begin communicating at that time. Indeed, many employers speak to employees about unions in the absence of any particular campaign, and will have laid the foundation for effective campaign speech well in advance. Finally, and most significantly, even where no pre-petition speech whatsoever takes place, these amendments will not eliminate the opportunity for meaningful speech, which will continue to be ample even after the petition is filed.

b. Employer Pre-Petition Knowledge

Numerous comments contend that any shortening of the time period between the petition and election will be detrimental to employers because employers are often unaware that an organizing campaign is underway until the petition is filed.[51] These comments contend that the union will have had a head start in the campaign because it will, necessarily, have already obtained authorization cards from at least 30 percent of

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distinction).

[50] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946).

[51] See, e.g., Chamber; CDW; National Ready-Mixed Concrete Association (NRMCA); Greater Raleigh Chamber of Commerce; Landmark Legal Foundation; Vigilant; Food Marketing Institute (FMI) II; Klein II**.**

employees in the petitioned-for unit, and will have been able to delay filing the petition for whatever amount of time it believed was advantageous in order to communicate with employees.[52] For example, the Chamber comments that union petitions "catch[] many if not most employers off guard and ill-prepared to immediately respond * * *." The Board was presented with no reliable empirical evidence, however, suggesting that employers are frequently unaware of an organizing drive before the filing of a petition.[53] Indeed, the available evidence suggests the contrary.

The Supreme Court's decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 620 (1969), which upheld the Board's authority to order an employer to bargain with a union that had not been certified as the result of an election, is relevant to this issue. In *Gissel*, the employers argued that the Board could not order an employer to bargain with the union, even when the union's majority support was demonstrated through employees' authorization cards and the employer's unfair labor practices had made a free and fair election impossible, because a union could solicit such cards before the employer had an adequate opportunity to communicate with employees. The Court rejected this argument:

> The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order

[52] NGA; National Meat Association. See also Spartan Motors, Inc.; Cook Illinois Corporation; Arizona Hospital and Healthcare Association; Constangy, Brooks & Smith, LLP (Constangy); Sheppard Mullin; Ranking Member Enzi and Republican Senators; Specialty Steel Industry of North America; International Foodservice Distributors Association; NAM; Chamber; NRTWLDF; Chairman John Kline of the House Committee on Education and the Workforce, and Chairman Phil Roe of the House Subcommittee on Health, Education, Labor and Pensions (Chairmen Kline and Roe) II.

[53] COLLE acknowledges this in its comment.

> to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, e.g., *Hunt Oil Co*., 157 NLRB 282 (1966); *Don Swart Trucking Co*., 154 NLRB 1345 (1965). Thus, in all of the cases here but [one,] the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began its antiunion campaign at that time; and even in the [one] case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority.

Id. at 603. The Supreme Court has thus recognized that the concern expressed in the comments "normally" does not arise even when there is no election and the organizing effort does not proceed beyond the signing of authorization cards. What was true at the time of *Gissel* is still true today.

There is substantial evidence on this point in the rulemaking record. See Testimony, Ole Hermanson on behalf of AFT II, Gabrielle Semel on behalf of CWA II, Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II, Maneesh Sharma on behalf of AFL-CIO II. In some cases, the employer's knowledge of the campaign is apparent from the fact that the employer committed unfair labor practices targeting employees' organizing activity before the filing of the petition.[54] This is the

[54] See, e.g., *Ryder Truck Rental*, 341 NLRB 761, 765 n.9, 767 (2004) (petition filed in December; in November, employer invited employees to report any harassment by union), *enforced*, 401 F.3d 815 (7th Cir. 2005); *Dlubak Corp*., 307 NLRB 1138, 1141, 1147 (1992) (threats and discriminatory discharges occurred October 5–13; petition filed October 24), *enforced mem.*, 5 F.3d 1488 (3d Cir. 1993); *Spring City Knitting Co.*, 285 NLRB 426, 431, 444, 448-49, 450 (1987) (unfair labor practices occurred March 1, 14, and 29; petition filed May 3); *Well-Bred Loaf, Inc.*, 280 NLRB 306, 311-16 (1986) (threats, interrogation, and unlawful discharges occurred August 22 and 23, at a time when union activity was already common knowledge; petition filed October 6); *Dilling Mechanical Contractors*, 318 NLRB 1140, 1141, 1144, 1155 (1995) (union informed employer of campaign on January 4, but employer had threatened employees with discharge in December if they engaged in union activity), *enforced*, 107 F.3d 521 (7th

basis for an empirical study conducted by Professors Kate Bronfenbrenner and Dorian Warren (and submitted with their comment).[55] The study concluded that in 47 percent of cases involving serious unfair labor practice allegations against employers that resulted in a settlement or a Board finding that the law was violated, the alleged unlawful conduct occurred before the petition was filed; in 60 percent of cases involving allegations of interrogation and harassment, the conduct occurred before the petition; and in 54 percent of cases involving allegations of threats and other coercive statements, the conduct occurred before the petition. Professor Warren testified at the 2011 public hearing that the researchers' review of the files in these cases indicated that the conduct resulting in the charge, whether it was actually unlawful or not, evidenced the employer's knowledge of the organizing campaign. Critics of the study contend that it inappropriately focuses on mere allegations of misconduct and that the category of "charges won" inappropriately includes settlements.[56] The importance of the study's findings for present purposes,

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Cir. 1997), cert. denied 522 U.S. 862 (1997).

[55] The study was based on a random sample of 1000 elections during the period 1999 through 2003 in units with 50 or more eligible voters and a survey of 562 campaigns from that sample. See Bronfenbrenner & Warren, *supra* at 2. An updated version of the study was discussed by Professor Bronfenbrenner in her 2014 hearing testimony.

[56] The Chamber in particular makes this point, and complains that the 2011 final rule did not respond to the Chamber's criticism. Chamber II. However, again, the Board is not relying on any evidence of increased ULPs during a lengthy campaign, or in any way suggesting that settled charges are meritorious. The essential point is that the case files themselves show that there was evidence that the employer knew about the campaign before the petition was filed.

Other comments argue that the study shows that only about 50-60% of employers have prepetition knowledge. This is a misunderstanding of the study. The study does not survey a statistical sample of campaigns generally, and ask whether the employer had prepetition knowledge; the study surveys campaigns which resulted in ULP charges, and asks whether the ULP occurred before a petition had been filed. Assuming that employers

however, does not rest on whether or not the charges had merit, but rather on the fact that they were filed based on pre-petition conduct and that available information in the case files suggests the employer had pre-petition knowledge of the organizing campaign. The study's findings in that regard are consistent with the Board's experience, and no contrary study was presented to the Board.

In addition, the AFL-CIO surveyed 57 union-side labor lawyers, and asked whether "[i]n the organizing drives you have been involved in that resulted in a petition for an election, was the employer aware of the organizing before the petition was filed?" The vast majority—41 attorneys—gave an unqualified "yes" in answer to this question (9 answered "no" and 7 gave some answer other than yes or no).[57] AFL-CIO II. Though this

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do not commit ULPs at the earliest possible moment, the fact that about half of ULPs surveyed occurred after petition filing does not prove the negative, i.e., that the employers in those cases *lacked* prepetition knowledge.

Thus the Board recognizes that neither the surveyed universe nor the 50-60% rates observed reflect the broader realities of union organizing campaigns. (The rates very likely are substantially higher.) The study merely provides some measure of empirical confirmation of the Board's qualitative conclusion, based on its own experience, that employers are very often aware of the organizing campaign before the petition is filed. Indeed, the study's focus on employer's with bargaining units larger than the Board's historical medians drives home this point. For the Board has long presumed that in smaller workplaces, employers are even more likely to be aware of union organizing activity among their employees. See, e.g., *Wiese Plow Welding Co.*, 123 NLRB 616, 618 (1959).

[57] The Chamber criticizes the statistical rigor and ambiguity of the AFL-CIO's survey. Chamber II reply. It is quite true, as the Chamber notes, that it is unclear how many campaigns in total are represented in this answer, and that, for a variety of reasons, it would not be methodologically sound to draw rigorous statistical inferences. A speaker representing the AFL-CIO conceded as much at the hearing. That is not, however, the purpose for which the survey was taken or submitted, and that is not the purpose for which the Board is citing it. Rather, the "survey" is nothing more than a summary of "what practitioners are reporting that they are experiencing." Testimony of Sharma on behalf of AFL-CIO II. In this way, it is like a compilation of comments from experienced

does not show with quantitative precision how often employers know about the campaign, it does cast doubt on the Chambers' unsupported statement that "many if not most" employers are surprised by the petition.

Board precedent is also replete with cases in which there was clear evidence that the employer was aware of the organizing campaign well before the petition was filed. In many cases, unions give the employer formal notice of the campaign before filing the petition, either by demanding recognition or by providing the employer with a list of employees on the organizing committee.[58] There are many pragmatic reasons for this common practice, which were explained in some detail by one speaker at the hearing: "[First,] the union, in order to build strength, has to * * * build up the confidence among the employees that they can join together to speak up for themselves. And then, in order to get that message to the larger group of employees, there has to be some committee, some group of people who are willing to go public, have their faces on campaign literature and have their names disclosed as the people who are willing to lead the

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labor attorneys, sharing the varieties of their experiences with Board procedures.

[58] See, e.g., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 1 (Feb. 20, 2014) (Union filed petition on March 30th, but informed the employer of its organizing activity on February 25th. Board also finds that employer already knew of the organizing drive for months before notice was given.); *Flamingo Hilton-Laughlin*, 324 NLRB 72, 76 (1997) (union informed employer of campaign and committee members on January 26 and filed petition on March 26), enf. granted in part, denied in part 148 F.3d 1166 (D.C. Cir. 1998); *Keco Industries*, 306 NLRB 15, 16 (1992) (union informed employer of campaign in January and filed petition on October 31); *Mariposa Press*, 273 NLRB 528, 533 (1984) (union informed employer of campaign on September 25 and filed petition on October 6); *Comet Corp*., 261 NLRB 1414, 1418, 1422 (1982) (union informed employer of campaign and committee members on July 23 and filed petition on August 23); *Quebecor Group, Inc.*, 258 NLRB 961, 964 (1981) (union informed employer of campaign on November 17 and filed petition on November 28).

campaign. Once that happens, the employer knows there is something going on. The second reason for this is quite simply that if you end up in litigation where somebody was discriminated against because of their union activity, you want to be able to show that [the employer knew about their union activity.] If it's been concealed you have a much, much harder time proving that. And then the third reason is because it doesn't work to keep it secret * * *. [W]ord gets to the employer." Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II.

Finally, the evidence on the record on this point is also consistent with the Board's own experience and expertise in processing representation petitions and unfair labor practice cases.

c. General Employer Communications About Unionization

The foregoing authority casts doubt on the contention that "many if not most" employers are unaware of an organizing drive prior to the filing of a petition. But even in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees.[59] Some comments suggest that, prior to receiving a petition, employers pay little attention to the issue of union representation, and that general efforts to inform and persuade employees about unionization in the absence of a petition would be time-consuming and expensive.[60] Although some employers may choose not to discuss unionization until a petition is filed, the Board's experience suggests that other

[59] See comments of John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D.; Center for American Progress Action Fund; LIUNA MAROC II; Testimony of Hermanson on behalf of AFT II; Testimony of Semel on behalf of CWA II.

[60] Fox Rothschild LLP; National Mining Association; NRF**.**

employers do discuss unionization with their employees beforehand, often as soon as they are hired. For example, some employers distribute employee handbooks or show orientation videos to all new employees that express the employer's view on unions or its desire that employees remain unrepresented.[61]

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[61] See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 378 (2006) (employee handbook, distributed to all new employees, included a section entitled, "What about Unions?"; the section stated the employer's preference to be union-free and asserted that employees do not need a union or outside third party to resolve workplace issues); *SNE Enterprises*, 347 NLRB 472, 473 (2006) (employee handbook stated, "The Company believes a union is not necessary and not in the best interest of either the Company or its Team Members."), *enforced*, 257 Fed.Appx. 642 (4th Cir. 2007); *Overnite Transportation Co.*, 343 NLRB 1431, 1455 (2004) (employee handbook stated: "It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop."); *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1188 (2004) (employee handbook stated that remaining "union-free" is an objective of the company); *Noah's New York Bagels*, 324 NLRB 266, 272 (1997) (section of employee handbook entitled "Unions" states: "At Noah's Bagels we believe that unions *are not necessary*. We believe this for many reasons[.] First, there is no reason why you should have to pay union initiation fees, union dues, and union assessments for what you already have* * * * Second, there is no reason why you or your family should fear loss of income or job because of strikes or other union-dictated activity. Third, we believe that the best way to achieve results is to work and communicate directly with each other without the interference of third parties or unions* * * * The federal government gives employees the right to organize and join unions. It also gives employees the right to say 'no' to union organizers and not join unions. Remember, a union authorization card is a power of attorney which gives a union the right to speak and act *for* you. If you should be asked to sign a union authorization card, we are asking you to say 'no.'"); *American Wire Products*, 313 NLRB 989, 994 (1994) (employee handbook states, "Our Company is a non-union organization and it is our desire that we always will be"; the same section also requests employees to direct union-related questions to a supervisor); *Heck's, Inc.*, 293 NLRB 1111, 1114 (1989) (employee handbook's "Union Policy" read: "As a Company, we recognize the right of each individual Employee, their freedom of choice, their individuality and their needs as a worker and a fellow human being. For these reasons and others, we do not want any of our Employees to be represented by a Union* * * * When you thoroughly understand Heck's liberal benefit programs, the desire to assist you in your job progress and willingness to discuss your job-related problems, you surely will agree there is no need for a union or any other paid intermediary to stand between you and your company.") Thus, employees may be well aware of their employer's views

Several comments contend that an employer's general ability to communicate with employees regarding unions is not a complete substitute for the ability to communicate regarding a specific petition and a known petitioner.[62] However, a complete substitute is not necessary in this context; rather, the question is whether the overall speech opportunity in the campaign is meaningful. The opportunity to engage in general speech of this sort is undoubtedly relevant on this question, and must be considered together with the opportunities for later, more specific campaign speech as part of the overall analysis.

Finally, even in the absence of any pre-petition campaign, employees have experience with the existing labor-management regime in their workplace, which informs their choice of whether to seek to alter it through collective bargaining. In unionized workplaces in which the incumbent union faces a decertification petition or a rival union petition, the incumbent union will be appropriately judged by its performance to date. Thus, eligible voters have a preexisting base of knowledge and experience with which to evaluate the incumbent. The same is true in workplaces where employees are unrepresented. Employees there have experience with labor-management relations in the absence of union representation. In both cases, employees base their choice, at least in part, on the relationship they are being asked to change.[63]

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regarding unions even before any campaign begins.

[62] See SHRM; COLLE; NAM; Seyfarth Shaw; ALFA; Testimony of Arnold Perl on behalf of TN Chamber of Commerce.

[63] See Testimony of Darrin Murray on behalf of SEIU II. In contrast to this point, which is unassailable, the AFL-CIO contends that, based upon a study by Getman and Goldberg, the employees' votes are determined *almost entirely* by preexisting attitudes

d. Employers' Post-Petition Opportunities for Speech

Although the Board has concluded that the record does not establish that pre-petition employer ignorance of an organizing campaign is the norm, the Board accepts that, in at least some cases, employers may, in fact, be unaware of an organizing campaign until a petition is filed. For example, COLLE cites union campaign strategy documents that allegedly call for "stealth" campaigns. In such cases, the union may indeed have a "head start" in the campaign in the sense that it begins communicating its specific message to the unit employees before the employer does so.[64]

And so the question is presented whether, as a general matter, the rules will provide a meaningful opportunity to campaign under these circumstances. The argument has been presented that a great deal of time is required, weeks and even months, in order to decide on a message and effectively communicate it. Testimony of Kirsanow on behalf of NAM II; Testimony of Edgardo Villanueva on behalf of EMSI Consulting II. This is not consistent with our experience in overseeing Board elections.

Most elections involve a small number of employees. A quarter of elections are held in units with 10 or fewer employees; half of elections are held in units smaller than 25; and three-quarters of all Board elections have 60 or fewer employees in the unit.[65]

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toward working conditions, rather than by campaign speech. AFL-CIO Reply II. Regardless of the empirical reality of this claim, which we strongly doubt, the Act itself is premised on a contrary assumption, as discussed above. The supposed ineffectiveness of employer speech in persuading voters cannot be cited as reason to restrict that speech, and we expressly decline to rely on this rationale.

[64] See also comment of RILA, contending that "stealth campaigns" are common in the retail industry.

[65] In FY2013; 99% of elections involved fewer than 500 employees.

Given this small size—much, much smaller than even the smallest political elections—effective communication with all voters can be accomplished in a short period of time. Even in much larger units, employers have a meaningful opportunity for speech.

The employer has opportunities to communicate with employees while they are in the workplace, during the workday. It can compel employees to attend meetings on working time at the employer's convenience.[66] Most employers spend more than 35 hours per week in close, in-person contact with the voters. As pointed out at the Board's public hearings in both 2014 and 2011, employers can use as much of that time as they wish communicating with employees about these matters. Testimony of Hermanson on behalf of AFT II; Testimony of Professor Joseph McCartin on behalf of the Kalmanovitz Initiative for Labor and the Working Poor. Both professional "persuaders" and employer representatives who testified against the rule were in agreement on this point. See, e.g., Testimony of Villanueva on behalf of EMSI Consulting II. Yet, generally, only three or four such meetings were considered necessary to communicate with employees effectively. *Id.*

Another speaker testified about a recent campaign which aptly illustrates this principle. Testimony of Elizabeth Bunn on behalf of AFL-CIO II. In the stipulation, the election was set 25 days from the petition; the unit comprised eight employees. The

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[66] A 1990 study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percent of the elections. John J. Lawler, Unionization and Deunionization: Strategy, Tactics, and Outcomes 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend so-called "captive audience" meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign. Bronfenbrenner & Warren, *supra* at 6.

employer held a total of 30 individual, mandatory meetings to communicate with employees about the vote. This demonstrates that, where employers wish to engage in an unusually high amount of communication, they can accomplish that in a short period of time because they control the quantum of work time which is used in conveying their message.

Under current law, employers can compel attendance at meetings at which employees are often expressly urged to vote against representation.[67] There is no limit on either the frequency or duration of such mandatory meetings and the rule imposes none. Employees may be relieved of regular duties and, instead, be required to attend such meetings.

These are examples of how employer speech can be expeditiously accomplished. The rule does not limit any communication methods available to employers. Indeed, that is precisely the point of this discussion: that employers have meaningful opportunities to speak with employees both under the old rules and the new.[68]

The Board considered such factors in its *Excelsior* rule, which requires that the names and addresses of voters be provided to the petitioning union prior to the election.

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[67] See, e.g., *Fontaine Converting Works Inc.*, 77 NLRB 1386, 1387 (1948) (employer did not violate the Act by "compelling its employees to attend and listen to speeches on company time and property").

[68] In light of this fact, the dissent's reading of this discussion is particularly perverse. Relying on *Citizen's United*, 130 S.Ct. 876 (2010) and progeny, the dissent claims the Board is using an "anti-distortion" theory to limit "an employer's undue influence," and rectify employers' "upper hand in campaign communications" by limiting the time employers have to speak. We—yet again—emphatically disclaim any such motivation. As previously discussed, the problems caused by delay have nothing to do with employer speech.

Excelsior Underwear, Inc., 156 NLRB 1236, 1240-41 (1966). The rule was designed, in part, to ensure fairness by maximizing the likelihood that all voters would be exposed to the nonemployer party arguments concerning representation. The rule requires that the petitioner have the opportunity to make use of a list of names and addresses of voters for a minimum of 10 days before the election, effectively allowing the petitioner a minimum of 10 days for such speech. See *Mod Interiors*, 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. "The *Excelsior* rule is not intended to test employer good faith or 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." *Mod Interiors, Inc.*, 324 NLRB 164 (1997). We think a similar analysis is relevant to employers' meaningful opportunity to speak here.

Finally, modern communications technology available in many workplaces permits employers to communicate instantly and on an on-going, even continuous basis with all employees in the voting unit. See, e.g., *Virginia Concrete Corp.*, 338 NLRB 1182, 1182 (2003) (employer sent "Vote No" message to "mobile data units" in employees' trucks in the final 24 hours before an election); Testimony of Bunn & Sharma on behalf of AFL-CIO II (less time is needed to communicate in the era of communications technology, from text messaging to video presentations on flash drives).[69] Access to information about particular unions, such as news reports, regulatory

[69] As described in the NPRM, and below, the Board's experience suggests employers are also increasingly using company and personal email to send campaign communications to their employees. 76 FR 36812, 36820 (June 22, 2011).

disclosures, or judicial opinions are readily available on the internet, both for employees to peruse and for employers who desire to use such information as part of their messaging. See, e.g., Office of Labor-Management Standards (OLMS), *http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm*. More general information praising or decrying the effects of union representation is also plentiful. Indeed, now more than ever, parties who wish to immediately participate in an election campaign have the tools to do so at their disposal.

e. No Regulatory Minimum or Maximum Time Should Be Set

Many comments propose that the Board set specific standards for the number of days between the petition and the election. In general, however, none of these proposals agree as to what the standards should be.

Some have contended that the minimum should be 0 days. Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II. Or the minimum could be 10 days, paralleling the Union's time with the list of voter contact information, also discussed above. Cook-Illinois Corporation suggests a minimum of 21 days, subject to expansion or contraction by agreement of the parties. The dissent suggests a minimum of 30-35 days and a maximum of 60 days. National Right to Work Legal Defense Foundation (NRTWLDF) II proposes a minimum of 35 days. The Heritage Foundation proposes a minimum of 40 days. Others suggest times longer still.[70]

[70] CDW draws an analogy to the Older Workers Benefit Protection Act, 29 U.S.C. 626, which provides 45 days for employees to sign releases regarding age discrimination claims. CDW argues that this provision demonstrates the impropriety of forcing employees to make a decision on representation in less time than the current 38-day median. The Board does not find it instructive to compare an individual employee's permanent waiver of rights under a completely different statutory scheme with the

On the other hand, others have suggested imposing a different kind of regulatory maximum on the election date, i.e., that the election should be held within 15 days of the final voter list unless the parties agree to a later date. Testimony of Hernandez on behalf of UFCW II.

As both supporters and opponents of the rule have noted, however, every case will be different, and it would disserve the purposes of the Act to create a procrustean timeline for election speech. Testimony of Professor Samuel Estreicher; Testimony of Petruska on behalf of LIUNA MAROC II; Testimony of Ronald Meisburg on behalf of the Chamber II; cf. Testimony of Kirsanow on behalf of NAM II (there is no "irreducible point" where "logistical First Amendment violation" takes place). The election will "vary in size, geography and complexity in just about every way imaginable," and various unique situations will present themselves in particular workplaces. Testimony of Petruska on behalf of LIUNA MAROC II.[71] Bearing in mind the general principles articulated

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election procedures at issue here involving groups of employees and, typically, an active campaign by several parties. We also reject NAM's (II) analogy to the 45-day plant-closing or mass layoff notice period under the Worker Adjustment and Retraining Notification Act.

[71] Many commenters argued that their industry or employment situation presented unique speech needs that should be considered.

RILA and NRF argue that sufficient time to campaign is particularly critical in the retail industry, where employees work on different shifts, often are seasonal or part-time, are less accessible during the workday because they are on the sales floor, and often are unavailable outside normal working hours due to other commitments. See also Food Marketing Institute (FMI) II (similar arguments in food retail). NRF contends, however, that more than 98 percent of all retailers employ fewer than 100 workers, and RILA contends that most petitions seek elections in single-store units and that front-line managers typically constitute 10 to 20 percent of the workforce in each store.

NRMCA and construction industry employers (ABC II) make similar arguments, that their various industries have unique features such as isolated plant locations,

above, the regional director will retain a measure of discretion to consider these matters along with other relevant factors in selecting an election date.

As an alternative, some have discussed reserving "expedited" procedures for cases where the employer has received advanced notice of the campaign from the union. U.S. Poultry II; Testimony of Perl on behalf of the TN Chamber II. This suggestion would at least partially account for case-by-case variation in employer knowledge of the campaign. However, it would account for none of the other ways that campaigns vary, and would continue to apply inappropriate standards to cases that do not justify them.

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unpredictable delivery hours, and dispersed employees. But again, the commenters state that the vast majority of employers in the industry are small businesses. Therefore, most bargaining units are likely to be quite small, which should enable employer communication to take place in a relatively short period of time. In addition, as explained in the text, under extant precedent, these employers (and others) can require all employees to attend a meeting or multiple meetings outside their normal work hours, in a central location, in order to ensure they receive the employer's message prior to the election.

AHA II takes a different tack, arguing that large units are common in the healthcare field, where large hospitals average 471 RNs, and that this requires more time for speech. There is no question that a small fraction of the Board's elections take place in larger units: in 2013, for example, approximately 2.5% of elections were held in units of 300 or more. But this does not necessarily mean more time for speech is required; in large units it is generally most likely that the employer will have prepetition notice of the organizing simply because a campaign of that magnitude cannot be kept secret. Moreover, considering all the opportunities for speech available in the particular workplace, the mere size of the unit may not be sufficient to justify lengthening the campaign period in the particular case.

Nor are we persuaded by the suggestion that prompt elections are not possible in work forces with a large number of non-English speakers. See testimony of Villanueva on behalf of EMSI Consulting II. Of necessity employers with linguistically diverse work forces have to find ways to communicate with their employees in order to respond to the day-to-day demands of the business. The press of daily business requires prompt response in other matters, and it is reasonable to believe that employers can respond with equal promptness when questions of representation arise in their workplace. In addition, standardized campaign material has been developed by persuaders in a wide variety of languages.

More fundamentally, as discussed, the petition itself is adequate notice because the procedures under the new rules still provide a meaningful opportunity to campaign.

As another alternative, some have argued that the Board should publish, together with the final rule, revised "time targets" for representation case procedures. CDW; Testimony of Joseph Torres on behalf of Winston & Strawn II; Testimony of Ross Friedman on behalf of CDW II. The existing time targets set expectations that facilitate the negotiation of stipulations because "there is discretion to negotiate an election date anytime within" the time target. CDW. Time targets have never been published by the Board; rather, the extant time targets were published by the General Counsel, and represent his experience administratively overseeing the regions. The Board declines to publish any such time targets at present, and will continue to leave the matter within General Counsel discretion. We note that experience with the rules will continue to provide the frame of reference for the General Counsel's time targets, and that some time may be necessary before sufficient experience is available to intelligently revise the current targets; however, we think it reasonable to anticipate that time targets will ultimately be revised and published, and that timely completion of this process will serve the Board's objective of encouraging election agreements as parties adjust to the new rule. Any short term difficulties in reaching election agreements, should dissipate quickly, as they have in the past when prior time targets have been adjusted.

The Board believes that its duty is to perform its statutory functions as promptly as practicable consistent with the policies of the Act. The Board has amended its rules in order to facilitate that objective, but even under the amended rules, which leave the ultimate decision about the setting of the election date within the sound discretion of the

regional director after consultation with the parties, the Board does not believe it is likely or even feasible that it could perform its statutory functions in such a short period, and a regional director would set an election so promptly, that employee free choice would be undermined. The Board has thus decided to maintain the current practice of not setting either a maximum or a minimum number of days between petition and election via its rules.

f. Timing Under the Rules in Practice

Finally, it must be noted that many of the concerns expressed about the time from petition to election are predicated on erroneous speculation. Citing Member Hayes's dissent from the NPRM, some comments suggest that the amendments will provide for elections in as few as 10 days after the filing of the petition.[72] The practicalities of a regional director's conducting a directed election suggest otherwise. First, it takes at least 8 days to begin the hearing. At least 1 day is required for the hearing and then a decision and direction of election must be drafted and issued; thereafter, the voter list must be produced and the Notice of Election posted for 3 days – all before an election is conducted.

We are also not persuaded by the complaint that the amendments will work a deprivation of employer speech rights in cases where the employer feels pressured to enter an agreement regarding the election date that provides for a very fast election. Testimony of Elizabeth Milito on behalf of National Federation of Independent Business (NFIB) II. If the employer does not want a particular election date, it is free to not sign,

[72] See Chamber; COLLE.

state its position in its statement of position, and the regional director can fix the date of the election in the direction of election. If the employer does sign, there cannot have been a deprivation of rights absent evidence of actual duress.

In addition to arguing that the rule fails to give employers sufficient time to deliver their campaign message, some comments contend that the new rules do not give employees sufficient time to receive and evaluate that message and, if they so choose, to organize themselves to oppose union representation.[73] This argument is pressed with particular force in cases where the employer has exercised its statutory right to decline to express any opposition to the union. As a related matter, it is argued that an employer's choice to enter into an election agreement will deny employees an adequate opportunity for free debate among themselves.

This final rule does not change anything about an employer's ability to remain silent and agree to an election on a particular date. The very same scenario occurs under current rules. If the situation were ever such as to truly work a deprivation of employee rights, the Board would of course remain free to address it. But to date no such case has arisen. Indeed, an important change in this final rule—to require an initial notice upon

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[73] See NRTWLDF; Seyfarth Shaw; ALFA; ACE; CDW; NRMCA; Indiana Chamber; Con-way; Specialty Steel; Americans for Limited Government; International Foodservice; testimony of C. Stephen Jones, Jr. on behalf of Chandler Concrete Co., Inc.; testimony of Charles I. Cohen on behalf of CDW; testimony of David Kadela on behalf of Littler Mendelson; testimony of Harold Weinrich on behalf of Jackson Lewis LLP; testimony of Brett McMahon on behalf of Miller & Long Construction; NRTWLDF II; testimony of William Messenger on behalf of NRTWLDF II.

Some comments include a related argument that employees who are considered likely to oppose the union, and therefore were not involved in the pre-petition organizing campaign, may not know about the organizing drive until the petition is filed. See Seyfarth Shaw; ALFA.

filing of the petition—is likely to obviate any such risk. A representative of NRTWLDF acknowledged as much at the public hearing in 2014. Testimony of Messenger on behalf of NRTWLDF II.

g. Miscellaneous Matters Relating to the Opportunity to Campaign

The Board discounts the argument made in some comments that the proposed rule improperly fails to give the employer sufficient time to refute unrealistic promises or correct any mischaracterizations or errors by union organizers.[74] For 3 decades, Board law has been settled that campaign misstatements–regardless of their timing–are generally insufficient to interfere with an election, unless they involve forged documents that make employees unable to evaluate the statements as propaganda. See *Midland National Life Insurance Co.*, 263 NLRB 127, 132 (1982) (noting that employees are capable of "recognizing campaign propaganda for what it is and discounting it"). The *Midland* rule applies even if the misrepresentation takes place only a few days before the election. See, e.g., *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 195 (2004) (document circulated by union two days before election did not amount to objectionable misrepresentation under *Midland*).

The Board rejects the argument of Vigilant that a shorter period between petition and election will result in a greater number of mail-ballot elections and an accompanying increase in the potential for fraud and coercion. Nothing in the proposed or adopted rules

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[74] Vigilant; Indiana Chamber of Commerce; John Deere Water; PIA; Greater Raleigh Chamber of Commerce; NMMA; Associated Oregon Industries; NAM; testimony of Michael Prendergast on behalf of Holland & Knight; Ohio Grocers Association II; Klein Dub & Holleb II**.** T&W Block Company makes a related argument, contending that the failure to allow sufficient time would destabilize labor relations because employees would enter bargaining with unrealistic expectations.

alters the standard for determining when an election should be conducted by mail ballot. A regional director's determination of whether an election should be held manually or by mail is not informed by the number of days between the petition and the election. Rather, it is based on factors such as the desires of the parties and whether employees are "scattered" due to their geographic locations or work hours and whether there is a strike, lockout, or picketing in progress. See *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998); Casehandling Manual Section 11301.2.

Baker & McKenzie contends that, to the extent the amendments will result in elections being held within 10 to 25 days after the petition, they are inconsistent with the Board's other notice provisions, which provide longer periods. For example, Baker & McKenzie notes that a respondent must post a remedial notice in an unfair labor practice case for 60 days or longer, and that the Board previously promulgated a rule requiring employers to continuously post in the workplace a notice of employee rights under the Act.[75] The Board does not agree that its other posting requirements are or were in any way inconsistent with the final rule, because each serves different purposes in different contexts than the notice rules issued today. First, remedial notices alleviate the impact of unlawful acts by an employer or union, rather than communicate about a specific petition in a specific unit. Thus, the time reasonably necessary for employees to obtain the message from a posted remedial notice, and for that message to dissipate the effects of

[75] Following litigation, that rule was withdrawn by the Board. See 77 FR 25868 (May 2, 2012) (announcing indefinite delay in effective date pending litigation outcome); NLRB January 6, 2014 press release announcing decision not to seek Supreme Court review of the two adverse appeals court decisions, *http://www.nlrb.gov/news-outreach/news-story/nlrbs-notice-posting-rule* (last visited September 26, 2014).

unfair labor practices, is longer than that necessary for employees to receive information from employers and unions actively campaigning for their support. Second, the Board explained why it required continuous posting of the NLRA rights notice, as opposed to its remedial and election notices, "[I]t is reasonable to expect that even though some employees may not see the notices immediately, more and more will see them and learn about their NLRA rights as time goes by." 76 FR 54005, 54030 (Aug. 30, 2011). Thus, the Board recognized the goal of "reach[ing] new employees" (*id.*) could be met by requiring the rights notice to be readily available to employees whenever they chose to examine it. In contrast, employee turnover is unlikely to be of concern during the time between a direction of election and the election itself. Finally, the Board's existing notice-posting provision for elections, unaltered by the final rule, requires that the notice be posted for only 3 working days before the election. Compare 29 CFR 103.20 (2010)[76] with amended 102.67(k). The Board thus rejects the "one size fits all" suggestion for maximum and/or minimum time periods for conducting elections under the Act.

Other comments suggest that the amendments will generate litigation because, if a party has less time to campaign between the petition and election, the party will "assert as many defenses as possible" or try to obtain a hearing simply to "buy * * * more time" before the election. AHA. SEIU's reply comment notes that there was no significant drop in the consent or stipulation rate following former General Counsel Fred Feinstein's initiative aimed at commencing all pre-election hearings between 10 and 14 days after the

[76] This and subsequent citations to the regulations in 2010 is not meant to suggest that there is a substantive difference between the current regulations and the regulations as they existed in 2010, but rather to emphasize that the relevant language existed in our regulations before the issuance of the first June 22, 2011 NPRM in this rulemaking.

filing of the petition. Rather than undermining the rationale for the proposals, the suggestion that parties might use the pre-election hearing to delay the conduct of an election reinforces the need for the final rule. Both the ability and incentive for parties to attempt to raise issues and engage in litigation in order to delay the conduct of an election are reduced by the final rule.

Some comments, including that of Professor Samuel Estreicher, suggest that the employer needs sufficient time not only to campaign, but to retain counsel so that the employer understands the legal constraints on its campaign activity and does not violate the law or engage in objectionable conduct.[77] A number of comments specifically argue that any compression of the time period between the petition and election will be particularly difficult for small businesses, which do not have in-house legal departments and may not have ready access to either in-house or outside labor attorneys or consultants to counsel them on how to handle the campaign.[78] Similarly, some comments suggest that, to the extent the amendments result in a shorter period of time between the petition and the election, they will increase objections and unfair labor practice litigation, because employers will not have an opportunity to train managers on how to avoid objectionable

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[77] See also testimony of former Board Member Marshall Babson on behalf of Seyfarth Shaw LLP (emphasizing that the rules must balance the various competing interests).

[78] NRMCA; Indiana Chamber; National Automobile Dealers Association (NADA); T&W Block Company; York Society for Human Resource Management; NMMA; Council of Smaller Enterprises (COSE); Bluegrass Institute; Landmark Legal Foundation; American Trucking Associations (ATA); testimony of C. Stephen Jones, Jr. on behalf of Chandler Concrete Co., Inc.; American Fire Sprinkler Association; Leading Age; testimony of Milito on behalf of NFIB II.

and unlawful conduct. See Con-way Inc.; Bluegrass Institute; ATA.[79]

However, under the final rule, when the petition is served on the employer by the regional office, it will be accompanied by the Notice of Petition for Election, (a revised version of Form NLRB 5492), which will continue to set forth in understandable terms the central rules governing campaign conduct. This provides an immediate explanation of rights and obligations, while an employer who wishes to locate counsel may do so. In any event, the Board does not believe that any shortening of the time between petition and election that results from the final rule will impair employers' ability to retain counsel in a timely manner.[80] In this regard, Russ Brown, an experienced labor-relations consultant, testified at the public hearing that his firm routinely monitors petitions filed in the regional offices and promptly offers its services to employers named in those petitions. In general, the well-documented growth of the labor-relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly.

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[79] Other comments, however, cite evidence indicating a positive correlation between the length of a campaign and unfair labor practice allegations. See SEIU; NELP; Senior Member Miller and Democratic House Members; John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D; Senators Tom Harkin, Robert Casey, and Patty Murray, and U.S. Representatives George Miller and John Tierney. See also testimony of Professor Ethan Daniel Kaplan (citing similar results from a study in Canada).

[80] Ranking Member Enzi and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption to the "persuader" disclosure requirement under the Labor-Management Reporting and Disclosure Act. See 76 FR 36178 (proposed June 21, 2011). However, the DOL's stated goal is publicizing the interactions between employers and covered entities, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to the DOL. The Department of Labor has not yet taken action on the proposed rule. See 79 FR 896, 1025 (Jan. 7, 2014). The Board also wishes to make clear that—contrary to COLLE's suggestion—its actions have been in no way influenced by any actions of the DOL.

Comments, such as the one cited above, indicate that it is a routine practice for labor-relations consultants to monitor petitions filed with the regional offices, so that the consultants may then approach the employers to offer their services.[81]

3. Congressional Inaction in 1959

ACC points out that Congress, in enacting the Labor-Management Reporting and Disclosure Act (LMRDA) in 1959, rejected a proposal that would have permitted an election to take place before a hearing when there were no issues warranting adjudication, so long as the election was not held sooner than 30 days after the petition was filed (ACC Reply). The proposal, contained in the Senate version of the bill, would have permitted a so-called "pre-hearing election," barred by the 1947 Taft-Hartley amendments to the Act. S. 1555, 86th Cong., 1st Sess. 705 (as passed by Senate, Apr. 25, 1959). At one point Senator Kennedy suggested that this 30-day period would provide a "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5984 (April 15, 1959) (statement of Sen. Kennedy). The House bill, however, never contained a parallel provision, and it was not enacted into law.

Nevertheless, ACC (Reply) argues that the proposed amendments described in the

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[81] See testimony of Russ Brown on behalf of the Labor Relations Institute (LRI), noting that the Labor Relations Institute's website "is probably one of the leading sources of keeping up with just about every scrap of paper you guys push." The Web site, *www.lrionline.com*, includes a section entitled "union avoidance" and advertises online libraries that include a "daily petition library" with "supplemental petition information available daily" and an "organizing library" tracking "union organizing activity." See also testimony of Michael D. Pearson, former field examiner (noting that consultants check the public filings of RC petitions on a daily basis to solicit business from employers); testimony of Professor Joseph McCartin on behalf of the Kalmanovitz Initiative for Labor and the Working Poor (noting that a "thriving industry of consultants has emerged").

NPRM are inconsistent with congressional intent because they do not guarantee a minimum of 30 days between petition and election. To the extent that ACC's argument bears on the final rule, the Board rejects it. Report language and statements of individual legislators on a provision that was not enacted in 1959 are entitled to little if any weight in assessing the meaning of legislation adopted in 1935 and amended in 1947. In fact, the Supreme Court has clearly stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" because a bill can be proposed or rejected for any number of reasons.[82] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001) (internal quotation marks omitted); see also *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Indeed, the rejection of the proposed amendment would more reasonably be understood as an indication that Congress did not believe a minimum time between petition and election is necessary. However, the legislative history of the LMRDA offers no guidance on why the provision was rejected, and Congress imposed no requirements in the LMRDA or at any other time concerning the length of time that must elapse between petition and election. Accordingly, the Board finds no indication in this legislative history that the final rule is in any way contrary to Congress's intent.

D. Effects on Employee Representation and the Economy

Many comments do not address the substance of the proposed amendments, but

[82] For this reason, the Board declines COLLE's similar suggestion to find relevant Congress' failure to pass the 1978 Labor Law Reform Act, versions of which provided for varying time frames for representation elections.

instead speak generally in favor of, or in opposition to, labor unions and the process of collective bargaining. In response, the Board continues to observe that, by passing and amending the NLRA, Congress has already made the policy judgment concerning the value of the collective-bargaining process; the Board is not free to ignore or revisit that judgment. As explained in the NPRM, the amendments are intended to carry out the Board's statutory mandate to establish fair and efficient procedures for determining if a question of representation exists, for conducting secret-ballot elections, and for certifying the results of secret-ballot elections. Accordingly, the Board will not engage in an analysis, invited by these comments, concerning the general utility of labor unions and the collective-bargaining process.[83]

Other comments assert that the proposed amendments would lead to increased union representation and question the wisdom of adopting rules that would have such an effect on a fragile economy. Again, the Board views these comments as questioning policy decisions already made by Congress.[84] The amendments do not reflect a judgment concerning whether increased employee representation would benefit or harm the national economy.

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[83] Many comments additionally charge that the Board's motives for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to "stack the deck" against employers in union organizing campaigns. No credible evidence has ever been provided in support of this claim. The reasons for issuing the rule are fully set forth in the NPRM and in this preamble; favoritism is not among them.

[84] To the extent that comments suggest that the Board failed to consider the proposed rule's potential to increase the costs on small employers associated with increased unionization as part of its obligations under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*., those comments are addressed in the Regulatory Flexibility Act section below.

V. Comments on Particular Sections

Part 102, Subpart C—Procedure Under Sec. 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

Sec. 102.60 Petitions

The final rule adopts the Board's proposals to permit parties to file petitions electronically and to require that the petitioner serve a copy of the petition on all other interested parties. The final rule also clarifies that parties filing petitions electronically need not also file an original for the Agency's records. The final rule further adopts the Board's proposal to require service of two additional agency documents that will be available to petitioners in the regional offices and on the Board's public Web site. The first document, which will substitute for and be an expanded version of the Board's Form 4812, will describe the Board's representation case procedures. The second document the petitioner will serve along with the petition will be a Statement of Position form, which will include a request for commerce information (such as that solicited by current NLRB Form 5081, the Questionnaire on Commerce Information).[85]

The Board received generally positive comments regarding its proposal to allow parties to file petitions electronically.[86] For instance, the AFL-CIO II noted that the electronic filing of petitions is consistent with general federal, state and local government

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[85] The contents and purpose of the Statement of Position form are described further below in relation to § 102.63.

[86] See PIA; American Federation of State, County and Municipal Employees (AFSCME); Chamber; Chairman Harkin, Senior Member Miller, and Congressional Democrats II; United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of US and Canada (Plumbers) II; Bart Bolger II; Testimony of Professor Anne Marie Lofaso.

practices and is part of the Board's 'gradual and entirely sensible transition' to electronic filing, service and storage of documents. The Center on National Labor Policy (CNLP) commends the proposal as "excellent", but apparently misunderstands the proposal as establishing *mandatory* electronic filing, when it does not. The Board's view, echoed by several comments, is that allowing—but not requiring—the electronic filing of petitions is part of its nearly decade-long effort to adapt its procedures to modern methods of communication.[87] This rule recognizes the widely accepted use of email for legal and official communications and more closely aligns Board service procedures with those of the federal courts.

The final rule's requirement that the petitioner serve a copy of the petition on all other interested parties when it files its petition with the Board further conforms to ordinary judicial and administrative practice. For example, a labor organization filing a petition seeking to become the representative of a unit of employees is required to also serve the petition on the employer of the employees. This will ensure that the earliest possible notice of the pendency of a petition is given to all parties. The few comments to

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[87] Also, the Board has decided to clarify, consistent with its current e-filing practice concerning other types of case documents, that petitioners who file their petitions electronically are not required to file an extra copy of the petition in paper form. Upon careful consideration of the NPRM proposal, which would have required extra paper copies to be filed for both faxed petitions and electronically-filed petitions, the Board is of the view that an extra paper copy of an electronically-filed petition would be unnecessary. The Board's experience has been that the legibility of electronically-filed documents does not differ significantly from paper originals, unlike faxes, which are sometimes significantly less legible than their original paper versions. Moreover, original paper-copies could cause administrative difficulties if regional staff were to inadvertently treat the later-arriving paper copy as a new case rather than a courtesy copy of the electronically-filed petition that would have been docketed earlier. However, the Board has concluded that such risks are worth incurring to overcome potential legibility issues regarding faxed petitions.

focus on this proposal either affirmatively support it as an improvement over current procedures or find it unobjectionable.[88]

Likewise, the Board received no significant negative comments concerning its proposal to require service of the Statement of Position form and an expanded version of the Board's Form 4812 to inform interested parties about the Board's representation case procedures. The Board agrees with GAM that requiring service of this latter document will aid employers' understanding of representation case procedures and render Board procedures more transparent.

A few comments state that parties may not receive petitions or other relevant documents due to the use of electronic filing. For example, AGC (AGC II) argues that parties' use of spam filters and other computer data protection tools could prevent the delivery of electronically-filed petitions and thereby lead to increased litigation due to their non-receipt of petitions or related documents. And the Cook-Illinois Corporation (Cook-Illinois) contends that the recipient of an emailed petition might unwittingly delete the email as spam. The Board responds that it already permits parties to electronically file most documents in unfair labor practice and representation proceedings and has yet to experience any increase in litigation resulting from the use of such software. Moreover, it is also possible for representation petitions sent via United States mail or facsimile to be misdelivered or to be incorrectly identified by the recipient as junk mail. Also, it is the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate regional decision making regarding the

[88] See Plumbers; Georgia Association of Manufacturers (GAM); PIA.

petition. See Casehandling Manual Section 11010. In addition, pursuant to § 102.63(a), the regional offices will re-serve a copy of the petition after the petition is docketed, making it even less likely a party will remain ignorant of an electronically-filed petition for any significant period of time. Therefore, the Board does not anticipate that the electronic filing of petitions will lead to litigation due to delivery failure and lack of notice of service.

A number of comments suggest the final rule should provide guidance with respect to what constitutes proper service by identifying the title of the individual who should be electronically served with the petition because this arguably triggers significant deadlines and obligations.[89] The Board's current rules and regulations do not provide guidance with respect to the proper agent for service of a petition (or an unfair labor practice charge). Any issue raised with respect to whether the petition was properly served will continue to be handled consistent with the Board's existing practices in this area. Moreover, the petitioner's simultaneous service of the petition is simply intended to provide all interested parties with the earliest possible notice of the filing of the petition, and does not, by itself, establish any deadlines or obligations related to the processing of the case for the party being served with the petition. The actual date of the hearing and other requirements are set by the regional director (after the filing of the petition) when the director issues the notice of hearing.

Several comments express concern that the electronic filing of petitions could increase opportunities for fraud. For example, NADA and the Chamber argue that the

[89] See, e.g., INDA II and AEM II.

regulations should require a party electronically filing a petition to mail the original documents to the Board at a later date.[90] CNLP comments that the Board should establish e-security practices that protect the identity of a party filing a petition and mitigate the possibility that fraudulent documents will be filed. CNLP also suggests that the Board should substantially adopt Federal Rule of Civil Procedure 11(b) and require a party filing a petition to certify that the document is supported by facts and law.

The Board believes that the final rule and current electronic filing procedures adequately address these concerns. As an initial matter, § 102.60 of the final rule continues the Board's practice of requiring that petitions "shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct." The Board already allows parties to maintain password-protected profiles and to redact or protect their sensitive personally identifiable information. To date, there has been no significant interference with election processes resulting from fraudulent petitions. The Board does not expect any change resulting from its decision to permit electronic filing of such petitions. Nonetheless, as mentioned above, a Board agent will contact parties after the filing of a petition and will be able to determine if there has been a fraudulent filing. Further, § 102.177(d) of the existing regulations already allows the Board to sanction an attorney or party representative for misconduct such as the filing of a document that is unsupported by facts and law. See, e.g., *In re David M. Kelsey*, 349 NLRB 327 (2007).

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[90] Fraud concerns specific to electronic signatures are addressed below in relation to § 102.61.

The National Right to Work Legal Defense Foundation (NRTWLDF) proposes that the Board further amend its existing procedures to prevent petitioners from withdrawing otherwise valid petitions before an election occurs. It asserts that allowing such withdrawal unfairly allows petitioners to manipulate the scheduling of elections. The Board declines to adopt this proposal. Continuing to permit the withdrawal of petitions serves the efficiency goals of these amendments by avoiding unnecessary case-processing efforts. Moreover, the Board's existing procedures adequately prevent such manipulation. The regional director or the Board will continue to have discretion to accept or reject a petitioner's request for withdrawal of the petition if the request would run counter to the purposes of the Act. See Casehandling Manual Section 11110.

One commenter noted that the proposal to allow the electronic filing of petitions may have merit, but that the Board should seek further comment and input from stakeholders before implementing this change. Leading Age II. However, the comment did not provide an explanation as to why the periods established to allow comments to the Board's NPRMs in 2011 and 2014 were not sufficient to effectively obtain input from stakeholders on this issue. The Board believes that stakeholders have had an ample opportunity to comment on this proposal and has carefully considered the input offered on this issue in deciding to implement this proposal.

Sec. 102.61 Contents of Petition for Certification; Contents of Petition for Decertification; Contents of Petition for Clarification of Bargaining Unit; Contents of Petition for Amendment of Certification; Use of Electronic Signatures to Support a Showing of Interest

Section 102.61 of the final rule continues to describe the contents of the various forms of petitions that may be filed to initiate a representation proceeding under Section 9

of the Act.[91] The Board will continue to make the petition form available at the Board's regional offices and on its Web site. As proposed in the NPRM, the final rule adds to the contents of the petitions in a few respects. First, the revised petition contains the allegation required in Section 9. In the case of a petition seeking representation, for example, the petition contains a statement that "a substantial number of employees wish to be represented for collective bargaining * * *." 29 U.S.C. 159(c)(1)(a)(i). Second, the petitioner is now required to designate, in the revised petition, the individual who will serve as the petitioner's representative in the proceeding, including for purposes of service of papers. GAM acknowledges that this is a practical requirement that may allow parties to quickly resolve election issues while helping to conserve agency resources.

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[91] The following abbreviations are used to refer to the different types of representation petitions filed under Section 9(c) of the Act:

RC (Representation petition) – A petition filed by a labor organization or employee(s) alleging that that there is a question concerning representation and seeking an election to determine whether employees wish to be represented by the petitioner.

RD (Decertification petition) – A petition filed by an employee, employees or a labor organization alleging that there is a question concerning representation and seeking an election to determine whether employees in the appropriate unit wish to continue to be represented by a labor organization that was previously certified and/or is currently recognized by the employer as their collective bargaining representative.

RM (Employer petition) – A petition filed by an employer alleging that there is a question concerning representation and seeking an election to determine if employees in the appropriate unit wish to be represented by a labor organization that has demanded recognition as their collective bargaining representative or that is currently recognized as their collective bargaining representative.

UC (Unit clarification petition) – A petition filed by a labor organization or an employer seeking a determination as to whether certain classifications should or should not be included within an existing unit.

AC (Amendment of certification) - A petition filed by a labor organization or an employer for amendment of an existing certification because of changed circumstances.

Third, the petitioner is now required to state the type, date(s), time(s) and location(s) of election it seeks.[92] This information will facilitate entry into election agreements by providing the nonpetitioning parties with the earliest possible notice of the petitioner's position on these important matters.

The final rule also requires that the petitioner file with the petition whatever form of evidence is an administrative predicate of the Board's processing of the petition rather than permitting an additional 48 hours after filing to supply the evidence. When filing a petition seeking certification as the representative of a unit of employees, for example, petitioners must simultaneously file the showing of interest supporting the petition. As explained in the NPRM, the Board believes that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. However, the final rule is not intended to prevent a petitioner from supplementing its showing of interest, consistent with existing practice, so long as the supplemental filing is timely. Also consistent with existing practice, the final rule does not require that the showing of interest be served on other parties.

The Board rejects the Chamber's request that the regional director refrain from serving notice of the filing of a petition on other parties until the region receives the original signatures establishing the showing of interest. Such a requirement would not serve the Board's purpose of encouraging the expeditious resolution of questions concerning representation. The final rule does not change the Board's longstanding policy of not permitting the adequacy of the showing of interest to be litigated. See, e.g.,

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[92] The final rule will require the petitioner to identify the type of election it seeks (e.g. a manual, mail or a mixed manual-mail election).

Plains Cooperative Oil Mill, 123 NLRB 1709, 1711 (1959) ("[T]he Board has long held that the sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation."); *O.D. Jennings & Co.*, 68 NLRB 516, 517-18 (1946). Nor does the final rule alter the Board's current internal standards for determining what constitutes an adequate showing of interest.

The Board further disagrees with the Chamber's II assertion that § 102.61(f)'s mandate that when showings of interest are filed electronically or by facsimile, the original authorization cards with handwritten signatures must be delivered to the regional director within 2 days, conflicts with the proposed language in § 102.60(a), which explained that the failure to follow an electronic or facsimile-filing of the petition with an original paper copy "shall not affect the validity of the filing by facsimile or electronically, if otherwise proper." First, as discussed in connection with § 102.60 above, the Board has decided not to require an extra paper copy of the petition when it is filed electronically, and as explained in the footnote below, the language in § 102.61 likewise does not require paper copies of electronically-signed cards (if accepting electronic signatures is deemed practicable by the General Counsel). So there is no potential inconsistency in the final rule as to electronically-filed petitions and electronically-signed authorization cards. There is also no inconsistency in the final rule even when focusing solely on facsimile-filed petitions or electronically-filed petitions that do not include electronically-filed authorization cards. Thus, the Board intentionally distinguishes the handwritten signatures that form the showing of interest supporting the petition as items that must be transmitted to the Board in their original form in order for the filing to be proper. In other words, while a regional director will not dismiss a petition

filed by facsimile simply because the petitioner failed to follow its facsimile filing by supplying the original paper copy to the regional office, a regional director will dismiss a petition if the facsimile-filed or electronically-filed showing of interest is not followed by original documents containing handwritten signatures within 2 days.[93] The Board therefore declines the Chamber's suggestion to strike or alter the language in § 102.60(a) to conform to the language in § 102.61(f).

GAM argues that requiring petitioners to file a supporting showing of interest simultaneously with the petition will lead to confusion and delays and create an unnecessary burden that may discourage the filing of petitions. GAM maintains that under existing rules, a petitioner could file a petition and then receive useful guidance from the regional office about how to file its showing of interest, thereby suggesting that a petitioner will no longer have the option of seeking such assistance under the amended rules. GAM alleges that the Board's motivation in adopting the amendment is a self-interested desire to improve its case-processing statistics, not to facilitate the holding of elections. The Board believes that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. If parties are confused about what evidence is necessary to file in support of a petition—or if they are

[93] To be clear, the language in amended § 102.61(f) is premised upon petitioners who file their petitions electronically providing electronically-scanned copies of authorization cards with handwritten signatures. This would be permitted completely apart from, as discussed below, electronically-signed authorization cards. The language in § 102.61(f) is not applicable to electronic signatures because electronic signatures are not "original signatures that cannot be transmitted in their original form by the method of filing the petition." To the contrary, electronic signatures should be transmittable with electronically-filed petitions in their original form, not triggering a need to later submit "original documents."

confused about any other aspect of the representation case process—they may continue to contact regional offices for guidance both before and after the filing of a petition, and the continued useful guidance flowing from such contact should mitigate any potential for discouragement felt by individuals who are contemplating filing an election petition. Further, the amendment does not establish inflexible time deadlines for when a petition must be filed.

The Board received a number of comments in response to the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures to support a showing of interest under § 102.61(a)(7) and (c)(8) as well as under § 102.84. Based on these comments, we believe that the Board's regulations as currently written are sufficiently broad to permit the use of electronic signatures in this context.[94] We also note that evaluating the showing of interest is an administrative matter within the discretion of the agency. For the reasons discussed below, we find, that the Board should, when practicable, accept electronic signatures to support a showing of interest, and therefore direct the General Counsel to undertake an analysis of whether there exists a practicable way for the Board to accept electronic signatures to support a showing of interest while adequately safeguarding the important public interests involved.

Several comments address the legal and procedural aspects of this potential

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[94] To be sure, our current regulations are completely silent on the subject of electronic signatures, and, as explained above, we likewise believe that the language in amended § 102.61(f) of the final rule would be consistent with the Board's acceptance of electronic signatures. While the Board's practice has been to accept only handwritten signatures, it may, consistent with its current Rules and Regulations as well as these amended rules, accept electronic signatures.

amendment. Joseph Torres argues that neither the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504, nor the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. 7001 *et seq*., both of which were cited in the Notice of Proposed Rulemaking, supports changing Board practice. Testimony of Joseph Torres on behalf of Winston & Strawn II. He argues that electronic signatures accepted under either of those acts are distinguishable from the electronic signatures that would be accepted to support a showing of interest. Regarding GPEA, he observes that there are safeguards attendant to submitting information to the government that are not available to the private gathering of electronic signatures. And he observes that E-SIGN allows private parties to litigate the validity of electronic signatures, whereas they cannot under the Board's current procedures. The Chamber (Chamber II) argues that the Board has yet to provide sufficient details about its potential use of electronic signatures and that an advanced notice of proposed rulemaking should therefore precede any action in this area. PIA and AHA II, among others, maintain that the Board has yet to provide any justification for this rule change.

The SEIU II, AFL-CIO II, and Alvin Velazquez (testifying on behalf of SEIU II) argue that GPEA and/or E-SIGN require the Board to accept electronic signatures. Even setting this requirement aside, SEIU observes that the Board's acceptance of electronic signatures would be beneficial and reflect modern changes in technology and methods of communication. SEIU (SEIU II) and the AFL-CIO, among others, also argue that the Board does not have to use the notice-and-comment rulemaking process to accept electronic signatures on showings of interest. For instance, SEIU contends, among other things, that such an amendment would relate to Board practice and procedure and

therefore not require public comment. See 5 U.S.C. 553(b)(3)(A) (excepting "interpretative rules, general statements of policy, or rules of agency organization, [and] procedure, or practice" from notice-and-comment rulemaking). SEIU and AFL-CIO observe that the Board's Rules and Regulations currently do not limit the form that the showing of interest can take. Further numerous comments, as summarized below, clearly articulate many of the potential benefits of accepting electronic signatures. Velazquez II, for instance, observes that electronic signatures, which typically require an employee also to fill-out an electronic form, are better indicators of an employee's interest in joining a union than paper authorization cards, due to the increased effort required to input additional verification information.

We believe that GPEA and E-SIGN embody a strong policy preference on the part of Congress for the use and acceptance of electronic signatures, when practicable, as a means, along with handwritten signatures, to support a showing of interest. GPEA directs the Office of Management and Budget (OMB) to ensure that "Executive agencies provide—(1) for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper, and (2) for the use and acceptance of electronic signatures, when practicable." GPEA additionally stipulates that "Electronic records submitted or maintained in accordance with procedures developed under this title, or electronic signatures or other forms of electronic authentication used in accordance with such procedures, shall not be denied legal effect, validity, or enforceability because such records are in electronic form." In its guidance on the implementation of GPEA, the OMB observes, "a decision to reject the option of electronic filing or record keeping should demonstrate, in the context of the particular application and upon considering

relative costs, risks, and benefits given the level of sensitivity of the process, that there is no reasonably cost-effective combination of technologies and management controls that can be used to operate the transaction and sufficiently minimize the risk of significant harm." OMB, *Procedure and Guidance; Implementation of the Government Paperwork Elimination Act*, 65 FR 25508, 25512 (2000) (OMB Guidance). We feel that the policy underlying this admonition applies equally to the use and acceptance of electronic signatures. Likewise, E-SIGN mandates that, "with respect to any transaction in or affecting interstate commerce or foreign commerce—(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." We believe that both of these statutes clearly evidence Congress's intent that federal agencies, including the Board, accept and use electronic forms and signatures, when practicable—i.e., when there is a cost-effective way of ensuring the authenticity of the electronic form and electronic signature given the sensitivity of the activity at issue, here the showing of interest.

That Congress should adopt this policy preference is not surprising. After all, the benefits of e-government are widely known. Among other things, electronic forms can "greatly improve efficiency and speed of government services." S. Rep. No. 105-335 (1998). Electronic forms reduce the "costs associated with such things as copying, mailing, filing and storing forms." Id.; see also OMB Guidance, 65 FR at 25515–16. These reductions in transaction costs also benefit the Board's transaction partner. OMB Guidance, 65 FR at 25516–17.

Many comments also address the ability to authenticate the electronic signature. Several of these comments argue that the Board should not allow the use of electronic signatures because they are more difficult to authenticate than handwritten signatures.[95] The Bluegrass Institute argues that, while the Board could allow employees to authenticate their electronic signatures with sensitive personal information such as social security numbers, this apparent solution would create a potential threat of identity theft. Given this problem with authentication, CDW suggests that electronic signatures would effectively nullify the showing of interest requirement. And SHRM accordingly urges the Board to follow the National Mediation Board in refusing to allow electronic signatures to support a showing of interest. In opposition to these comments, the AFL-CIO (AFL-CIO II), SEIU II, and Velazquez II counter that electronic signatures are easily verifiable and commonly used in governmental and commercial dealings. In fact, more tools are available to confirm the authenticity of electronic signatures than are available to confirm physical signatures.

At this point, the weight of evidence appears to agree with the AFL-CIO, SEIU, and Velazquez. "State governments, industry, and private citizens have already embraced the electronic medium to conduct public and private business." S. Rep. No. 105-335. And since the adoption of GPEA and E-SIGN, federal agencies, including the Board, have also accepted electronic signatures and electronic forms.[96] Electronic signatures can "offer greater assurances that documents are authentic and unaltered. They minimize the

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[95] SHRM; Gary Wittkopp; Seyfarth Shaw; AHA (AHA II); National Council of Investigation & Security Services (NCISS) II; AEM II.

[96] See 79 FR 7323 (discussing the evolution of the Board's electronic filing practice).

chances of forgeries or people claiming to have had their signatures forged." S. Rep. No. 105-335; see also OMB Guidance, 65 FR at 25516. There are numerous forms that electronic signatures can take, each providing additional methods to ensure the authenticity of the signature. See, e.g., S. Rep. No. 105-335; OMB Guidance, 65 FR at 25518–25520. And the technology that makes electronic signatures possible continues to evolve and become ever-more sophisticated, providing even more safeguards.

Some comments claim that the use of electronic signatures to support a showing of interest could encourage petitioner misconduct. Seyfarth Shaw contends that electronic signatures present a greater risk of fraud than handwritten signatures because they do not create any physical evidence of signing. Several comments allege that the use of electronic signatures could lead to deceptive practices by petitioners, such as hiding authorization agreements within seemingly innocuous website content.[97] PIA likewise argues that employees might have to rely on the petitioner to instruct them in the use of electronic signatures, creating the possibility of undue influence and coercion. But other comments counter that electronic signatures would actually reduce incidents of intimidation due to lack of personal solicitation.[98]

As stated above, we believe that cost-effective methods may exist to ensure that electronic signatures are authentic, and electronic signature technology may provide more methods to authenticate and ensure the validity of the signature as compared to handwritten signatures. Further, the Board already has internal administrative processes

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[97] Bluegrass Institute; Mary Rita Weissman; Con-way.

[98] David Nay II; Lisa Thomas II; Jack Steele II.

to deal with allegations of fraud and misrepresentation regarding manually signed authorization cards and petitions. See Casehandling Manual Sections 11028-11029. We expect that the General Counsel will evaluate whether the Board could employ these or similar processes in connection with electronic signatures.

A few comments argue that the lack of reliability of electronic signatures and the accompanying prospect of petitioner misconduct will lead to more pre-election challenges to the validity of petitions, creating a greater burden on agency resources, and running counter to the goal of eliminating delay.[99] Constangy, Brooks & Smith, LLP (Constangy) contends that the use of electronic signatures would no longer allow the Board to verify authorizations by simply comparing employee signatures to those on handwritten cards. Rather, Constangy argues that the Board would have to allow parties to present testimony to challenge or support contested signatures. Torres argues that, if the Board starts to look underneath the process of obtaining electronic signatures, employers should also be able to examine and, if necessary, challenge the showing of interest. Testimony of Torres on behalf of Winston & Strawn II. UFCW (UFCW II) disagrees, proposing that the Board could verify the authenticity of a showing of interest merely by checking a random sample of individual signatures, as is a current practice. As noted, the Board already has processes in place for resolving allegations of fraud or misrepresentation in connection with showing of interest evidence which the rule does not change and which might be effectively utilized to verify electronic signatures.

For the reasons discussed above, we are not persuaded that the Board's current or

[99] AHA (AHA II); Georgia Mining Association; Con-way; Testimony of Torres II.

similar administrative procedures would necessarily be inadequate to the task of ensuring that there is a sufficient showing of interest to warrant conducting an election. The General Counsel should consider the matter and determine whether electronic signatures can practicably be accepted without such a fundamental change to the Board's procedures as those suggested in the comments.

A few comments address the practical problems with permitting electronically signed authorization cards. Some of these comments are concerned that a petitioner could gather electronic signatures through the employer's own computer system, thereby disrupting work and opening the employer to allegations of unlawful surveillance.[100] Some of these comments further maintain that the use of handwritten authorization cards already leads to confusion among employees, and that allowing electronic signatures would exacerbate these problems.[101] One comment observes that it would be difficult for the Board to impose a unified system of gathering electronic signatures, and thereby ensure the reliability of those signatures, given the number and diversity of petitioning parties. Testimony of Torres on behalf of Winston & Strawn II.

We are doubtful that the use of electronic signatures will present the practical problems raised in these comments. We see no reason why electronic authorization cards would create a greater disruption to an employer's operations or subject an employer to charges of surveillance to a greater extent than would the transmission of other

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[100] NCISS II; AEM II.

[101] Americans for Limited Government (ALG); Labor Relations Institute, Inc. (LRI); PIA; Georgia Mining Association; CAST-FAB Technologies, Inc. II; U.S. Poultry II; NAM II.

information relating to union or protected concerted activity. Regarding Torres's argument that electronic signatures would be impracticable to administer, we ask the General Counsel to examine the issue and, if administration is practicable, issue guidance.

Based on our review of our current Rules and Regulations, Congressional policy, and the comments, we conclude, as a matter of policy, that the Board should, when practicable, accept electronic signatures to support a showing of interest. Our current rules do not prohibit the acceptance of electronic signatures, and so no change in our rules is necessary to effectuate this policy conclusion. The General Counsel shall promptly determine whether, when, and how electronic signatures can practicably be accepted and shall issue guidance on the matter. In making these decisions, we encourage the General Counsel to follow the framework outlined in the OMB Guidance.

Sec. 102.62 Election Agreements; Voter List; Notice of Election

A. Election Agreements and Board Resolution of Post-Election Disputes

In the NPRM, the Board proposed a number of amendments to § 102.62. The amendments were intended to clarify the terms used to describe the three types of pre-election agreements, to eliminate mandatory Board resolution of post-election disputes under a stipulated election agreement, to codify the requirement of the *Excelsior* list and to alter the content and timing of its provision to the nonemployer parties to the case,[102] and to alter the means of transmittal of the notice of election. The Board has decided at

[102] See *Excelsior Underwear, Inc*., 156 NLRB 1236, 1236 (1966) (establishing requirement that employers must file a list of the names and addresses of all eligible voters with the regional director within 7 days after a Board election has been approved by the regional director or directed; the regional director then makes the information available to all parties in the case).

this time to adopt the proposed amendments to § 102.62 clarifying the terms used to describe pre-election agreements and eliminating mandatory Board resolution of post-election disputes under a stipulated election agreement. The Board has also decided to adopt the proposed amendments concerning the *Excelsior* list and the notice of election[103] with the modifications described in the discussion of the voter list below.

The final rule's amendments to § 102.62(b) revise the contents of the stipulated election agreement. The revision eliminates parties' ability to agree to have post-election disputes resolved by the Board. The amendments provide instead that, if the parties enter into what is commonly referred to as a "stipulated election agreement,"[104] the regional director will resolve any post-election disputes subject to discretionary Board review. This procedure is consistent with the changes to § 102.69 described below making all Board review of regional directors' dispositions of post-election disputes discretionary in cases where parties have not addressed the matter in a pre-election agreement.[105]

As explained in the NPRM, the amendment makes the process for obtaining Board review of regional directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes. The Board perceived no reason why pre- and post-election dispositions should be treated differently in this regard, and the comments on this proposal offered no convincing

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[103] As noted below in connection with §§ 102.63 and 102.67, the final rule retitles the proposed "Final Notice to Employees of Election" as the "Notice of Election."

[104] Casehandling Manual Section 11084.

[105] The current rules governing Board review of regional directors' dispositions of post-election disputes appear on their face to provide for both mandatory and discretionary review depending on how the regional office processes the case. See 29 CFR 102.69(c)(3) and (4).

reason.

The Board affirms the vast majority of post-election decisions made at the regional level, and many present no issue meriting full consideration by the Board.[106] In some cases, for example, parties seek review of post-election decisions based on mere formulaic assertions of error below and without pointing to any facts or law in dispute.[107] Review as of right should not be granted in those situations. Others cases present only circumscribed, purely factual issues.[108] Given the highly deferential standard that the Board employs in reviewing a hearing officer's post-election credibility findings,[109] it is reasonable for the Board to require the party seeking review of such a finding to justify that review by showing that the standard for obtaining discretionary review is satisfied. There are other cases in which the regional director assumes the facts asserted by the objecting party but finds that no objectionable conduct occurred,[110] or where there is no dispute about the facts at all.[111] A discretionary system of review will provide parties

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[106] For example, in FY 2013, parties appealed to the Board in only one third of the 98 total cases involving regional post-election decisions concerning objections or determinative challenges, and the Board reversed the regional decision to set aside or uphold election results in only 3 cases.

[107] See, e.g., *C& G Heating*, 356 NLRB No. 133, slip op. at 1 (2011).

[108] See, e.g., *Ruan Transport Corp.*, 13-RC-21909 (Nov. 30, 2010) (resolving intent of voter who marked an X in two boxes on ballot but "nearly obliterated" one of them with pen markings in lieu of erasure); *Multiband, Inc.*, 2011 WL 5101459, slip op. at n.2 (Oct. 26, 2011) (credibility).

[109] See *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957).

[110] See, e.g., *Care Enterprises*, 306 NLRB 491 n.2 (1992).

[111] See, e.g., *CEVA Logistics U.S., Inc.*, 357 NLRB No. 60, slip op. at 1-2 (2011) (consequences of regional delay in forwarding *Excelsior* list).

with a full opportunity to contest those determinations. Another group of cases represent parties' efforts to seek reconsideration, extension, or novel application of existing Board law,[112] and there is equally no reason why a discretionary system of review will not fully provide that opportunity. Still other cases simply involve the application of well-settled law to very specific facts.[113] In short, for a variety of reasons, a substantial percentage of Board decisions in post-election proceedings are unlikely to be of precedential value because no significant question of policy is at issue. The final rule requires the party seeking review to identify a significant, prejudicial error by the regional director or some other compelling reason for Board review, just as the current rules require a party to do when seeking Board review of a regional director's pre-election decision.[114]

In addition, the final rule will enable the Board to devote its limited time to cases of particular significance. This should constitute a significant time savings considering the inefficiency involved in having the multi-member Board engage in a de novo review of the entire record before disposing of a post-election case on exceptions from a hearing officer's report. Indeed, when post-election cases have come before the Board over the

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[112] See, e.g., *1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Ctr.*, 357 NLRB No. 71, slip op. at 1-2 (2011); *Ace Car & Limousine Service, Inc.*, 357 NLRB No. 43, slip op. at 1-2 (2011).

[113] *Mental Health Ass'n, Inc.*, 356 NLRB No. 151, slip op. at n.4 (2011) (whether employer's particular statements about bonuses constituted objectionable promise of benefit); *G&K Services, Inc.*, 357 NLRB No. 109, slip op. at 2-4 (2011) (whether employer's letter about health coverage constituted objectionable promise of benefit).

[114] See current § 102.67(c) (discussing compelling reasons necessary for a grant of review, including the presentation of a substantial question of law or policy, a clearly erroneous regional director decision on a substantial factual issue prejudicing a party, conduct of the hearing prejudicing a party, or compelling reasons to reconsider an important Board rule or policy).

past 3 years, the median time for the Board to resolve them has ranged from 94.5 days to 127 days. In comparison, the median time it has taken regional directors to issue pre-election decisions has been 20 days, and the median time for the Board's action to grant or deny review regarding these decisions under the same request for review standard maintained in the final rule has been only 12 to 14 days over the same 3-year period. Under the new rules, it will be possible to have similar efficiency in regional and Board processing of post-election decisions. This will save time and resources, both public and private, and bring finality to representation proceedings in a more timely manner.

Based on all of the considerations listed above, the Board concludes that making review of regional directors' post-election decisions available on a discretionary basis, as is currently the case with pre-election review and some post-election review, will assist the Board in fulfilling its statutory mandate to promptly resolve questions concerning representation.

Several comments argue that if the Board were to adopt these amendments, it would be abdicating its statutory responsibility and function.[115] For example, SHRM and NAM argue that only Board members, because they are appointed by the President and confirmed by the Senate, can make final decisions about these matters and that the regional directors, who are career civil servants, lack comparable authority and political legitimacy. The Chamber II also argues that this proposal will make it possible for elections to be conducted without Board review of any regional action or decision, contrary to Section 3(b) of the Act. Others state that denying aggrieved parties the right to

[115] See Chamber; SHRM; CDW; COLLE; NAM II; AHA II; Testimony of Curt Kirshner on behalf of AHA II.

appeal adverse determinations to the Board undermines due process protections.[116] NAM contends that the Board is required to review conduct affecting election outcomes in order to safeguard employees' Section 7 rights. Similarly, other comments argue that conduct that could be the basis for setting aside an election goes to the essence of employee free choice and deserves de novo Board review.[117] Still other comments contend that, although Section 3(b) of the Act permits Board delegation to the regional directors of decisions pertaining to representation issues, those decisions must be reviewed by the Board upon request.[118]

Section 3(b) of the NLRA does not support the conclusion expressed in those comments. Section 3(b) provides in part:

> The Board is * * * authorized to delegate to its regional directors its powers * * * to determine [issues arising in representation proceedings], except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him * * *, but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b).

Since Congress adopted this provision in 1959 and the Board exercised its authority to delegate these functions to its regional directors in 1961, the Board's rules have provided that regional directors' dispositions of pre-election disputes are subject only to discretionary Board review even though a failure to request review pre-election or a denial of review precludes a party from raising the matter with the Board post-election.

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[116] See, e.g, SHRM and Chamber.

[117] See, e.g., Dassault Falcon Jet.

[118] See, e.g., SHRM and NAM, NAM II.

29 CFR 102.67(b) and (f). Notably, none of the comments suggests that the current rules as to pre-election disputes violate Section 3(b) or are otherwise improper.[119]

In fact, the Supreme Court has upheld the Board's decision not to provide parties with a right to Board review of regional director's pre-election determinations, in a holding that clearly permits the Board to adopt the final rule's amendments concerning post-election review. In *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971), the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent "technical 8(a)(5)" unfair labor practice proceeding, the employer asserted that "plenary review by the Board of the regional director's unit determination is necessary at some point," i.e., before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140-41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word "may" in the clause describing the possibility of Board review, the Court held, "Congress has made a clear choice; and the fact that the Board

[119] Moreover, even under the current rules, specifically § 102.69(c)(4), if the regional director issues a decision concerning challenges or objections instead of a report in cases involving directed elections, an aggrieved party's only recourse is a request for review. Thus, the comments' objections apply to the current regulations as well as to the final rule.

has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination." *Id.* at 142. Consistent with the purpose of the final rule here, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that Section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to "expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." *Id.* at 141 (citing 105 Cong. Rec. 19770). And undermining the comments' suggestion that regional directors lack authority, status, or expertise to render final decisions in this area, the Court further explained that the enactment of section 3(b) "reflect[s] the considered judgment of Congress that the regional directors have an expertise concerning unit determinations." *Id.* [120]

The Board concludes that the language of Section 3(b), its legislative history, and the Supreme Court's decision in *Magnesium Casting* are dispositive of the statutory objections to the proposed amendment.

Some comments suggest that providing only discretionary review of regional directors' decisions will undermine the uniformity of election jurisprudence, with different regional directors issuing divergent opinions in similar cases and under similar circumstances. The comments contend that if those decisions are not reviewed by the

[120] See also *St. Margaret Memorial Hosp. v. NLRB*, 991 F.2d 1146, 1154 (3d Cir. 1993); *Beth Israel Hosp. and Geriatric Ctr. v. NLRB*, 688 F.2d 697, 700-01 (10th Cir. 1982) (en banc); *Transportation Enterprises, Inc. v. NLRB*, 630 F.2d 421, 426 (5th Cir. 1980) (finding that "decisions rendered by the regional offices of the NLRB which are not reviewed by the Board, for whatever reasons, are entitled to the same weight and deference as Board decisions, and will be given such unless and until the Board acts in a dispositive manner.").

Board as a matter of right, there is a risk that the regional office in which the employer's operations reside, rather than the merits of the parties' positions, will govern how the dispute is resolved. For example, Bluegrass Institute contends that discretionary Board review will result in less uniformity, the denial of due process, and diminished legitimacy in election processes. Other comments argue that discretionary post election review will result in unchecked regional errors[121] and slow the development of binding and authoritative precedent.[122] The Board disagrees.

Since 1961, regional directors have made pre-election determinations, and their decisions have been subject to only discretionary review through the request for review procedure. The same has been true of post-election determinations processed under § 102.69(c)(3)(ii). There is no indication that the quality of decision-making has been compromised by this procedure or that regional directors have reached inconsistent conclusions. Under the final rule, the same review process will apply to all cases involving post-election objections and challenges except where they are consolidated with unfair labor practice allegations before an administrative law judge. As it has done for over 50 years in respect to pre-election disputes, the Board will scrutinize regional directors' post-election decisions where proper requests for review are filed.

One purpose of that review will be to determine if there is an "absence of" or "a departure from, officially reported Board precedent," i.e., to ensure uniformity via adherence to Board precedent. See 29 CFR 102.67(c)(1). Accordingly, the final rule

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[121] See, AHA II.

[122] See, RILA II.

provides parties with an opportunity to appeal regional decisions that are inconsistent with precedent or which contain facts that are clearly erroneous and prejudicial under a discretionary standard. The parties may also utilize this discretionary review process if there are substantial questions of law or policy or compelling reasons for reconsidering a Board rule or policy.

For these reasons, the Board does not believe that the final rule will lead to lack of uniformity or quality in decisions or adversely affect the development of the law. In fact, the discretionary standard enables the Board to better focus its resources and attention on those cases that are legally or factually significant and have greater impact on parties and/or the development of law and policy. And, since most of the Board's post election decisions under the existing standard of mandatory review are not published and have no precedential value,[123] this proposed change is not likely to have a significant adverse impact on the precedential value of post election decisions.[124]

A few comments question the competence of regional personnel. For example, COLLE argues that "Regional Directors can be dictatorial and imprudent to the rights of private parties in disputes before them" and "can exhibit irrational and unfair behavior and deprive parties of their rights to go to hearing and litigate legitimate issues under the

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[123] For instance, in FY 13, the Board published only five of the decisions it issued on post election exceptions.

[124] Nor would the Board agree that a discretionary review process infringes on parties' due process rights. Constitutional due process requires only one fair hearing and does not require an opportunity to appeal. The Supreme Court has so held even with respect to criminal cases. See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 * * * (1894).").

Act." Other comments contend that because hearing officers report directly to regional directors, appeal to the regional directors does not constitute meaningful review.

The Board's experience in reviewing the work of and supervising its regional directors gives no credence to these comments. Moreover, Congress expressed confidence in the regional directors' abilities when it enacted Section 3(b). As one comment in favor of the rule (Professor Joel Cutcher-Gershenfeld) noted, empowering regional directors to make final post-election rulings, as they now do in respect to pre-election matters, locates decisions with the individuals who have the greatest knowledge about and experience with representation case procedures.[125] Similarly, the Chamber (Chamber II), although it generally opposes the proposals, notes the "professionalism, experience and integrity" of the regional directors and their staffs. Rather than detracting from their authority and legitimacy, the Board concludes that the regional directors' career status ensures their neutrality and, in almost all cases, their extended service at the Board and thus extensive experience with and knowledge about representation case procedures and rules.

ALFA argues that regional directors tend to uphold election results, and therefore a right to Board review should be retained if the Board wishes to discourage litigation via refusals to bargain. As noted above, the Board rejects the suggestions that regional

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[125] The Board also notes that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act, and those prosecutorial decisions often involve questions of employee status and questions of whether certain conduct is unlawful, both of which often parallel questions that arise in post-election representation proceedings. The courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct. See, e.g., *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

directors are systematically biased in this or any other way, and repeats that it will scrutinize regional directors' decisions when proper requests for review are filed.

Some comments contend that, if the proposals are adopted, employers will increasingly refuse to bargain with newly certified representatives in order to obtain judicial review of regional directors' determinations.[126] This argument is, at best, highly speculative. There is no evidence that this happened after the Board delegated adjudication of pre-election disputes to its regional directors in 1961 subject to only discretionary review by the Board, and the Board can see no reason why an increase in refusals to bargain would be more likely if Board review of post-election decisions is similarly made discretionary. The Board does not believe that judicial review through technical refusal to bargain litigation will be more frequent when the Board denies review of a regional director's post-election decision than it is when the Board summarily affirms the same regional decision, as it often does now. See, e.g., *The Pepsi Cola Bottling Company*, 9-RC-110313 (Sept. 18, 2013); *King Soopers*, 27-RC-104452 (Sept. 13, 2013); *Geralex Inc.*, 13-RC-106888 (Sept. 12, 2013).

Several comments argue that the rule is contrary to the preferences of both employers and unions, as shown by the high rate of stipulated election agreements—providing for adjudication of post-election disputes by the Board—and the comparative rarity of consent election agreements—providing for a final decision by the regional director. AHA (AHA II), SHRM, and ACE contend that parties prefer this form of pre-election agreement because it provides for Board disposition of post-election issues. As a

[126] See Chamber; Chamber II; AHA; CDW; Baker & McKenzie; Testimony of Curt Kirshner on behalf of AHA II.

corollary to this argument, some comments argue that eliminating automatic Board review will result in fewer pre-election agreements and thus more litigation.[127]

The Board believes for several reasons that the final rule will not create a disincentive for parties to enter into consent or stipulated election agreements. The final rule makes post-election Board review discretionary whether the parties enter into a stipulated election agreement or proceed to a hearing resulting in a decision and direction of election. Thus, parties who prefer Board review of post-election disputes will have no incentive to litigate pre-election issues in order to gain such review. The Board believes that if parties genuinely prefer agreements that permit Board review, they will continue to enter into stipulated rather than consent election agreements in order to preserve their right to seek such review. Whether parties enter into any pre-election agreement or litigate disputes at a pre-election hearing under the final rule will depend on the same calculus that it does at present: the likelihood of success, the importance of the issue, and the cost of litigation. In addition to avoiding the time, expense and risk associated with a pre-election hearing, parties also gain certainty with respect to the unit description and the election date by entering into a stipulated election agreement. In short, parties will continue to have ample reason to enter into stipulated election agreements under the final rule, even though the final rule makes Board review of regional directors' dispositions of post-election disputes discretionary.

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[127] See, e.g., Chamber II. Constangy contends that an employer entering into a stipulation will lose any rights to appeal pre-election unit issues and that this will have a negative effect on the Board's stipulation rate. The Board notes, however, that under current procedures, parties who enter into stipulated election agreements, by definition, agree about pre-election issues, and therefore waive any right to bring pre-election issues to the Board. Thus, the final rule does not change that aspect of stipulated election agreements.

Some comments, such as that of Sheppard Mullin II, express confusion about the rule and the request-for-review procedure. The grounds for granting a request for review under § 102.69(c)(2) (referencing § 102.67(d)) of the final rule are nearly identical to the grounds set forth in § 102.67(c) of the existing rules. The Board will continue to review cases involving issues of "first impression" or where there is "conflicting or unsettled" law in the same manner that it currently does under the pre-election request-for-review procedure. The Board is not aware of any concerns about the way it has evaluated requests for review in representation proceedings, and does not anticipate any in the future.

One comment questions whether "the denial of review" is subject to appeal to the federal courts. Orders in representation cases are not final orders for purposes of judicial review. Rather, an employer must refuse to bargain and commit a "technical 8(a)(5)" violation to secure court review of the Board's representation decisions. See 29 U.S.C. 159(d); *Boire v. Greyhound Corp*., 376 U.S. 473, 476-79 (1964). Under the current rules, if an employer refuses to bargain, it may obtain review of a regional director's pre-election rulings even if the Board denied review thereof, and the same will be true of post-election rulings under the final rule. Thus, there are no open questions about the Board's discretionary review process that will undermine confidence in its decisional processes.

Similarly, comments misinterpret the rule with respect to how regional decisions will be reviewed and how that review will affect the law. The final rule simply makes post-election dispositions reviewable under a discretionary standard, rather than as of right. The Board's rulings on post-election requests for review will be public and will be

published on the Board's Web site, as will the underlying regional directors' decisions, just as rulings on pre-election requests for review are now. Thus, the public and labor law community will have full access to the Board's rulings.

In sum, the amendments to § 102.62(b) conform the review provisions of the stipulated election agreement to the amended review provisions for directed elections. Parties should not be entitled to greater post-election Board review simply by virtue of the fact that there are no pre-election disputes. Under the final rule, all Board review of regional directors' dispositions of challenges and objections will be discretionary under the existing request-for-review procedure.

B. Voter List

In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), the Board established the requirement that, 7 days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an election eligibility list—containing the names and home addresses of all eligible voters—with the regional director, who in turn makes the list available to all parties. Failure to comply with the requirement constitutes grounds for setting aside the election whenever proper objections are filed. *Id.* at 1240.

Numerous comments address the Board's multi-part proposal in the NPRM (in § 102.62 as well as in § 102.67(l)) to codify and revise the *Excelsior* requirement, which was approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969).[128] The proposed revisions to the *Excelsior* requirement were intended to better

[128] Some of the comments concerning the voter list also generally implicate the Statement of Position Form proposal.

advance the two objectives articulated by the Board in *Excelsior*: (1) ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the *nonemployer* party arguments concerning representation; and (2) facilitating the public interest in the expeditious resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters based solely on lack of knowledge as to the voter's identity. *Excelsior*, 156 NLRB at 1240-41, 1242-43, 1246.[129]

Specifically, the Board proposed that the employer be required to furnish to the other parties and the regional director not just the eligible voters' names and home addresses, but also their available email addresses and telephone numbers as well as their work locations, shifts, and job classifications. In addition, the Board proposed to shorten the time for production of the voter list from the current 7 days to 2 work days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction of election. The Board also proposed that the voter list be provided in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form, and that the employer serve the voter list on the other parties electronically at the same time the employer files the list with the regional director. In order to be timely filed, the list would have to be received by the other parties and the regional director within 2 work days after approval of the election agreement or issuance of the direction of

[129] In addition, this information will facilitate both the fair and free choice of bargaining representatives and the expeditious resolution of questions of representation by permitting the parties to more efficiently investigate post-election objections and other Board proceedings, such as unfair labor practice charges, arising out of the election.

election. The NPRM also proposed that failure to file or serve the list and related information within the specified time and in the proper format would be grounds for setting aside the election whenever proper objections are filed. Finally, the Board proposed a restriction on the use of the voter list, barring parties from using it for any purposes other than the representation proceeding and related proceedings, and sought comments regarding what, if any, the appropriate remedy should be for a party's noncompliance with the restriction.

Comments attacking the proposal criticize the information required to be disclosed, the format of the information to be disclosed, the time period for its production, and the proposed restriction language. Comments praising the proposal claim the proposal would better serve the twin purposes of the original *Excelsior* list requirement and help the Board to expeditiously resolve questions of representation. Positive comments further claim that the proposal would merely update the old disclosure requirement to reflect present day realities regarding how people and institutions communicate with one another and exchange information. Other comments suggest that the Board should require the employer to furnish a broader array of contact information than proposed in the NPRM, and that the contact information should be provided earlier in the process—before the parties enter into an election agreement (or the regional director directs an election).

After careful consideration of the comments, the Board has decided to largely adopt the proposals with certain changes, as outlined below:

(1) The final rule clarifies that in the event that the parties agree that individuals in certain classifications or other groupings should be permitted to vote subject to

challenge, or the regional director directs that individuals in certain classifications or other groupings be permitted to vote subject to challenge, the employer shall provide the information about such individuals in a separate section of the voter list.

(2) The final rule does *not* require employers to furnish the other parties or the regional director with the work email addresses and work phone numbers of the eligible voters and the work email addresses and work phone numbers of those individuals whom the parties have agreed may vote subject to challenge (or whom the regional director has directed be permitted to vote subject to challenge). However, the final rule clarifies that the Board retains discretion to require through future adjudication or rulemaking that additional forms of contact information be included on the list.

(3) The final rule clarifies that the Board's General Counsel, rather than the Board's Executive Secretary, will be the official with whom the authority will reside to specify the acceptable electronic format of the voter list.

(4) The final rule clarifies that the employer has 2 *business* days, rather than 2 calendar days, after the regional director approves the parties' election agreement or issues a direction of election to furnish the list to the nonemployer parties to the case and the regional director. Although the NPRM had proposed that the regional director would make the voter list available to the nonemployer parties upon request, that language has not been incorporated into the final rule due to the Board's judgment that it is unnecessary since the rule requires direct service of the voter list from the employer to the nonemployer parties.[130]

[130] Given that employers will have responsibility for service of the voter list on nonemployer parties, the final rule includes a requirement that the employer file with the

(5) The final rule modifies the restriction language to prohibit nonemployer parties from using the voter list information for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.[131]

1. Contact and Job Information

a. Work Email Addresses / Work Phone Numbers

A large number of employer comments oppose the voter list proposals, particularly to the extent that they could be construed as requiring the employer to furnish the other parties with the work email addresses and work phone numbers of its employees.[132] For example, CDW suggests that the Board's proposal is vague and does not clarify whether the rules require production of employees' work phone numbers and email addresses for use by the nonemployer parties. If the rules would so require, then CDW argues that they "would be irreconcilable with longstanding Board case law" on

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regional director a certificate of service on all parties when the voter list is filed. The final rule also uses the same "whenever proper *and timely* objections are filed under the provisions of § 102.69(a)" language in describing the consequences for failure to comply with the voter list amendments that § 103.20 of the prior rules used in describing the consequences for failure to comply with the obligation to post what was previously called the Board's "official Notice of Election." Further, the rule adds language to 102.62(d) and 102.67(l) (similar to that which had been proposed in 102.76(i) regarding the posting of the proposed final notice of election) to clarify that employers will be "estopped from objecting to the failure to file or serve the list within the specified time or in the proper format" if the employers are responsible for the failure.

[131]The final rule also conforms the election notice provisions in § 102.62(e) to the election notice provisions that are discussed in relation to §§ 102.67(b),(k). Thus, for example, the text of amended § 102.62(e) explicitly provides, just as the text of amended § 102.67(k) explicitly provides, that "The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)."

[132] See, e.g., SHRM; ALFA; COLLE.

solicitation, distribution, and lawful access restrictions,[133] in addition to prompting a huge number of surveillance complaints stemming from employers' routine monitoring of internal phone and email systems. The SEIU disagrees, claiming in reply that under the Board's proposal, employers would still be able to maintain non-discriminatory, restrictive email policies, but that given most employers' permissive attitudes toward employees' use of email, it would be highly unlikely that many such rules would prevent election-related uses of employees' work email by the nonemployer parties. Meanwhile, the AFL-CIO (AFL-CIO II) contends that the Board should address issues surrounding work email through the adjudicatory process, and the Chamber II in reply—while generally opposed to requiring any phone and email information on the voter list—agrees that it would be more appropriate to disclose employees' personal email and phone information than their work email and phone information.

Other comments emphasize the threat of harm to employer email and phone systems and associated productivity concerns that would allegedly flow from the disclosure of employees' work contact information to the nonemployer parties.[134] For example, the Employment and Labor Law Committee of the Association of Corporate Council (ACC), cites the Sixth Circuit's decision in *Pulte Homes v. Laborer's Int'l Union*, 648 F.3d 295 (6th Cir. 2011)[135] as evidence of union propensity to misuse this

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[133] For other comments to this effect, see, e.g., NAM II; Sheppard-Mullin II; RILA.

[134] See, e.g., ACC; AGC; Indiana Chamber; ABC; Sheppard Mullin II; Mrs. Octavia Chaves II.

[135] In this case, which does not involve a union's use of an *Excelsior* list, the Sixth Circuit denied Pulte's motion for a preliminary injunction, but reversed the district court's dismissal of Pulte's claims against the Laborers union under the Computer Fraud and

information in order to inflict economic damage on an employer. However, the American Health Care Association and the National Center for Assisting Living II (AHCA)—which also cites *Pulte*—admits that "a petitioning union might be expected to be more solicitous of employees whose votes it was seeking in an NLRB election." CDW also mentions the threat of malicious software and viruses being introduced to employer computer systems, but SEIU (reply) answers that such threats are far-fetched considering that "riddling an employee's computer [albeit one owned by the employer] with a virus is not likely * * * to encourage her to support the union." Furthermore, comments point out that email providers, such as Google and Microsoft, are vigilant about identifying malicious attachments, and that many employer email systems are protected by commercially available software, thus minimizing any potential risks to employer email systems.[136]

Still other comments argue that because the concerns associated with inclusion of work email and work phone numbers on the voter list are so significant, the Board would be breaching its obligation of neutrality in the election process if it were to order the employer to disclose them to a petitioning union.[137]

After careful consideration of all the comments concerning the voter list proposals as they relate to work email addresses and work phone numbers, the Board believes that the issues raised require further study, and so the final rule does *not* require the employer

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Abuse Act based upon allegations that the Laborers intentionally transmitted a high volume of email messages and phone calls to several Pulte executives and managers in retaliation for Pulte's firing of several employees concerning which the Laborers filed unfair labor practice charges with the NLRB.

[136] See SEIU II; Testimony of Jess Kutch on behalf of Coworker.org II.

[137] See, e.g., National Association of Wholesaler-Distributors (NAW) II; AEM II.

to furnish the other parties (such as the union in an initial organizing context) with either the work email addresses or work phone numbers of eligible voters. If, in the future, the Board decides through adjudication or rule-making that the inclusion of additional contact information on the voter list is warranted, then it will be incumbent on the Board to address concerns appropriately raised at that time. However, at this time, we express no opinion as to the merits of the various concerns raised that are specific to including work email addresses or work phone numbers on the voter list.

b. Personal Email Addresses / Personal Phone Numbers

Although the final rule does not require the employer to furnish the other parties or the regional director with the work email addresses and work phone numbers of the eligible voters, the final rule does require the employer to furnish the other parties and the regional director with the available personal email addresses and available home and personal cellular ("cell") telephone numbers of the eligible voters to help advance the principal objectives behind the original *Excelsior* requirement. As set forth in the NPRM, in elections conducted under Section 9 of the Act, there is no list of employees or potentially eligible voters generally available to interested parties other than the employer and, typically, an incumbent representative. 79 FR 7322. The Board addressed this issue in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), where it held:

> [W]ithin 7 days after the Regional Director has approved a consent-election agreement * * * or after the Regional Director or the Board has directed an election . . ., the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Although several Justices of the Supreme Court expressed the view that the requirement to produce what has become known as an "*Excelsior* list" should have been imposed through rulemaking rather than adjudication, the Court upheld the substantive requirement in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969).

In *Excelsior*, the Board explained the primary rationale for requiring production of an eligibility list:

> [W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also free from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice * * *.
>
> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation

156 NLRB at 1240-41 (footnotes omitted). The Supreme Court endorsed this rationale in *Wyman-Gordon*, 394 U.S. at 767, stating that:

> The disclosure requirement furthers this objective [to ensure the fair and free choice of bargaining representatives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

Since *Excelsior* was decided almost 50 years ago, the Board has not significantly altered its requirements despite transformative changes in communications technology, including that used in representation election campaigns. Fifty years ago, email did not exist; and communication by United States mail was the norm. For example, the union in *Excelsior* requested a list of names and home addresses to answer campaign propaganda that the employer had mailed to its employees. See *Excelsior*, 156 NLRB at 1246-47. Indeed, if a union wanted to reach employees with its arguments in favor of representation, it frequently resorted to the United States mail or visited employees at their homes because, as the Board recognized in *Excelsior*, the union, unlike the employer, "normally ha[s] no right of access to plant premises" to communicate with the employees. *Id.* at 1240. However, as SEIU points out, in 2010, nearly all working adults used email, and indeed, 39.6 billion emails were being sent every day—more than 80 times the number of letters being sent through the U.S. Postal Service.[138] The AFL-CIO II cites to a study released during the 2014 comment period suggesting that up to 87% of U.S. adults have an email address and use the internet.[139] Other comments likewise assert that the voter list requirements should be updated to include email addresses in recognition of how

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[138] See "Email vs. snail mail (infographic)" (Sept. 29. 2010), *http://royal.pingdom.com/2010/09/29/email-vs-snail-mail-infographic*.

[139] Susannah Fox & Lee Rainie, "The Web at 25 in the U.S.", Pew Research Center (Feb. 27, 2014), *http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-U-S/*.

individuals, employees, employers, and institutions now communicate with one another.[140]

The Board believes that the provision of only a physical home address no longer serves the primary purpose of the *Excelsior* list. Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*. As Justice Kennedy observed in *Denver Area Educational Telecommunications Consortium, Inc. v. FTC*, 518 U.S. 727, 802-803 (1996) (Kennedy, J., dissenting) (internal citation omitted):

> Minds are not changed in streets and parks as they once were. To an increasing degree, the most significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

Similarly, in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2-3 (2010) (footnotes omitted), the Board recently observed,

> While * * * traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase. Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, "[t]oday's workplace is becoming increasingly electronic."[141]

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[140] See, e.g., National Nurses Union (NNU); Professor Joel Cutcher-Gershenfeld; SEIU-United Healthcare Workers – West; Southwest Regional Joint Board, Workers United; Testimony of Brenda Crawford II; Testimony of Darrin Murray on behalf of SEIU II.

[141] To be clear, the Board cites *J. Picini Flooring* and related examples simply to demonstrate its view of the changing realities of workplace communication, and not—as

Moreover, our experience with campaigns preceding elections conducted under Section 9 of the Act indicates that employers are, with increasing frequency, using email to communicate with employees about the vote. See, e.g., *Arkema, Inc.*, 357 NLRB No. 103, slip op. at 14 (2011) (employer sent an email to employees broadly prohibiting "harassment" with respect to the upcoming election), enf. denied 710 F.3d 308 (5th Cir. 2013); *Humane Society for Seattle,* 356 NLRB No. 13, slip op. at 3 (2010) ("On September 27, the Employer's CEO, Brenda Barnette, sent an email to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader emailed employees a link to a third-party article regarding 'KCACC Guild's' petition and reasons the Guild would be bad for SHS."); *Research Foundation of the State University of New York at Buffalo,* 355 NLRB 950, 958 (2010) ("On January 12, Scuto sent the first in a series of email's [sic] to all Employer postdoctoral associates concerning the Petitioner's efforts to form a Union at the Employer[,]. * * * explaining the Employer's position on unionization * * *."); *Black Entertainment Television,* 2009 WL 1574462, at *1 (NLRB Div. of Judges June 5, 2009) (employer notified several employees by email to attend a meeting in which senior vice-president spoke one-on-one with the employees regarding the election scheduled for the following day).[142]

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suggested in the comments of AHCA—to argue that simply because an employer might use a particular mode of communication that a union should therefore be entitled to use of that same mode as a quid pro quo.

[142] In addition, the rulemaking record reflects that employers sometimes use their employees' personal contact information to communicate about campaign issues. See United Nurses Associations of California/Union of Health Care Professionals (UNAC/UHCP) II and testimony of Brenda Crawford II (describing an employer sending

Disclosure of the employees' personal email addresses, like the disclosure of personal phone numbers discussed below, will allow the nonemployer parties (including unions and decertification petitioners) to promptly convey their information concerning the question of representation to all the eligible voters. Disclosure of this contact information also makes it more likely that nonemployer parties can respond to employee questions, both individually and collectively, including questions that employees have, but may be uncomfortable raising on their own.[143] It also permits the nonemployer parties to engage with employees on campaign issues in a timely manner and specifically, prior to the election, as well as share those responses with other employees, thus making it more likely that employees can make an informed choice in the election. After all, it obviously takes less time for an employee to receive the nonemployer party's campaign communication when that message is sent via email than when it is sent via United States mail.[144] Nurse Brenda Crawford explained the difficulty in organizing off-campus

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text message blasts to employees' personal cell phones as part of its election campaign).

[143] For example, Board caselaw provides examples of campaigns in which employees are presented with hypothetical "questions" to "ask" the organizing union. See, e.g. *Kellwood Co.*, 178 NLRB 20, 23 (1969) (employer encouraged employees to ask organizing union what would happen when no contract was reached); *Smithtown Nursing Home*, 228 NLRB 23, 26 (1977) (employer encouraged employees to ask the organizing union for a "guarantee" of no strikes, and other strike related demands); *World Wide Press, Inc.*, 242 NLRB 346, 357 (1979) (employer distributed leaflets encouraging employees to ask about discontinued pension negotiations at another plant); *Flamingo Hilton-Laughlin*, 324 NLRB 72, 80-83 (1997) (employer distributed leaflets encouraging employees to ask 18 questions of the organizing union including certain "guarantees"); *Eldorado Tool*, 325 NLRB 222, 224 (1997) (employer distributed leaflet encouraging employees to ask 15 rhetorical questions of the organizing union including whether the union could "guarantee" no job loss or facility closure).

[144] We recognize that nonemployer parties can reply by email to any voter who chooses to pose questions by email since the return email address is included in the email itself,

informational meetings when her colleagues work 12-hour shifts and have outside family responsibilities. In her view, modern communication tools, including email, would enhance the ability to provide information in a manner that is convenient to workers and their families. Testimony of Crawford II. The Board agrees, and has concluded that the required disclosure of available personal email addresses of eligible voters will permit the timely give-and-take of campaign information that will increase the likelihood that employees will be placed "in a better position to make a fully informed and reasonable choice." *Excelsior*, 156 NLRB at 1240.[145] And of course, the Board included employees' home and personal cell telephone numbers in the voter list proposals because the use of telephones to convey information orally and via texting is an integral part of the communications evolution that has taken place in our country since *Excelsior* was decided.[146]

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but we would find unpersuasive any claim that voluntary disclosures of this sort establish that it is unnecessary to provide nonemployer parties with email addresses of all eligible voters. Looking at the matter so narrowly overlooks that an organizing campaign is not merely a series of discrete individual communications addressed to interested employees with particular questions. Union representatives may seek to answer questions that not all employees may have thought to ask and to provide information about representation issues that not all employees possess. The ability to communicate effectively with all employees is necessary for this purpose. Accordingly, the Board believes that requiring an employer to furnish the available personal email addresses of eligible voters to the nonemployer parties makes it more likely that employees can make an informed choice in the election.

[145] To be sure, the Board believes that requiring the provision of employees' available personal email and phone numbers is a necessary improvement to the existing *Excelsior* policy even in workplaces where employers do not choose to avail themselves of email and phones as a tool of their representation campaign, i.e., its importance and usefulness is not linked to, or dependent on, the employer's use of email or phone communication.

[146] SIGMA and others suggests that many employers do not keep records of employees' personal email addresses and so "the Board may overestimate the availability or utility"

However, some comments question the inclusion of phone numbers in the final rule, implying that because the Board chose not to mandate disclosure of phone numbers in 1966, at a time when at least basic telephone technology existed, then it should not do so today.[147] CDW attempts to lend force to this argument by asserting that in the late 1960s "the United States led the world in telephone usage * * * and * * * the average person had 701 telephone conversations", while simultaneously arguing that the home addresses disclosed under the current *Excelsior* policy continue to be the "most reliable and near universal points of contact" for employees.

The Board believes that comments such as CDW's do not adequately appreciate the way phone communication has changed in the last 45 years. While it may be true that when the Board issued its *Excelsior* decision, many households had at least one telephone, the telephone was not nearly as ubiquitous as it is presently, and those that existed bore little resemblance to the technology we have become accustomed to today.

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of personal email addresses as a means for petitioners to reach all employees with their message. Yet, the amendments merely require an employer to furnish its employees' "available personal email addresses" (and "available home and personal cellular ("cell") telephone numbers"). Accordingly, if the employer does not maintain those addresses and numbers, it does not need to ask its employees for them. As discussed below, the Board recognizes that delays in conducting elections would result if employers (or the Board) were required to collect personal information directly from employees after the parties entered into an election agreement or the regional director directed an election. However, the fact that some employers may not maintain records of their employees' personal email addresses and personal phone numbers does not demonstrate that it is not worthwhile to require those employers who do maintain such information to disclose it in the interests of fair elections and more efficient administrative proceedings. Similarly, the fact that an employer may not possess the personal email addresses and personal phone numbers for each and every one of its employees does not demonstrate that it is not worthwhile to require the employers to disclose those employees' personal email addresses and personal phone numbers that it does possess.

[147] See, e.g., SIGMA; Schnuck Markets, Inc.; INDA II.

In particular, voicemail service had yet to be invented, and no commercially viable home answering machine had yet entered the marketplace. See "The History of…Answering Machines," *http://transition.fcc.gov/cgb/kidszone/history_ans_machine.html* (last updated June 4, 2004). Because answering machine and voicemail technology was uncommon or nonexistent in 1966, a nonemployer party could not leave a message if the employee with whom it intended to speak about the upcoming election was not at home when the union called. By contrast, the employee would receive the nonemployer party's letter even if the employee was not at home when the post office delivered it. Today, however, even if the employee is not home when the call is placed, the caller is virtually always able to leave a voice message—to say nothing of the ability to send written messages via phone texting technology. And, of course, if an employee has a cell phone, the caller can reach the employee even if the employee is not at home when the call is received.

Contrary to CDW, the Board believes that the changes in phone ownership and use make personal phones a universal point of contact today in a way that was unimaginable in 1966. The share of U.S. households possessing a telephone has steadily increased since the 1960s, from 78% in 1960 to 95% in 1990. See Bureau of the Census, Census Questionnaire Content, 1990 CQC-26, "We asked…You told us: Telephone and Vehicle Availability" 1 (Jan. 1994), *http://www.census.gov/prod/cen 1990/cqc/cqc26.pdf*. The Census Bureau reports that the numbers of households with no available phone had shrunk to only 2.4% by 2000. See U.S. Census Bureau, 2000 Census of Population and Housing, *Summary Social, Economic, and Housing Characteristics*, PHC-2-1, United States Summary 10 (2003) (Table 10), *http://www.census.gov/prod/cen2000/phc-2-1-*

pt1.pdf. And that tiny percentage of households with no phone service appears to have remained nearly unchanged through 2013. See Stephen J. Blumberg and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013," National Center for Health Statistics 2 (December 2013), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf* (reporting only 2.3% of U.S. households lacking phone service).

In addition, as of January 2014, 90% of American adults had a handheld mobile phone or a cell phone—a non-existent technology at the time of *Excelsior*—and 29% of cell phone owners described their cell phone as "something they can't imagine living without." Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/ fact-sheets/mobile-technology-fact-sheet/*. In fact, the use of cell phones has increased to the point that it is overtaking the use of landline phones. For example, SEIU's comment cites a 2007 study finding that 85% of adults own cell phones, while only 71% of adults own home phones. And the Bureau of Labor Statistics identifies 2007 as the first year in which spending on cellular phone services exceeded spending on residential phone services. See "Consumer Expenditure Survey: Spending on Cell Phone Services Has Exceeded Spending on Residential Phone Services," *http://www.bls.gov/cex/cellphones2007.htm* (last modified Jan. 14, 2009). In 2010, more than a quarter of adults lived in households with only wireless telephone service, up from less than 5% a mere 7 years earlier. See Stephen J. Blumberg and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2010," National Center for Health Statistics 1 (June 2011), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf*. By 2013, 38% of all

adults lived in households with only wireless service, and more than half of adults younger than 35, as well as adults living in poverty, had only wireless phone service in their households. See Blumberg and Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013," National Center for Health Statistics 2-3 (December 2013), *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf*. These statistics validate the hearing comments of Ronald Mikell, speaking on behalf of the Federal Contract Guards of America, that many of his members possess only cell phones, and that Mikell's cell phone was his primary point of contact for both business and personal matters.

The advent of cell phones has expanded communications not only by phone but by other electronic media. Some 55% of cell phone owners use their phones to go online— to browse the internet, exchange emails, or download apps. Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*. In addition, the prevalence of cell phones, which are typically carried with adults on their person whether at home, at work or around town, now allows callers' messages to reliably reach their recipients with speeds that would have been shocking in 1966. This speed and reliability has been enhanced through text messaging, which has seen a dramatic rise in usage in only the past few years, becoming the preferred mode of communication for many young people. In marked contrast to CDW's citation of an average person's 701 annual phone conversations in 1968, more recent statistics show young adults sending an average of 1,630 texts per month. See "U.S. Teen Mobile Report Calling Yesterday, Texting Today,

Using Apps Tomorrow" (October 14, 2010), http://www.nielsen.com/us/en/insights/news/2010/u-s-teen-mobile-report-calling-yesterday-texting-today-using-apps-tomorrow.html.

Additionally, there is a separate rationale for requiring mobile and home phone numbers in addition to email addresses, namely, to reach persons who rely on phone calls and not emails. According to the Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*, over forty percent of phone users do not possess smartphones and therefore would not receive last minute emails responding to campaign issues. Disclosure of personal phone numbers is thus a practical necessity if this significant portion of eligible voters is going to have access to late breaking developments.

In addition to the increased use of personal telephones, text messaging, and email, smartphones have recently emerged as single devices capable of managing all three modes of communication. Even as of 2011, more than two-thirds of Americans 34 years old or younger, and 48% of individuals 15 years old and above, had a smartphone. U.S. Census Bureau, Computer and Internet Use in the U.S. (May 2013). As of January 2014, 58% of American adults had a smartphone. Pew Research Internet Project, Mobile Technology Fact Sheet (Jan. 2014), *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*. A smartphone's ability to combine telephone, text message, and email access in one hand-held, portable device is perhaps the most tangible example of how the evolution of communications since 1966 has made the personal phone a universal point of contact and, as indicated above, smartphone users comprise more than

half of cell phone owners.[148]

In the face of this revolution in communications technology, it is not surprising that, as SEIU notes, door to door solicitation is nearly extinct, and first class mail is at its lowest volume in 25 years with further profound declines predicted over the next decade. In the experience of union attorney Thomas Meiklejohn, some employers may no longer keep updated home address information on their employees because they do not regularly communicate with them via mail, in contrast to employee telephone lists, which are updated of necessity.[149] Indeed, many comments support adding phone numbers to the voter list disclosures, as a "common sense" change, precisely because the disclosures of only home addresses may be ineffective in allowing a petitioner's message to reach eligible voters.[150] Union attorney Caren Sencer testified that in her experience with

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[148] See also *Riley v. California*, 134 S.Ct. 2473, 2484 (June 25, 2014) (describing cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy" and acknowledging that smart phones, and even less sophisticated cell phones "are based on technology nearly inconceivable just a few decades ago").

[149] Although, the Board is mindful, as asserted by U.S. Poultry II, that employees may change personal email addresses and phone numbers, it nevertheless disagrees with U.S. Poultry's conclusion that requiring this additional information won't solve the problem of outdated contact information. By requiring these two additional forms of available contact information, the Board believes that the voter list amendments will increase the likelihood that nonemployer petitioners will receive at least one piece of up-to-date contact information (if not more) for eligible voters. Moreover, instantaneous responsive messages commonly utilized by both telephone and email providers—indicating that an email message cannot be delivered to the address entered or that a phone call cannot be completed as dialed—are much more likely to bring inadvertent transcription mistakes to the parties' attention (and allow for potential correction) during the pre-election period than would corresponding returned pieces of U.S. mail indicating that the mailing could not be delivered as addressed.

[150] See, e.g., AFL-CIO; SEIU; Senior Member Miller and Democratic House Members; testimony of Ronald Mikell on behalf of the United Federation of Special Police and

seasonal workers covered by the NLRA, employers use cell phones to communicate with their employees and have only a P.O. Box for a physical address—which would be of limited utility to a petitioning union. Similarly, NELP stresses that the expanded voter list disclosures are "especially crucial to low-wage workers, who may not remain at one address for long or may not even have a fixed home." The Board shares this perspective, and for that reason believes that the addition of phone numbers is necessary to ensure that messages concerning representation are able to reach the lowest paid sectors of our national workforce.[151]

Like the disclosure of email addresses, disclosure of the employees' home and

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Security Officers and Federal Contract Guards of America.

[151] In view of the foregoing discussion, the Board disagrees with PCA's comment that home addresses are sufficient, as well as PCA's claim—shared by CNLP—that the Board should not require disclosure of the additional contact information because there is no evidence that the current requirements hinder union access. Nor is the Board persuaded by RILA's II assertion that new electronic means of communication outreach available to unions via various social media outlets undercuts the need to disclose employee personal email and cell phones. Moreover, the *Excelsior* Board rejected the argument that the Board may not require employer disclosure of employee names and addresses unless the union would otherwise be unable to reach the employees with its message in the particular case at issue. *Excelsior*, 156 NLRB at 1244. As the Board explained, cases addressing the existence of alternative channels of communication are not relevant in this non-unfair-labor-practice context, where the opportunity to communicate made available by the Board does not interfere with a significant employer interest, and the interest in a fair and free choice of bargaining representatives is so substantial. *Id.* at 1245. Thus, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, the Board "may properly require employer disclosure of [the additional contact information] so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election." *Id*. We repeat that the *Excelsior* rule is designed, first of all, to maximize the likelihood that all of the voters will be exposed to the nonemployer party arguments concerning representation, and the requirement that the additional contact information be disclosed better advances that goal given the changes in how individuals, employees, employers, associations and institutions communicate, and exchange information with, one another.

personal cell phone numbers will allow the nonemployer parties to promptly convey their information concerning the question of representation to the eligible voters. Disclosure of this contact information also makes it more likely that the nonemployer parties can both respond to employee questions prior to the election and share those responses with other employees, thus making it more likely that employees can make an informed choice in the election. After all, it obviously takes less time for an employee to receive the nonemployer party's campaign communication when that message is sent via a telephone call or a text or voice mail message than when it is sent via United States mail. In sum, the Board has also concluded that requiring the employer to furnish the other parties with the available home and personal cell phone numbers of eligible voters will facilitate an informed electorate, thus serving the first purpose of the *Excelsior* rule.

The Board has further concluded that requiring the employer to furnish the available personal email addresses and home and personal cell phone numbers of the eligible voters will also better advance the second rationale articulated by the Board in *Excelsior*: facilitating the expeditious resolution of questions of representation. As the Board explained in *Excelsior*, in many cases at least some of the names on the employer's list of eligible voters are unknown to the other parties. The parties may not know where the listed individuals work or what they do. Thus, for example, the union may be unable "to satisfy itself as to the eligibility of the 'unknowns'," forcing it "either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote." *Excelsior*, 156 NLRB at 1243. As the Board further explained, "The effect of putting the union to this choice . . .is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring

investigation and resolution by the Regional Director or the Board." *Id*. at 1243. Only through further factual investigation—for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves—can the union potentially discover the facts needed to assess eligibility and avoid the need for election-day challenges based solely on ignorance. And to avoid unnecessary delay, the union must receive the recipient's response in time to be able to determine whether the employer correctly included those names on the list of eligible voters or whether it should challenge those individuals if they come to vote.

The provision of the additional contact information will help the union (or decertification petitioner) investigate the identity of any unknown employees on the employer's voter list in a more timely manner, thereby helping to decrease the chances that the union (or decertification petitioner) will have to challenge voters based solely on ignorance of their identities.[152] Accordingly, the Board concludes that the provision of the additional contact information will advance the second rationale of *Excelsior* as well as the first rationale, and the final rule requires the employer to disclose this additional contact information in amended §§ 102.62(d) and 102.67(l). The Board also reiterates that both rationales will be advanced by permitting nonemployer parties to more promptly and effectively contact employees in relation to post-election objections and other proceedings, such as unfair labor practice charges, that may arise from the representation proceedings. For example, as discussed below in connection with § 102.69, in order to help the Board to more expeditiously resolve election objections and

[152] For comments in agreement, see, e.g., National Union of Healthcare Workers – California Nurses Association (NUHW) II; Nicole Teixeira II.

thereby help the Board to more expeditiously resolve questions concerning representation, the Board has decided to require parties filing election objections to simultaneously file with their objections a written offer of proof supporting those objections, unless parties can show good cause to file their offers of proof at a later date. The Board has thereby eliminated the default extra 7-day period parties had to file evidence in support of their objections under the Board's prior rules.[153] Because the voter list amendments require the employer to include the available home and personal cell phone numbers along with the available personal email addresses of the unit employees on the voter list that it provides to the nonemployer parties before the election, the Board believes that unions, as well as employers, ordinarily will have sufficient time to contact potential witnesses and prepare their offers within the allotted time.[154]

Nevertheless, the Board is mindful of comments predicting that communications technology is changing so rapidly that even the proposed expansion of the voter list to include personal email addresses and personal phone numbers may be insufficient to advance *Excelsior's* interest in the near future. For example, Joseph Torres predicted that email—both work and personal—is headed toward obsolescence and that young people are already turning to social media platforms such as Tumblr, Instagram, and Facebook to communicate electronically. Testimony of Joseph Torres on behalf of Winston & Strawn

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[153] The regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause.

[154] On a related note, we observe that using modern technology to lessen delays in representation cases is also fully consistent with one of the key goals of the E-Government Act of 2002 (Pub. L. 107-347), "improv[ing] the ability of the Government to achieve agency missions and program performance goals," *id.*, section 2, Dec. 17, 2002, 116 Stat. 2900.

II. In this vein, SEIU II suggests that the Board rules should require employers to provide to petitioners "all other contact information, such as social media identifiers, used by the employer to communicate with employees[.]" The Board, however, shares the Chamber's skepticism (Chamber II Reply) that few, if any, employers maintain social media contact information about their employees, and declines to explicitly include it as part of the voter list at this time.[155]

Should the Board's experience administering the expanded voter list requirements suggest that additional forms of contact information should be included in future voter lists, then the Board is open to revisiting its conclusion concerning the contours of the list. For that reason, the Board is adopting a modified version of the language suggested by the AFL-CIO II to phrase the required contents of the voter list as a minimum, to allow for future Boards to require more or different forms of contact information in a particular case (should the peculiar circumstances so warrant), or in all future cases. Thus, the new regulatory language will read, in pertinent part, "* * * a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters." Thus, the Board retains discretion to require through adjudication or rulemaking that the list include additional contact information.

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[155] The Board does not, however, share the Chamber's concern (Chamber II Reply) that a regulation requiring employers to include on voter lists any additional contact information, such as social media identifiers, that they maintain in their records would start down the "slippery slope" of requiring employers to solicit and maintain such information from their employees.

c. Work Location, Shift, and Job Classification Information

The final rule also adopts the proposal that the employer furnish the work locations, shifts, and job classifications of all eligible voters in amended §§ 102.62(d), (providing for the final voter list in election agreement cases), and 102.67(l) (providing for the same list in directed election cases). Provision of the information will assist the nonemployer parties in investigating whether the unknown employees on the employer's list are in fact eligible. The Board agrees with the comments advocating that provision of this information will reduce the need for challenges based solely on ignorance of the identity of voters, and thereby help the Board expeditiously resolve questions of representation.[156] In addition, the Board is sympathetic to the view that in some cases, providing employee scheduling and shift information to a petitioning union would allow for more targeted communications either in person or by phone that would be less disruptive to the employee and his or her family. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

d. Employee Privacy Concerns

Many comments argue, however, that the Board should refrain from requiring that the employer furnish the other parties with the employees' personal email addresses, home and personal cell phone numbers, work locations, shifts and job classifications, because, among other things, disclosure of such information could cause harm to the employees, invade their privacy, or conflict with precedent or other laws. Other comments appear to attack even the nearly 50-year old Supreme Court-sanctioned

[156] See, e.g., NUHW II; Testimony of Maneesh Sharma on behalf of AFL-CIO II.

requirement that the employer disclose the home addresses of eligible voters.

Without minimizing the legitimacy of the concerns underlying these comments, we conclude for the reasons that follow that the public interests in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation outweigh the interests employees and employers have in keeping the information private. As the Supreme Court has long recognized, it is quintessentially the Board's function to balance the competing interests of employees, employers, and labor organizations in effectuating the policies of the Act. See, e.g*., NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957); *NLRB v. Fleetwood Trailer Co., Inc.* 389 U.S. 375, 378 (1967); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). Indeed, in upholding the Board's *Excelsior* rule the Supreme Court noted: "It is for the Board and not for this Court to weigh against this interest [in the fair and free choice of bargaining representatives] the asserted interest of employees in avoiding the problems that union solicitation may present." *NLRB v. Wyman-Gordon Co.*, 394 U.S. at 767.[157]

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[157] The issue of employee privacy rights was also raised in the litigation preceding *Wyman-Gordon*, and the courts called on to consider the issue consistently held that it was within the Board's discretion to conclude that the interests advanced by the *Excelsior* requirement outweighed employee privacy interests. See *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 1183 (9th Cir. 1968) (rejecting privacy arguments), *cert. denied sub nom*., *Teledyne, Inc. v. NLRB*, 394 U.S. 1012 (1969); *NLRB v. Q-T Shoe Mfg. Co., Inc.*, 409 F.2d 1247, 1250 (3d Cir. 1969) (holding employee privacy rights not infringed by *Excelsior* requirement); *NLRB v. J. P. Stevens & Co.*, 409 F.2d 1207, 1209 (4th Cir. 1969); *NLRB v. Beech-Nut Life Savers, Inc.*, 274 F. Supp. 432, 437-438 (S.D.N.Y. 1967), *aff'd*, 406 F.2d 253 (2d Cir. 1968), *cert. denied* 394 U.S. 1012 (1969). Although the Motor & Equipment Manufacturers Association (MEMA) II (2-3) criticizes the *Excelsior* Board for its analysis that allegedly did not take account of the then-recent decision by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognizing a constitutional right to privacy, neither the Supreme Court in its 1969 *Wyman-Gordon* decision affirming the *Excelsior* policy, nor any of the post-*Griswold* circuit court decisions listed above, faulted the *Excelsior* Board for this alleged deficiency.

As explained above, the Board has concluded that access to employees' more modern contact information, including available, personal email addresses, and home and personal cell phone numbers is as fundamental to a fair and free election and the expeditious resolution of questions concerning representation in 2014, as was access to employee names and home addresses in 1966 when that requirement was created in *Excelsior,* 156 NLRB at 1243, 1246, and later approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. at 768. As further noted above, 50 years ago answering machines, voicemail, email, cell phones, texting, and smart phones did not exist or were not widespread. In this day and age, providing such tools of communication to the nonemployer parties once a regional director has directed an election or all parties have agreed to an election will significantly advance the objectives of the original *Excelsior* policy: ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the *nonemployer* party arguments concerning representation, and helping to expedite resolution of questions of representation by preventing challenges based solely on ignorance of the identities of the voters.

The objections that disclosure of the additional information could lead to harassment and coercion of employees[158] are similar to arguments presented to the *Excelsior* Board. Commenters have failed to persuade us that the Board's response then is any less valid today:

> [W]e reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and

[158] See, e.g., SHRM; CDW; NRF; PIA; ALG.

> coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy. We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether.

156 NLRB at 1244 (footnote omitted). With the benefit of almost fifty years of post-*Excelsior* experience, it is clear that the harm to employees forecast by the decision's opponents did not come to pass. The Board will not make policy based on mere speculation of misconduct and abuse, particularly where, as a matter of the Board's decades of experience, such abuse is unlikely.[159]

Nevertheless, the Board is cognizant that advances in technology since *Excelsior* have created a heightened risk of unauthorized dissemination of personal information, and comments have stressed the public's increased concern with privacy issues due to incidents of identity theft, government surveillance and hacking of retailers' electronic databases.[160] However, here, as in *Excelsior*, and other areas of the law, the risk of harm must be balanced against other legitimate considerations that also warrant protection. Cf. *Canadian American Oil Co. v. NLRB*, 82 F.3d 469, 473-75 (D.C. Cir. 1996) (confidentiality interest of employees claiming union threats yielded to union's interest to

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[159] See also *NLRB v. Delaware Valley Armaments, Inc.*, 431 F.2d 494, 499-500 (3d Cir. 1970) (noting that mere possibility of harassment is not enough to invalidate directive to furnish *Excelsior* list), *cert. denied,* 400 U.S. 957 (1970); *NLRB v. Q-T Shoe Mfg. Co.*, 409 F.2d 1247, 1250 & n. 9, (3d Cir. 1969) ("it hardly appears likely that union agents will unduly harass any employee, since their objective is to obtain support rather than arouse hostility * * *. The mere possibility of such harassment is surely not a sufficient ground for invalidating a rule designed to achieve greater enlightenment"); *NLRB v. Hanes Hosiery Division-Hanes Corp.*, 384 F.2d 188, 191 (4th Cir. 1967) ("every annoyance of the voters is shunned by the seasoned campaigner, and unions are not novices in this area"), *cert. denied*, 390 U.S. 950 (1968).

[160] See, e.g., Chamber II; SHRM II; Brent Jones II; Marna Skripko II.

confront the evidence offered in support of the objection at the hearing); *NLRB v. Herbert Halperin Distributing Corp.*, 826 F.2d 287, 293 (4th Cir. 1987) (confidentiality interest of employees claiming union threats did not justify objecting party's transmitting the employees' affidavits to the Board without also serving them on the union); *Seth Thomas Div.*, 262 NLRB 715, 715 n.2 (1982)(same).

Therefore, even assuming that the privacy, identity theft, and other risks may be greater than the Board has estimated—and, in particular, that adding personal email addresses and home and personal cell phone numbers to home addresses may, in combination, result in increased risks, especially as technology changes—nevertheless the Board's conclusion remains the same. These risks are worth taking and as a practical matter, must be taken, if communication about organizational issues is going to take place using tools of communication that are prevalent today. Email and cell phones are ever increasing the modes by which people communicate; this continuing expansion in the use of new electronic media demonstrates that the risks associated with these speedy and convenient tools are part of our daily life.

The Board therefore disagrees with the assertion of Constangy, that the mere potential for misuse of the voter list information outweighs any benefit gained by the disclosures. Nonetheless, we emphasize that if the disclosure of the additional contact information does subject employees to harm, the Board "shall provide an appropriate remedy" *Excelsior*, 156 NLRB at 1244, as discussed further below.

Likewise, the Board is not persuaded that SHRM's raw citation of unfair labor practice charges alleging union coercion evidences a problem with communication resulting from current *Excelsior* disclosures. The charges cited are not linked to misuse of

Excelsior list information but, rather, include the entire range of coercive union conduct, including when that union is already acting as an employees' bargaining representative. The Board is skeptical that a union seeking to persuade employees to select it as a bargaining representative would tend to act coercively toward those employees, and the statistics cited by SHRM—which do not purport to focus on whether the charges were filed in a representational context or had any relationship to the *Excelsior* list information, much less whether they had merit[161]—do not undermine the Board's view on the issue.

Moreover, the dearth of specific and documented incidents of alleged misuse of employee contact information cited in the comments lends additional support to our conclusion that such misuse has not been a significant problem in the past, and is unlikely to be a problem in the future. Thus, in the two rounds of critical commentary on the voter list proposals, several years apart, the Board was presented with no documentation demonstrating misuse of contact information provided in voter lists by petitioning unions during the nearly 50 years in which the Board's *Excelsior* policy has been in place.[162]

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[161] Over the past 3 years, just over one third of all charges were found to have merit. See NLRB Performance Accountability Reports 2011-2013, *http://www.nlrb.gov/reports-guidance/reports* (reporting merit rates of 35.2% in FY 13, 36.4% in FY 12, and 37% in FY 11).

[162] Indeed, our examination of the data contained in the last decade of the Board's use of its Case Activity Tracking System (CATS) further confirms the lack of evidence that unions are generally coercing and intimidating employees during organizing campaigns, or specifically misusing information from *Excelsior* lists. The data reveals that out of 24,681 representation elections conducted between fiscal years 2000 and 2010, employers filed objections involving allegations of union threats and/or violence in 469 cases, and the election result was set aside by the Board on only 16 occasions. Nothing in the Board's database indicates that any of these 16 cases involved the misuse of *Excelsior* information, but even if the Board were to assume that it did, a record of union coercion

However, despite the absence of any examples of that kind of abuse, the Board recognizes that the potential for such abuse exists. For example, RILA II mentioned—without citation—one case in which a decertification petitioner allegedly received pornography mailed to his home. Yet, even in that case, Doreen Davis (testifying on behalf of RILA) reported that the NLRB appropriately set aside the subsequent election and ordered it to be rerun.[163] See RILA II. And when William Messenger (testifying on behalf of NRTWLDF) discussed another incident where union members allegedly harassed a dissident coworker by mailing magazine subscriptions to the coworker's home address, he admitted that the employee contact information at issue was not made available pursuant to the Board's *Excelsior* policy. In sum, the Board agrees with comments by the AFL-CIO II,[164] Melinda Hensel (Testimony on behalf of the International Union of Operating Engineers (IUOE), Local 150 II) and Thomas Meiklejohn (Testimony on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly II) who noted the lack of evidence demonstrating voter list misuse.

In a similar vein, the Board, contrary to Con-way's comment, does not believe

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sufficient to set aside an election in 0.065% of elections over a recent 10-year span simply does not demonstrate that "union coercion and intimidation in the context of an organizing campaign is rampant" as argued by SHRM. (This data has not been updated through 2013 because it is not readily available for 2011-2013 in the Board's new NxGen case tracking software which replaced CATS in 2011.)

[163] We also note that a decertification petitioner's address appears on the face of the petition itself, which is a public document. Thus, there was no allegation that *Excelsior* list information played any role in the case cited by Davis.

[164] The AFL-CIO's 2014 comment asserted that "despite this extensive experience [with the existing *Excelsior* policy], neither the Board nor any party that commented on the prior NPRM or testified at the prior hearing could point to a single, specific instance where an eligibility list was misused or even used for a purpose unrelated to the representation proceeding."

that disclosure of employee phone numbers will jeopardize truck drivers' safety by potentially interrupting their mandated work breaks. The final rule does not require the employer to disclose the employees' *work* phone numbers to the nonemployer parties. Nothing in the final rule requires individuals to keep the their home or personal cell phone ringers on "loud," let alone requires them to take calls. Moreover, cell phones are especially effective in showing the identity of the caller, or at least whether the caller is known or unknown, so that the recipient may exercise an informed choice in answering or not. The Board trusts that after the final rule becomes effective, truckers will be able to exercise discretion in fielding incoming union calls during their breaks should any occur, just as they exercise discretion in fielding other kinds of calls now.[165]

The Board acknowledges, however, the concern raised by many comments that the disclosure of the additional contact information could harm employees by impinging on their privacy.[166] To one way of thinking, such privacy concerns should be more pronounced surrounding an employee's home address—long disclosable under *Excelsior*—than for the additional contact information (phone numbers and email addresses) disclosable by virtue of the voter list amendments. After all, disclosure of home addresses may lead to face-to-face contact between union and employee organizers and an employee at the employee's home, whereas disclosure of employee phone

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[165] The Board likewise disagrees with Fern Netzky's unsupported assertion that the voter list will violate attorney-client privilege. The Board fails to see how the new requirements, any more than the existing *Excelsior* requirements, would force employers to reveal confidential communications made to counsel in order to secure legal advice.

[166] See, e.g., Chairmen Kline and Roe II; Klein II; COLLE; SIGMA; RILA; ACE; COSE; Ann Pomola.

numbers or email addresses may simply lead to phone calls or email messages, which are more easily ignored.[167] Indeed, to the extent that disclosure of employee email and phone contact information lessens the likelihood that union organizers will seek to engage them in face-to-face dialogues concerning representation,[168] then those disclosures would arguably mitigate the most serious incursions on employee privacy.

On the other hand, the Board recognizes that some labor organizations may elect to contact employees via telephone and email in addition to, rather than instead of, contacting them at home. Further, the Board acknowledges that some employees will consider disclosure of the additional contact information—particularly email addresses and cell phone numbers which may not be readily accessible through public directories—to invade their privacy, even if they are never contacted.[169] Moreover, at least two commenters make the counterintuitive claim that including personal email addresses and phone numbers on voter lists constitutes a bigger invasion of privacy than including home addresses because employees have less control over unwanted email and phone

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[167] See, e.g., UFCW II; Chairman Harkin, Senior Member Miller and Congressional Democrats; AFL-CIO II; SEIU II; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (UAJAPPFI) II; Nicole Teixeira II.

[168] As IUOE attorney Melinda Hensel explained: "The days of union visits to people's homes I think are—I wouldn't say it's over, but I think it's a much less popular manner of organizing these days." Testimony II.

[169] Of course, the rule only impacts contact information that the employee has already disclosed to the employer. Any information which the employee kept private from the employer will also be kept private from other parties to the proceeding. As discussed above, if an employee has chosen not to share a personal email address or cell phone number with her employer, the employer will not be able to disclose it to the other parties—and the amendments do not require the employer to ask the employee for it. In this way, employees have some control over whether their contact information is utilized by employers or nonemployer parties concerning the campaign.

calls than they do over unwanted visitors at their front door.[170] Although the courts "have differed in their characterization of the magnitude of the interest[s] implicated," *U.S. Dept. of Defense v. FLRA* ("*DOD v. FLRA*"), 510 U.S. 487, 501 n.8 (1994), the Supreme Court has held, for example, "that [employees] have [a] nontrivial privacy interest in nondisclosure" of home address information. *Id.* at 501.[171]

In our view, however, many features of the voter list amendments help to minimize any invasion of employee privacy caused by disclosure of the information. The disclosure of information is limited in a number of key respects. The information itself is limited in scope. It is available only to a limited group of recipients, to use for limited purposes. These limitations persuade us that the substantial public interests—in fair and free elections and in the speedy resolution of questions of representation—served by the voter list amendments outweigh the employees' acknowledged privacy interest in the information that will be disclosed.

First, the information is limited in scope. Plainly, not every piece of personally identifiable information is equally sensitive or entitled to the same weight when balanced

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[170] See Testimony of Doreen Davis on behalf of RILA II; Testimony of William Messenger on behalf of NRTWLDF II.

[171] Compare *DOD v. FLRA*, 510 U.S. at 501 n.8 (noting that courts of appeals have variously characterized employees' privacy interests in their home addresses as "important," "minimal," "general," and "significant") and *id.* at 506-07 & n.4 (Ginsburg, J., concurring) (noting that "most courts" have found that employees have only a "relatively modest" privacy interest in their home addresses) with *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010) (characterizing agent's privacy interest in his email address as "minor"). See also *In re Deloitte & Touche, LLP, Overtime Litigation*, 2012 WL 340114 (S.D.N.Y. Jan. 17, 2012) (not reported) (characterizing the disclosure of class member phone numbers as "routine", including personal email as not unduly intrusive on employee privacy concerns, and collecting similar cases ordering such disclosures).

against the interests served by disclosure.[172] We do not equate disclosure of employee email addresses and phone numbers, for example, with disclosure of employee medical records. Indeed, in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-19 & n.15 (1979), the Supreme Court explicitly noted that the "interests at stake" in *Wyman-Gordon—w*here the Court upheld the Board's *Excelsior* requirement that an employer disclose the names and addresses of employees to a union in the process of an organizing campaign—were "far different" from those at stake when for purposes of arbitrating a grievance an incumbent union seeks highly sensitive information going to an employee's basic competence such as aptitude test scores linked to named employees. While email addresses, phone numbers, work locations, shifts, and job classifications constitute additional pieces of information, they are not fundamentally different in kind from the disclosures discussed in *Wyman-Gordon*, and standing alone, may reasonably be viewed as less private.[173]

Furthermore, disclosure of the employees' email addresses, phone numbers, work locations, shifts, and job classifications reveals nothing about the employees' politics,

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[172] Cf. U.S Department of Commerce, "Guide to Protecting the Confidentiality of Personally Identifiable Information (PII): Recommendations of the National Institute of Standards and Technology, Special Publication 800-122" (2010) *http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf* at E-2 through E-3 ("Organizations should evaluate the sensitivity of each individual PII data field. For example, an individual's SSN or financial account number is generally more sensitive than an individual's phone number or ZIP code.").

[173] See, e.g., SEIU II (pointing out that per the published standards of the NLRB (*http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1673/electronic_filings.pdf*) and the D.C. federal courts (*http://www.dcd.uscourts.gov /dcd/civil_privacy_notice; https://ecf.cadc.uscourts.gov/*) individual email addresses are not treated as sensitive personal information that must be deleted from documents before they are filed electronically).

their religion, their associations, or even their position regarding the labor organization in question.[174] Employees will not have their contact information disclosed because they engaged in any particular expressive activity. Rather, their information will be disclosed solely by virtue of their being employed in a unit in which a question of representation has arisen that will be resolved by a secret ballot election conducted by the Board. The voter list disclosures will not reveal employees' personal beliefs that they might prefer to keep to themselves. Instead, the amendments merely require disclosure of information which will enable the nonemployer parties to contact the employees outside of the workplace to provide information about the voting issues, determine whether the employer properly included such employees on the voter list, and investigate post-election objections and prepare for Board proceedings arising out of the election and related matters.

Second, the voter list information will be provided to a limited set of recipients. It will not be made available to the public at large. Nor will it even be made available to the nonemployer parties in every representation case. Thus, the Board has not, does not, and will not allow "indiscriminate" disclosure of employee information to petitioning unions, as charged by NRF. The Board's showing of interest requirement specifically safeguards against such "indiscriminate" disclosures. See *Local 3, IBEW v. NLRB*, 845 F.2d 1177, 1181 (2d Cir. 1988) (noting that showing of interest requirement was part of *Excelsior*'s

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[174] For example, the Supreme Court recently justified requiring police officers to seek warrants before searching arrestees' cell phones by explaining the vast quantity of private information that may now be found on modern cell phones. *Riley v. California*, No.13-132, 134 S.Ct. 2473 (June 25, 2014). Yet none of that information would be accessible to petitioners merely through receipt of individual phone numbers.

balancing of public and private interests); see also *Big Y Foods, Inc.*, 238 NLRB 855, 855 n.4 (1978) (showing of interest requirement safeguards against the indiscriminate institution of representation proceedings). Moreover, the employer is not required to furnish the list to a petitioning union or a decertification petitioner until after the employer admits that a question of representation exists by entering into an election agreement or the regional director finds that a question of representation exists after a pre-election hearing. Indeed, as discussed below in connection with § 102.63, the Board has rejected SEIU's suggestion that employee contact information be provided to the nonemployer parties before an election is directed, as part of the employer's pre-hearing statement of position. In addition, the Agency will continue its current practice of determining voter lists to be categorically exempt from disclosure to non-party FOIA requesters. See *Reed v. NLRB*, 927 F.2d 1249, 1252 (D.C. Cir. 1991).[175]

Third, even when the voter list information is disclosed to the nonemployer parties in a particular case, such parties will not be able to use it for whatever purpose they desire. Rather, they will only be allowed to use employee contact information for limited purposes. As discussed below, the final rule provides that "parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." Thus, employees need not fear that their contact information, once disclosed, will be shared with or sold to entities having nothing to do with the representation proceeding. And should such misuse of the list occur, the Board will provide an appropriate remedy, as discussed further below.

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[175] Thus, we reject the ATA's claim that the voter list amendments create "difficulties * * * under * * * FOIA."

Finally, any infringement into employees' personal sphere enabled by the disclosure requirement in the final rule will likely be of relatively limited duration. As discussed below in connection with § 102.67, the final rule also eliminates the mandatory 25-day waiting period between issuance of a decision and direction of election and the holding of the election. Accordingly, the time period between the employer's production of the voter list and the election may be shorter than that which existed prior to the amendments in at least some directed election cases. And parties are likely to agree to a shorter time period between the employer's production of the voter list and the election in at least some stipulated election cases, because bargaining about election details in the election agreement context is influenced by the parties' estimation of how soon the regional director could conduct an election if the parties were to go to a hearing. Thus, while some employees may certainly prefer not to receive calls or emails from the nonemployer parties, we note that such communications may not continue beyond the period of the representation proceeding at issue and Board proceedings arising from that election and related matters.[176]

Accordingly, as previously discussed, just as the Board's longstanding *Excelsior* rule reflects a reasonable balance of the conflicting legitimate interests in the context of that era, so the Board's update of its policies similarly reflects a reasonable balance of risk and benefit that is well adapted to contemporary modes of communication.

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[176] Moreover, in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013 between 8 and 18 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals. Thus, in the great majority of representation cases which are definitively resolved without resort to the courts of appeals, the nonemployer party is unlikely to use the voter list data after the election in the absence of unfair labor practice or other related proceedings.

Moreover, the rule reasonably advances the public interest in the timely resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters at the polls based solely on lack of knowledge as to the voter's identity. These important interests are sufficient to counterbalance the interests of those who would prefer to be left entirely alone and not be exposed to the issues raised by an organizing campaign.

Some comments, such as those filed by SHRM, ACE and the NRF, argue that FOIA case law demonstrates that employees have such a substantial privacy interest in their home addresses and email addresses that the Board should abandon the voter list proposals. For example, NRF argues that the Supreme Court recognized in *DOD v. FLRA*, 510 U.S. at 501, that "even though the disclosure of personal email addresses may facilitate union communications, employees nevertheless enjoy a right not to be bothered in their personal environment with work-related matters."

After careful consideration of the comments, we conclude that *DOD v. FLRA* does not undermine the Board's position that it is appropriate to require employers to furnish the voter list information directly to the nonemployer parties. Put simply, the propriety of the Board's requiring employers under its jurisdiction to disclose employee contact information directly to a union after an election has been agreed to or directed under the NLRA—in order to advance the public interests in free and fair elections and the expeditious resolution of questions of representation—was not before the Court in that case. Rather, the issue before the Court there was whether federal agency employers subject to the Federal Service Labor-Management Relations Statute could lawfully refuse to furnish the home addresses of their employees to the unions which already represented

them, because the Privacy Act would otherwise bar the employers, as governmental entities, from disclosing their employees' home addresses. See *id*. at 490-94.

DOD v. FLRA involved a "convoluted path of statutory cross-references." *Id.* at 495. As the Court noted, the Privacy Act provides that "No agency shall disclose any record which is contained in a system of records * * * to any person * * * unless disclosure of the record would be * * * required under section 552 of [FOIA]." *Id*. at 493-94. The employee addresses that the incumbent unions sought the federal agencies to disclose were "records" covered by the Privacy Act, and therefore the agencies were forbidden from disclosing them by the Privacy Act unless FOIA required release of the addresses. *Id*.

As the Court observed, "while 'disclosure [of government documents], not secrecy, is the dominant objective of [FOIA],' there are a number of exemptions from the statute's broad reach." *Id*. at 494 (citation omitted). The Court then considered Exemption 6, which provides that FOIA's disclosure requirements do not apply to personnel files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 494-95 (citing 5 U.S.C. 552(b)(6)).

In determining whether disclosure of the home addresses to the incumbent unions would constitute a clearly unwarranted invasion of the personal privacy of the unit employees within the meaning of FOIA, the Court explained that a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect. *Id*. at 495. However, as the Court explained, there is only *one* "relevant 'public interest in disclosure' to be weighed in this balance": namely whether the information to be disclosed would contribute significantly to letting the public know what the

government is up to. *Id*. at 495, 497 (citation omitted). By definition, that purpose is not served by disclosure of information about private citizens that is in governmental files but that reveals little or nothing about an agency's own conduct. *Id*. at 496-97.

The Court found that disclosure of employee home addresses "would reveal little or nothing about the employing agencies or their activities," even though it would be useful for the union to have the information for bargaining purposes. *Id*. at 497. In short, because disclosure of the employees' home addresses would not serve "the only relevant [FOIA-related] public interest in disclosure" in that case, the "nontrivial" privacy interest employees have in their home addresses sufficed to outweigh the "negligible FOIA-related public interest in disclosure." *Id.* at 495, 501-02. Accordingly, the Court concluded FOIA did not require the agencies to divulge the addresses, and the Privacy Act therefore prohibited their release to the unions. *Id*. at 502.

However, the final rule's requirement that a private sector employer disclose voter list information directly to the nonemployer parties to a representation case does not run afoul of the Privacy Act, and the relevant public interests favoring disclosure of the voter list information are entirely different from the only "relevant" public interest favoring disclosure in *DOD v. FLRA*. As the Court explicitly recognized in *DOD v. FLRA*, "unlike private sector employees, federal employees enjoy the protection of the Privacy Act" with respect to their employer's disclosure of information about them.[177] *Id.* at 503. Put

[177] The Board notes that the United States Postal Service, as an employer, is uniquely subject to both the Privacy Act and the NLRA. But it has not been exempt from disclosing employee eligibility lists to petitioning unions under *Excelsior*, see *NLRB v. U.S. Postal Serv.*, 790 F. Supp. 31, 33 (D.D.C. 1992), and did not provide any comment in this proceeding, much less a suggestion that it would be exempt from the present amendments. We therefore trust that the Postal Service will, in the first instance, seek to

simply, *private* sector employers' disclosure of the voter list information to the nonemployer parties does not implicate the Privacy Act because the Privacy Act does not apply to such employers. See also DOJ Overview of the Privacy Act of 1974 at 5 (2012) (DOJ Overview), http://www.justice.gov/sites/default/files/*opcl/docs/ 1974privacyact-2012.pdf* ("The Privacy Act * * * applies only to a federal 'agency'.") Accordingly, unlike in *DOD v. FLRA*, the Privacy Act would not otherwise bar private sector employers from disclosing the voter list information to the nonemployer parties to representation cases unless disclosure were required by FOIA.

As also shown, the voter list amendments are designed to advance the public interests in free and fair elections as well as the prompt resolution of questions of representation—interests entirely different from the single relevant public interest FOIA is designed to advance. And the public interests in free and fair elections and in the prompt resolution of questions of representation are indeed advanced by requiring employers to disclose the voter list information to the nonemployer parties to representation cases once elections have been agreed to or have been directed. Thus, the public interests in favor of disclosure of the voter list information are not "negligible, at best" as was the case in *DOD v. FLRA*, 510 U.S. at 497.

In short, we conclude that nothing in *DOD v. FLRA* calls into question the propriety of the voter list amendments requiring employers to furnish information about its employees to the nonemployer parties after an election has been agreed to by the parties or directed by the regional director. To the contrary, the Court recognized there

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harmonize its duties under the two federal statutes.

that private sector unions covered by the NLRA occupy a different position from their federal sector counterparts. *Id* at 503. See also *id*. at 506 (Ginsburg J. concurring) (noting that private sector unions covered by the NLRA "routinely receive" employees' home addresses and citing *NLRB v. Wyman- Gordon* for the proposition that the Board *may* require an employer "to disclose [employees'] names and addresses before election[s].")

Similarly, *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876 (9th Cir. 2010), cited by SHRM among others, is, in relevant part, simply a routine FOIA Exemption 6 case, in which disclosure is not required if the information sought does not advance FOIA's interest in government transparency—the sole interest relevant to the court's analysis. That case involved FOIA requests for information relating to governmental discussions with telecommunication carriers about proposals to immunize the carriers for their role in government surveillance activities. *Id*. at 880-81, 885-89. To be sure, the court held that the email addresses of the carriers' lobbyists were exempt from disclosure under Exemption 6, but this was because disclosure of the lobbyists' email addresses—as opposed to the lobbyists' names—would reveal little or nothing about the government's conduct. *Id*. at 888-89. As the court explained, disclosure of the email addresses—as opposed to the names—would not shed light on who the government was meeting with in deciding whether to immunize telecommunication carriers for their role in the government surveillance activities. *Id.* at 888. Accordingly, it was only because the sole relevant public interest in favor of disclosure under FOIA would not be advanced by disclosure that the lobbyists' privacy

interest in their email addresses prevailed. *Id*. at 888-89.[178] As noted above, the balancing of privacy and public interests in this context is quite different from that under FOIA.

Nonetheless, given the comments claiming that the Board's proposals violate the Privacy Act,[179] the Board has carefully considered whether and how the Privacy Act could be implicated by the voter list amendments. The Board notes that the voter list amendments require the employer to furnish a copy of the voter list to the regional director. See amended §§ 102.62(d) and 102.67(l). But, as discussed in connection with § 102.67 below, the final rule does not anticipate—contrary to the original NPRM proposal—that the regional director will attempt to serve employees directly with the notice of election. Thus, the agency's use of the list will simply be the traditional one of allowing the Board agent conducting the election to verify individuals' identification as they arrive to vote at the polls. Morever, if the list is retrieved electronically, it will be by the employer's name or case number, and not individual voters' names.

The Privacy Act generally only applies to "records" that are maintained by an agency within a "system of records." See, e.g., *Baker v. Dep't of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987). A piece of information is only a "record" if it contains information about an individual. And it is generally only considered to be maintained in a "system of

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[178] It bears mentioning that, contrary to SHRM's suggestion that the court found that lobbyists have a "substantial privacy interest" in their email addresses, the court actually concluded that the lobbyists have only a "minor privacy interest" in the email addresses. See *id.* at 888 ("If, however, a particular email address is the *only* way to identify the carriers' agent at issue from the disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to.'" (citation omitted)).

[179] See Allen LeClaire; Robert Mills II.

records" if two conditions are met: (1) the record is maintained in a format that makes it possible for agency employees to locate it by searching according to a name or other personal identifier, and (2) agency employees actually do retrieve records in this manner. DOJ Overview of the Privacy Act of 1974 at 28 (2012) (DOJ Overview), *http://www.justice.gov/sites/default/files/opcl/docs/1974privacyact-2012.pdf*. "The highly technical 'system of records' definition is perhaps the single most important Privacy Act concept, because * * * it makes coverage under the [Privacy] Act dependent upon the method of *retrieval* of a record rather than its substantive content." DOJ Overview at 30. The OMB has provided the following illustration of this concept:

> For example, an agency record-keeping system on firms it regulates may contain "records" (i.e., personal information) about officers of the firm incident to evaluating the firm's performance. Even though these are clearly "records" ["]under the control of" an agency, they would not be considered part of a system as defined by the Act unless the agency accessed them by reference to a personal identifier (name, etc.). That is, if these hypothetical "records" are never retrieved except by reference to company identifier or some other nonpersonal indexing scheme (e.g., type of firm) they are not a part of a system of records.

OMB Privacy Act Guidelines, 40 FR 28948, 28952 (July 9, 1975).[180]

In short, records are only within a Privacy Act "system of records" if "an agency has an actual *practice* of retrieving information by an individual's name" or other

[180] Subsection (v) of the Privacy Act requires the Office of Management and Budget (OMB) to: (1) "develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing" the Act; and (2) "provide continuing assistance to and oversight of the implementation" of the Act by agencies. 5 U.S.C. 552a(v). Because "Congress explicitly tasked the OMB with promulgating guidelines for implementing the Privacy Act, [the courts] give the OMB Guidelines the deference usually accorded interpretation of a statute by the agency charged with its administration." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1120 (D.C. Cir. 2007) (internal quotation marks omitted).

personal identifier. *Henke v. Dep't of Commerce*, 83 F.3d 1453, 1459 (D.C. Cir. 1996). "[R]etrieval capability is not sufficient to create a system of records." *Id.* at 1460. And a "practice of retrieval by name or other personal identifier must be an *agency* practice to create a system of records and not a practice by those outside the agency," *McCready v. Nicholson*, 465 F.3d 1, 13 (D.C. Cir. 2006) (internal quotation marks omitted), such as the nonemployer parties to an election.

Applying these principles to the voter list amendments, the Board concludes that it will not retrieve information from voter lists by use of individuals' names or other personal identifiers (rather, it will only be retrieved electronically via the name of the employer or case number), and therefore, although the voter lists will generally be produced in an electronic format that will theoretically be searchable by employees' names, the voters lists are not part of a "system of records" within the meaning of the Privacy Act. Accordingly, nothing about the voter list amendments can reasonably be viewed as violating the Privacy Act.

Multiple comments urge a variety of means by which the Board should protect employees' privacy interests: (1) require that employees must affirmatively indicate that they are willing to have their personal contact information shared with the parties on the ballot before it requires the employer to disclose that information;[181] (2) allow employees the opportunity to opt out of such disclosures;[182] (3) mandate that contact information be

[181] See, e.g., ACE; CNLP; Senator Alexander and Republican Senators II; National Grocer's Association (NGA) II.

[182] See, e.g., Baker & McKenzie LLP; COSE; Anchor Planning Group; SHRM II.

obtained directly from employees themselves instead of from the employer;[183] or (4) require that the Board host opportunities for electronic contact between petitioners and employees through some type of protected communications portal.[184] We have consistently rejected similar proposals in the past. In *Excelsior*, the Board was not swayed by the "argu[ment] that if employees wished an organizing union to have their names and addresses they would present the union with that information." 156 NLRB at 1244. And in *British Auto Parts, Inc.*, we rejected an employer's attempt to comply with *Excelsior* by informing its employees that the Board had requested their names and addresses and providing them with "an envelope addressed to the Regional Director for * * * employee[s'] use in submitting the information should [they] desire to do so." 160 NLRB 239, 239 (1966). The Board has recognized that even unsolicited contact by the union remains an important part of the basic Section 9 process. See *Excelsior*, 156 NLRB at 1244. Indeed, a wide open debate cannot take place unless employees are able to hear all parties' views concerning an organizing campaign—even views to which they may not be predisposed at the campaign's inception. And as explained above, we have concluded that disclosure of available personal email addresses and telephone numbers is just as critical to the holding of fair and free elections and to the expeditious resolution of questions of representation in 2014 as was disclosure of home addresses in the 1960s. Thus, it would hardly be consistent with the policy underlying *Excelsior*—ensuring that employees receive sufficient information from the nonemployer party to make an

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[183] See, e.g., Gregg Stackler; Harold Kapaun; Kimberley McKaig; Greg Smith II.

[184] See, e.g., MEMA II; Vigilant II; IFA II.

educated decision—to begin allowing employees to opt in or opt out of such disclosures.

Nevertheless, the Board is mindful that the disclosures in the final rule go further than those at issue in the original *Excelsior* decision, and so we have considered whether a different balance should be struck. After thoroughly considering the issue, however, we have concluded that notwithstanding the additional information to be disclosed under the amendments, the public interests in fair and free elections and in the prompt resolution of questions of representation outweigh employee privacy interests and that creation of an opt-in or opt-out procedure, or an agency-hosted protected communications portal, would harm those public interests and, in some cases, impose significant administrative burdens on the government and the parties.

Just as was the case under the prior rules, the voter list information is not due until soon after the parties have entered into an election agreement in a unit appropriate for collective bargaining, or the regional director has directed that an election be held in an appropriate unit. In either event, congressional policy is clear that representation elections should be conducted with the utmost expedition.[185] Yet, typical opt-in or opt-out

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[185] As the Supreme Court held in *NLRB v. A.J. Tower*, the Board must "promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." 329 U.S. 324, 331 (1946). Again, Congress knew that the Board would need flexibility in crafting procedures, and noted "the exceptional need for expedition" in representation cases when exempting them from the APA's adjudication provisions. Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)); see also *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d. Cir. 1966) (Congress insulated representation cases from direct review because "[t]ime is a critical element in election cases"). Long before the NPRM, Section 11302.1 of the Agency's Casehandling Manual reflected this congressional directive of timely elections, stating that "[a]n election should be held as early as is practical." Similarly, § 102.67(b) of the final rule provides that "[t]he regional director shall schedule the election for the earliest day practicable consistent with these rules."

requirements would further delay the election's conduct. Such delay would arise, for example, if extra time were allotted between an election's direction and its conduct for communication with the subject employees concerning their ability to opt in or out of disclosing their email addresses or phone numbers because until the parties agree to any election, or the director directs an election, the unit in which the election is to be conducted is not known. Accordingly, not every relevant employee could be contacted regarding opting in or out until after the election agreement was reached or the director directed an election. Employees would then need some additional reasonable period of time to make their choices.[186] Still more time would be required for compiling those preferences and producing a voter list (which respects those preferences) for use by the nonemployer parties to the case. And of course, the nonemployer parties would have to be afforded time to make use of the information with respect to the employees who have opted in. Such a system could well prove to be administratively difficult,[187] and even if operating smoothly could delay the election by many days or weeks.

Moreover, if the regional director were assigned the responsibility to contact the employees to ascertain whether they wished their contact information to be shared with the union, the regional director could not do so unless and until the employer revealed the employees' contact information to the regional director. Yet, presumably at least some of

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[186] Marvin Kumley suggests that employees be given at least 30 days to opt in, and further suggests that opt-in notices be posted in the Federal Register and local newspapers as a matter of course.

[187] The *Excelsior* Board rejected a similar suggestion that employee names and addresses be provided to a third party mailing service for distribution of union campaign literature due, in part, to the "difficult practical problems" that would be created by such an arrangement. 156 NLRB at 1246.

the employees who object to having their contact information disclosed to the nonemployer parties to the case would similarly object to having their contact information disclosed to the government. And requiring the regional director to contact each and every unit employee to ascertain his or her position regarding disclosure of the voter list information would place a significant administrative burden on the government.

We are also concerned that any opt-in or opt-out process would invite new areas of litigation resulting in additional costs to the parties and the Board. Considering that neither the region, nor the petitioner would be in a position to administer the opt-in or opt-out process until after the employer had disclosed employee contact information, it could be argued that it would be more efficient for the employer to administer the opt-in or opt-out process. It would be curious indeed for the Board to create a process which obligated employers to ask their employees—including those employees who have deliberately chosen to keep their pro or anti-union sentiments private—whether they wish to share their contact information with the union, given that employers could be found to have committed unfair labor practices by interrogating such employees about their union sentiments or contacts with the union.[188]

In the likely circumstance in which nonemployer parties, when receiving a voter list indicating that substantial numbers of employees had chosen not to have their email addresses or phone numbers disclosed, raise accusations of improper employer coercion of their employees regarding their choice, investigations would be triggered. Such

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[188] Indeed, multiple parties at the public hearing on April 11, 2014, acknowledged this very problem when discussing employer's potentially administering an opt-in or opt-out process. See, e.g., Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

proceedings would impose costs on the parties and the government, and could cause significant delay in conducting the election. Even in a process in which the employee choices were shielded from employer knowledge,[189] however, we would still foresee frequent accusations of and opportunities for subtle employer pressure to keep contact information from the petitioning union as a fertile area for representation case disputes, requiring the expenditure of additional regional resources to investigate and for the parties to litigate, all with the result of pushing resolution of representation cases further and further into the future.[190]

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[189] For example, once all parties have agreed to an election or the regional director has directed an election, the employer could be required to post information including the union's (or decertification petitioner's) email address and phone number to allow employees to directly contact the union (or decertification petitioner) if they desired to share their personal email addresses or phone numbers in order to receive communications from the nonemployer party concerning the upcoming election, without informing the employer of their choice. But, as shown, such a process would require delaying the election to provide sufficient time for employees to opt in and to allow the nonemployer parties to make use of the information with respect to those employees who have opted in.

The Chamber's II similar suggestion of allowing petitioning unions to create a website for employees to visit and then sharing site information with employees via U.S. mail after employers shared a traditional voter list of names and home addresses with the petitioner would involve still more delay, and would, of course, reduce the likelihood of employees receiving campaign communication from the petitioning union. Furthermore, the Chamber's proposal presumes not only internet access for all employees, but also a level of technological sophistication (i.e. the ability to create and monitor interactive web sites) that we think is unrealistic for many petitioners—particularly low wage workers and small union locals or individual employees seeking to oust an incumbent union.

[190] We see similar problems with designing a system in which the nonemployer parties would, by default, receive only employees' names and addresses as under the current *Excelsior* policy, subject to a showing that email addresses and/or phone numbers are necessary in a particular case for effective and timely communication with the employees. If such a showing were required after the nonemployer parties had already attempted communication via home addresses, then it would necessarily add a substantial amount of time to the election process. In the alternative, if the showing were required

Moreover, even if employees were questioned whether they wished to share their contact information with the petitioning union in a noncoercive manner and even if such an opt-in or opt-out procedure did not result in additional litigation, we believe that one could conclude that such a process would require the invasion of employee privacy in the name of protecting employee privacy. Thus, the opt-in or opt-out procedure could not be administered in a blind fashion like a secret ballot election in which no one is forced to vote. Rather, each employee would have to be asked whether he or she wished to share his or her contact information with the nonemployer parties, and the questioning would necessarily result in a list indicating which employees had authorized their additional contact information to be shared with the nonemployer parties. In our view, at least some employees would believe that their answering the question would reveal their sentiments about whether they wished to be represented for purposes of collective bargaining by the union. Accordingly, employees could conclude that the process would expose their private beliefs to both the party asking the question and to the nonemployer parties who ultimately receive the voter list.[191]

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preemptively as part of the petition itself, we would be introducing yet another area for litigation that would have to be decided before an election could be directed; likely adding time to the pre-election process, and increasing the chance of post-election appeals by the losing party, which would serve to lengthen the post-election process.

[191] We do note that it would be possible to require all employees to designate a single means by which to be contacted—telephone number, email address, or home address. This approach would be less likely to reveal employees' views on the question of union representation. Delays would result, however, as employers collected employees' designations after the regional director directed an election or the parties entered into an election agreement. Such delays could only be avoided by imposing a duty upon all employers under the Board's jurisdiction to record such employee choices at the time of hire. But nothing in the final rule creates such a widespread burden on small employers nationwide to collect and retain information no matter how remote the possibility may be

The Board has also considered whether the rules might mandate that unions provide an opt-out feature, such as an "unsubscribe" option in bulk emails. But this union-administered approach would do nothing to allay privacy concerns having to do with the disclosure of contact information in the first place. It would also be of limited utility, given the short period during which contacts are most likely to occur and given that it would be necessary to allow a certain amount of time for the nonemployer party to update its records. Furthermore, as discussed below, if they are applicable, the CAN-SPAM Act and Do-Not-Call Rule may already impose similar requirements in any event. Indeed, some union comments stressed that it was already their organizers' practice to cease contacting employees when so requested,[192] and that unsubscribe features are included in bulk email messages and texts as a matter of course.[193] For all these reasons, the Board's attempting to craft a universally applicable opt-out requirement unique to

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that such employers will someday be involved in an NLRB representation case, and we are reticent to impose such a burden in this context.

In any event, such an approach would defeat the very purposes identified in *Excelsior*, by reducing the chance that voters would be presented with a nonemployer party's information concerning representation and the likelihood that the nonemployer parties could investigate the eligibility of the unknown employees on the employer's list prior to the election.

[192] See UFCW II.

[193] See Testimony of Katy Dunn on behalf of SEIU II. Also, according to the testimony of Jess Kutch, any union (or third party provider) in the business of sending bulk emails already includes such unsubscribe options in its bulk emails in order to avoid being labeled as spammers with attendant downgrading to their IP server reputation scores. This testimony also demonstrates that effectively administering a mandatory "opt-out" requirement would, as a practical matter, likely be beyond the NLRB's capacity, as it might unintentionally come into conflict with the requirements of bulk-emailers already imposed by the market's continuously adapting responses to "spam." Meanwhile, an opt-out mandate would also likely prove inadministrable as applied to individual employees and small independent organizations.

Board elections would have highly uncertain benefits at a cost of generating new election disputes and possible conflicts with other federal regulation of the same subject matter. On balance, the existing self help remedy available to anyone who objects to unwanted communications—ignoring calls or letters and deleting emails—seems for the time being to be a more cost-effective option. Of course, should unwanted contacts rise to the level of harassment or coercion, the Board has the remedial authority to craft appropriate remedies, as discussed below in connection with the proposed restriction on use of the voter list.

Agency-hosted communications portals—raised in the NPRM (see 79 FR 7328)—were endorsed by a few comments as an alternative that could possibly avoid some of the problems inherent in the opt-in or opt-out processes discussed above.[194] Yet, we harbor serious doubts about whether such a portal would be feasible for the agency to construct or administer, and the comments did nothing to ease our concerns. To the contrary, the comments analyzing the concept in more depth raised several issues that lead us to believe that the concept is seriously flawed. For example, comments observed that communication between a petitioner and employees becomes less likely, the more steps (or "clicks" in internet parlance) that an individual must take to enable the communication.[195] The Board found the testimony of Jess Kutch particularly persuasive on this point, especially as she explained how the potential problems associated with individuals needing to take multiple steps to access or log-in to the agency portal would

[194] See, e.g., IFA II; Louis Toth II.

[195] See SEIU II; AFL-CIO II.

be exacerbated if those individuals—as can reasonably be expected—would be attempting to access the portal through the comparatively small screens on their cell phones. See Testimony of Jess Kutch on behalf of Coworker.org II. Moreover, Ms. Kutch (relying on her background in online organizing and bulk email delivery) persuaded the Board that designing a system whose success depended on the agency's navigation of spam filters to ensure high rates of email deliverability to the individuals at issue would likely be beyond the agency's technological capacity (or our forseeable budgetary restrictions). *Id.* In addition, the Board finds troubling the suggestions that an agency-sponsored communications portal could destroy legal privileges that might otherwise attach to communications between union attorneys and organizing employees (AFL-CIO II), and that the alternative of providing petitioners with masked emails to use in communicating directly with employees could have the unintended consequence of preventing unions from allowing employees to unsubscribe from bulk messages (SEIU II). In sum, we doubt that we have the resources to effectively implement a protected communications portal, and even if we did, the potential for unintended consequences associated with that proposal counsel against its pursuit.

Perhaps the most fundamental flaws with the agency-sponsored communications portal, however, are ones that are shared by any paradigm in which the agency would allow employees to opt-in, opt-out, or to pick one mode of communication to be utilized by employees with a nonemployer party. Namely, each of these options would carry the potential to leave nonemployer parties in a worse position to effectively communicate with employees than they are under the current *Excelsior* regime. Instituting an opt-in, opt-out, or a portal system that would apply only to communications between employees

and nonemployer parties, would deny employees information from the nonemployer party, a problem the *Excelsior* doctrine seeks to mitigate. Moreover, we are concerned that agency communication with employees concerning each of these alternatives carries an inappropriate implication that those employees have something to fear from nonemployer parties possessing their contact information—contact information that is, at least in some instances, already in the possession of their employers or an incumbent union representative.[196] Each of these alternatives also inappropriately implies that the nonemployer party's message is not important—i.e. that paying attention to it is optional to becoming fully informed about the election. This would amount to the Board putting a virtual thumb on the scales in influencing employees' exercise of their rights to decide for themselves whether to seek (or maintain) union representation, and would run directly counter to a core animating purpose of the *Excelsior* doctrine. The Board notes that some comments take the opposite view: that by sponsoring avenues of communication between employees and a petitioning union—via protected portals or opt-out processes—the Board would improperly suggest that it was not neutral, but pro-unionization. This possible interpretation is yet another reason not to pursue these alternative proposals.[197]

In sum, even if we were to judge that a fair election required only that employees be given the option of enabling or disabling email or phone communication channels with the nonemployer parties, we are skeptical that such a system could be put in place

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[196] See, e.g., NUHW II.

[197] See Testimony of Kara Maciel on behalf of the NGA II; see also Testimony of Melinda Hensel on behalf of IUOE, Local 150 II (agreeing with the NGA's concerns as to the agency-sponsored communications portal).

without significant negative ramifications for the representation case process. In a rulemaking designed to eliminate unnecessary barriers to the fair and expeditious resolution of questions concerning representation, we are loath to create new barriers in place of the old.[198] Instead, we have concluded that employees' legitimate interest in the confidentiality of their personal email addresses and phone numbers is outweighed by the substantial public interest in disclosure where, as here, disclosure is a key factor in insuring a fair and free election and an expeditious resolution of the question of representation.

In reaching this conclusion, we wish to emphasize that we are mindful of the

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[198] We also reject—as inconsistent with the concerns animating *Excelsior*—suggestions that: all individualized contact between unions and employees be eliminated (Dante Fauci II); unions should only be allowed to pass out flyers from parking lots on agreed-upon dates (Charles Lingo II); and unions should only have a right to view, but not copy, a list of employee names and addresses once within 30 days of an election (Testimony of J. Aloysius Hogan on behalf of the Competitive Enterprise Institute II). Similarly, the Board declines Brian Richardson's suggestion that an employer should mail union information to employees if the union bears the costs. At the very least, such a two-step procedure would invite delay, and clearly would not serve the key purpose of the *Excelsior* list: ensuring that the nonemployer parties have access to the electorate. As the *Excelsior* Board noted in rejecting a similar argument, the union should not be limited to the use of the mails in its efforts to communicate with the entire electorate. 156 NLRB at 1246. It would also invite litigation if employees did not timely receive the union's correspondence. The Board also notes that employers have never had a right to see other parties' campaign propaganda, let alone to see it before the unit employees view it. Nor are we persuaded by comments that the concerns underlying *Excelsior*, or any other relevant concern, would be advanced by providing union officials' or union activists' personal contact information to employers. (See Richard Oakes II and Anonymous Anonymous II). Non-employee union organizers or officials do not cast ballots in representation case proceedings, and so there is no parallel reason that employers should be empowered to communicate with them outside of the official channels listed in the petition. To the extent that union activists are employees, employers already enjoy all of the mandatory means to communicate with them discussed above, and need not be specifically provided with any personal contact information that the employer does not otherwise possess.

privacy interests employees have in the information in question. But we reiterate that the Board must balance that privacy interest against the interests served by disclosure. As explained above, the comments do not persuade us that the balance struck in *Excelsior* and approved by the Supreme Court in *Wyman-Gordon* should be struck differently because of the additional information to be disclosed under the voter list amendments.

AHA II, ACE and others complain that the rule may conflict with employer confidentiality policies and that the Board should therefore reject the voter list proposals. But the potential for such conflicts already exists under the current *Excelsior* requirement, and the comments do not cite a single case in which an employer's confidentiality policy has been permitted to stand in the way of *Excelsior* disclosures. Indeed, one of the courts called on to review the original *Excelsior* requirement flatly rejected an employer's claim that it did not have to make the disclosures because it had promised its employees that any contact information would be kept confidential. See *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368, 373-74 (C.D. Cal. 1967), aff'd, 405 F.2d 1182 (9th Cir. 1967). In a similar context, where employers have refused to disclose requested information to an incumbent collective-bargaining representative, the Board and the courts have repeatedly held that simply invoking a confidentiality policy will not allow an employer to avoid disclosure.[199]

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[199] See, e.g., *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 131 (2d Cir. 1986) ("Simply asserting that the results should remain confidential because the employees were promised confidentiality does not discharge the employer's burden"); *Holiday Inn on the Bay*, 317 NLRB 479, 482 (1995) (standing by itself, an employer's desire to shield employee information from disclosure on the basis of a confidentiality policy "cannot suffice to preclude disclosure which promotes statutory policies"); *New Jersey Bell Telephone Co.*, 289 NLRB 318, 319-320 (1988) (noting that *Detroit-Edison* provides no support for employer claim that it should be able to deny requests for relevant

We recognize that some employers strive to preserve the confidentiality of private employee information.[200] But we also note that pledges of confidentiality may provide for exceptions such as when, as here, disclosure would be legally required. See, e.g., *Howard University*, 290 NLRB 1006, 1007 (1988). Employers will be able to point to the Board's published rules should such disclosure be questioned by an employee. Ultimately, we conclude that the substantial public interests in fair and free elections and in the expeditious resolution of questions of representation outweigh whatever legitimate interest an employer may have in keeping confidential his employees' personal email addresses, home and personal cell phone numbers, work locations, shifts and job classifications. See *Excelsior*, 156 NLRB at 1243 (similarly concluding that an employer's interest in keeping employees' names and addresses confidential was outweighed by the public interest in disclosure).

Some comments attacking the proposals also indicate persistent privacy concerns about the original *Excelsior* policy. For example, GAM asserts that employers already experience significantly distressed employees because their home addresses are currently being disclosed to petitioners without their consent under *Excelsior*. Although some comments predict that disclosure of phone numbers and email addresses will exacerbate this perceived problem,[201] as noted above, the Board takes the opposite view. Indeed, the Board agrees with the views expressed in many comments that contact via phone and

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information simply because its privacy plan requires employee consent for such disclosures), *enforced mem.*, 872 F.2d 413 (3d Cir. 1989).

[200] We note that the comments do not persuade us that employers routinely pledge to their employees that they will keep confidential such information.

[201] See, e.g., Sheppard Mullin II; Bruce E. Buchanan; ALG; U.S. Poultry II.

email is less invasive than face to face visits with employees at their homes. The Board anticipates that unions, as predicted by Melinda Hensel,[202] in an effort to conserve finite organizing resources, will in some cases make use of phone and email contact information in lieu of visiting employees at home.[203] It follows that to the extent that invasion of privacy concerns persist about the original *Excelsior* policy of home address disclosure, those concerns could be ameliorated by the final rule's provision for the disclosure of personal email addresses and home and personal cell phone numbers.

To the extent that comments focus on the annoyance of unwanted calls or emails,[204] the Board sympathizes with employees who simply wish to reduce the volume of such communications they receive. Even so, however, the Board is not persuaded that the potential for such irritations—which may be dealt with by simply refusing the call, hanging up, scrolling over, or hitting the delete key—should trump the public interest in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation. Indeed, the Board agrees with the Fourth Circuit's statement regarding the original *Excelsior* requirement, that "the mere possibility that employees will be inconvenienced by *telephone calls* or visits to their homes is far outweighed by the public interest in an informed electorate." *NLRB v. J. P. Stevens & Co.*, 409 F.2d at

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[202] See Testimony of Melinda Hensel on behalf of IUOE Local 150 II.

[203] The Board therefore is skeptical of RILA's fear that the expanded disclosure requirements will trample the privacy of nonemployees. Indeed, the ability of organizers to reach employees by personal cell phone or email suggests that organizers will be less likely to interact with non-employees (such as family members of employees) for any length of time. The Board also sees no reason to fear that any serious problems will be created by the potential that employees' children could view union messages when sent to an email address shared by the family. See Testimony of Maciel II.

[204] See, e.g., CBFC; ALG; SSINA.

1209 (emphasis added). We believe that the advent of caller identification services on many home phones and virtually all cell phones will allow employees to avoid unwanted calls with relative ease, and the typical display of an email's sender and subject should similarly allow employees to disregard organizing messages should they so choose. As explained by Jess Kutch at the Board's April 11, 2014, public hearing, the policies and professional interests of mass emailers utilized by most organizing unions will ensure that employees have an option to unsubscribe from most mass campaign email lists should they so choose, and employees will also enjoy the option of blocking emails from individual senders with whom they no longer desire to communicate. See Testimony of Kutch II. Moreover, we note that as AFL-CIO Organizing Director Elizabeth Bunn explained in her public hearing testimony, organizing unions typically "find that workers actually prefer to talk to union supporters and their union representatives off work because it's in an environment where the fear at least is taken out of the communication. So we've not experienced that anger and irateness that was discussed yesterday [by employer representatives]." In short, the Board does not view the potential for annoyance as a sufficient counterweight against an informed electorate and the expeditious resolution of questions of representation to justify keeping the voter list information disclosures as minimal and outdated as they are today.

Additionally, as SEIU (reply) points out, labor law already tolerates encroachment on an employee's time during representation campaigns as employers face no legal impediment to using contact information in their possession (which is to be disclosed on the voter list). Employers may place calls and text messages to the employees' home and personal cell phones and send email messages to their employees' personal email

addresses. In short, whether or not employees' phone numbers and email addresses are disclosed to petitioners, there is no guarantee that employees will not receive campaign-related messages on their personal phones and personal email accounts, because their employer may have this information and use it to send campaign information.

Implicitly, however, privacy claims in the comments assume that employees should be able to prevent campaign messages from reaching their personal email and phone. If this perspective were accepted in toto, it would suggest that the Board should also be restricting employer use of personal contact information, in addition to excluding it from the voter list given to nonemployers. Yet, we are not persuaded that the current rulemaking should be used to restrict such currently-lawful campaign speech by employers under the cause of employee privacy.[205] In this regard, the Board also rejects the suggestion by the Chamber II that home visits should be either eliminated or restricted to one visit. As discussed above, no patterns of abuse have emerged since *Excelsior* to support such a restriction on nonemployers' ability to use home visits to communicate about representation issues if they so choose. Moreover, employees can reject attempts at home visits by, for example, not answering the door, closing the door, asking visitors to leave, and through enforcement of state and local trespass laws.

The Board also disagrees with the view expressed by Pinnacle Health System of

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[205] To be sure, there was some agreement amongst speakers at the Board's April 11, 2014 public hearing that it would be inappropriate to apply the same restrictions to employer communications with their employees on the subject of unionization, as those same speakers advocated should be applied to communications to employees coming from petitioning unions. See, e.g, Testimony of Kara Maciel on behalf of NGA II; Testimony of Joseph Torres on behalf of Winston & Strawn II; Testimony of Fred Wszolek on behalf of Workforce Fairness Institute II.

Harrisburg, Pennsylvania (Pinnacle) that the voter list disclosures are "particularly problematic considering that the list may contain the information of individuals who are managers and supervisors and whose status will not be determined until after the election by way of post-election challenge."[206] As more thoroughly explained in connection with § 102.66 below, this alleged problem existed prior to the NPRM. Thus, prior to the NPRM, supervisory and managerial status determinations could be deferred until after the election. In those cases, regional directors instructed employers to include the disputed individuals on the *Excelsior* list with the understanding that they would vote subject to challenge. And, in any event, the Board does not presume that an alleged supervisor's or manager's contact information being inadvertently disclosed will lead to any greater dangers than the disclosure of contact information for other coworkers.

The Board also does not share the fears expressed by some commenters that disclosure of cell phone numbers will lead employees to suffer significant unwelcome costs from phone calls and texts that exceed their data plans.[207] As an initial matter, the Board does not believe that a union is likely to act counter to its own organizing self-interests by placing so many calls or sending so many texts as to financially harm those potential voters who lack unlimited calling and text plans. Given that their use will be restricted to the representation proceeding at issue, Board proceedings arising from it, and related matters, the risk that unions' receipt of cell phone numbers will cause financial harm to employees is further lessened. In addition, the Federal Communications

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[206] AHCA shares this concern.

[207] See, e.g., CDW; Buchanan; NRF; Indiana Chamber; Doug Muyres II.

Commission has addressed the cell phone "bill shock" issue alluded to by CDW, and in 2011 touted its far-reaching agreement with the wireless industry to address the problem. See "CTIA, Consumers Union and the FCC to Announce New Industry Guidelines" (Oct. 17, 2011), *http://www.fcc.gov/events/ctia-consumers-union-and-fcc-announce-new-industry-guidelines*. By 2013, the FCC announced that approximately 97 percent of wireless customers across the nation were protected from bill shock as participating U.S. wireless companies met a deadline to provide free, automatic alerts to customers who approach or exceed their wireless plan limits. See "FCC Marks Milestone in Effort to Eliminate 'Bill Shock'." (April 18, 2013), *http://www.fcc.gov/tools/headlines-archive/2013*. The Board trusts that any lingering bill shock concerns—relevant to a great percentage of Americans beyond those who may participate in an NLRB election—will continue to be addressed by the FCC, and need not cause the Board to abandon disclosure of cell phone numbers. Of course, should bill shock nonetheless prove to be a serious problem in the representation case context, the Board has clear authority to create appropriate remedies through adjudication.

e. Purported Conflict with Precedent and Other Laws

The National Ready Mix Concrete Association (NRMCA) and others assert that disclosure of personal email would be inconsistent with the Board's stated concerns about email in *Trustees of Columbia University*, 350 NLRB 574, 576 (2007).[208] We disagree. The Board in that case posed a number of questions "regarding the potential ramifications * * * of requiring employers to furnish * * * employees' *workplace* email addresses." *Id.*

[208] See, e.g., National Mining Association; ACE; Sheppard Mullin.

at 576 (emphasis added). We noted, for instance, that union mailings to work email addresses could impose costs on employers and raise unlawful surveillance concerns. *Id.* As explained above, however, the final rule does not require the employer to disclose the work email addresses to the nonemployer parties, and therefore it is unnecessary for us to answer questions concerning work email in this rule. And, as we expressed in the NPRM, the Board's limited holding in *Trustees of Columbia University* was only that, "given the Employer's undisputed compliance with its *Excelsior* obligations as they stood as of the date of the Union's request, we are unwilling, on the facts of this case, to characterize that compliance as objectionable conduct." *Id*. In short, we see nothing in that case that precludes us from requiring the provision of personal email addresses as part of the voter list, to the extent that an employer keeps records of employees' personal email addresses.

Several comments also raise the specter of conflicts with circuit court precedent and state privacy law if the Board were to require disclosure of employee contact information. The Board is not persuaded by these comments. Regarding circuit court precedent, ACE for example cites *JHP & Associates, LLC v. NLRB*, 360 F.3d 904, 911-912 (8th Cir. 2004), and NRMCA II cites *Chicago Tribune Co. v. NLRB*, 79 F.3d 604, 608 (7th Cir. 1996) as possibly at odds with the rule. But those cases are inapposite. The courts found that harassment was a concern in each of those cases because the respective unions sought the home addresses of the individuals hired to replace the employees who had struck in support of the very union seeking the information. See *JHP& Associates*, 360 F.3d at 908, 911-12, and *Chicago Tribune*, 79 F.3d at 606-08.[209] The disclosures

[209] NRMCA II also cites *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993) as possibly at odds with the NPRM, but the court's opinion did not

mandated by the final rule therefore do not implicate the concerns articulated by the circuit courts in these cases.[210]

Regarding state privacy law, NRMCA for example, cites a case discussing the New Jersey state constitution while Sheppard Mullin II points to several cases explaining the California state constitution. The case NRMCA cites, however, is concerned with privacy expectations under the unreasonable search and seizure provision of the New Jersey state constitution, *State v. Reid*, 945 A.2d 26, 31-32 (N.J. 2008), an entirely different privacy interest than any implicated by the final rule. Similarly, the cases involving the California constitution are not in obvious conflict with the final rule, as they involve different types of disclosures and acknowledge that the right to privacy in personal information under the California constitution is not absolute.[211] Indeed, a prior

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address the question whether an employer should be obligated to disclose employee contact information in any setting, let alone whether an employer should be obligated to provide employee contact information to the union which had petitioned for an election so that it could be certified as their collective-bargaining representative.

[210] See also *Tenneco, Inc.*, 357 NLRB No. 84 (Aug. 26, 2011), *enforced in relevant part*, *denied in part*, 716 F.3d 640 (D.C. Cir. 2013), where the Board found that the employer's withholding of the replacements' home addresses breached its bargaining duty, because the union represented the replacements after strike's end and there was no "clear and present danger" of the union misusing the information; the Board also addressed the "totality of the circumstances" standard used by some circuits.

[211] See *White v. Davis*, 13 Cal. 3d 757, 760, 775-776 (1975) (holding police posing as students to record classroom activities at university solely for information-gathering purposes violated California constitution); *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554, 556-559, 561-562 (Cal. Ct. App. 2007) (holding that plaintiff's request for names, addresses, and phone numbers of defendant's employees did not violate California constitution where plaintiff was trying to identify potential class members in class action and employees were able to opt out of disclosure); *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 352-353, 357, 369 (Cal. Ct. App. 2000) (holding state interest in broad discovery outweighed by nonparties' interest in privacy where plaintiff sought names, addresses, and phone numbers of

Board, with judicial approval, rejected as "frivolous" an employer's contention that it would violate an employee's California constitutional right to privacy by furnishing an employee's address to a labor organization which represents the employee. See *A-Plus Roofing, Inc.*, 295 NLRB 967, 974 (1989), *enf'd. mem.*, 39 F.3d 1410 (9th Cir. July 12, 1990). Moreover, Sheppard Mullin fails to cite the most recent and on point case of *County of Los Angeles v. Los Angeles County Employee Relations Commission*, in which the California Supreme Court clarified that an incumbent public sector union's significant interest in communicating with non-members outweighed employees' privacy interests in their home contact information under California's state constitution. 56 Cal.4th 905, 911-12 (2013). More generally, the Board observes that state privacy and confidentiality laws may have exceptions allowing for disclosures where authorized by statute or regulation, in which case there would be no conflict between such laws and the voter list disclosures.[212] See, e.g., *Valley Programs, Inc.*, 300 NLRB 423, 423 fn. 2 (1990); *Kaleida Health, Inc.*, 356 NLRB No. 171, slip op. at 6-7 (2011). Finally, to the extent that the disclosures conflict with any state privacy laws, the state laws may be preempted. See

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nonparty supporters of Planned Parenthood without demonstrating need for such information). Sheppard Mullin also cites *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 527 (2011), a case dealing with a statute prohibiting businesses from requesting that cardholders provide personal identification information during credit card transactions and then recording that information. The final rule clearly does not implicate the statute or interests at issue in that case.

[212] IFA II and Senator Alexander and Republican Senators II highlight such language in a recently passed privacy statute in Virginia, noting that Virginia employers are prohibited from disclosing employees' personal identifying information to third parties "unless required by federal or state law." While both comments suggest that the voter list proposal puts the Board's regulations at odds with the general trend of protecting employee privacy rights, neither argues that the Virginia statute's language would trump the Board's regulations.

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); *Mann Theatres Corp. of California*, 234 NLRB 842, 842-843 (1978) (noting, in context of employer refusal to provide union with employee wage information, that if state public policy in fact required nondisclosure of employee wage information, it would be preempted under *Garmon*).

Some comments also claim that the Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act") evidences a federal privacy concern regarding email addresses and that the Board's voter list proposals run afoul of that federal statute.[213] Among other things, the CAN-SPAM Act makes it unlawful for any person to transmit a commercial electronic mail message that "contains, or is accompanied by, header information that is materially false or materially misleading" (15 U.S.C. 7704(a)(1)) and for a person to transmit a commercial electronic mail message that does not contain an opt-out procedure. 15 U.S.C. 7704(a)(3)(A).[214] The statute further provides that if a recipient requests that the sender not send it any more commercial electronic mail messages, then it is unlawful for the sender to send it another commercial electronic mail message more than 10 business days after receipt of such a request. 15 U.S.C. 7704(a)(4)(A)(i). Con-way, Inc. argues that email messages transmitted by a union would be subject to, and potentially in violation of, the CAN-SPAM Act because the "primary purpose" of union messages would be "the commercial

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[213]See, e.g., Con-way; NRTW; Sheppard Mullin; RILA.

[214] As the statute indicates, "The term 'commercial electronic mail message' means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service[.]" 15 U.S.C. 7702(2)(A).

advertisement or promotion of a commercial product or service." 15 U.S.C. 7702(2)(A). Katy Dunn (Testimony on behalf of SEIU II) disputes that unions are bound by the commercial provisions in CAN-SPAM but nevertheless explains, along with SEIU II, that many unions voluntarily comply.

We need not offer an opinion as to whether the CAN-SPAM Act would apply to a nonemployer party's use of email to investigate voter eligibility issues or to solicit a vote in an upcoming Board election. Simply put, if the CAN-SPAM Act does apply to a nonemployer party's use of email in an organizing campaign, nonemployer parties will have to conform their conduct to the statutory requirements, such as providing header information that is neither "materially false [n]or materially misleading," providing opt out procedures, and honoring opt out requests no more than 10 days after the request is made.

Similarly, PCA and others argue that because union solicitations are subject to the Federal Trade Commission's Do-Not-Call Rule, 16 CFR Part 310, a union could not contact individual employees by phone before those employees authorized the union to do so.[215] The regulations were adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108. (See 16 CFR 310.1) in which Congress charged the FTC with prescribing rules prohibiting deceptive and other abusive

[215] In contrast, NGA II notes that it is unclear whether union calls to employees would fall under the FTC's definition of solicitation for purposes of the Do Not Call Registry. Meanwhile, SEIU II cites the Telephone Consumer Protection Act, 47 U.S.C. 227, as another comprehensive scheme governing calls and texts by autodialers, which among other things, requires an opt-out. In SEIU's view, this statute provides an existing regulatory gloss to any voter list proposals adopted by the Board, making unnecessary any additional restrictions by the Board. We do not agree that the statute renders the proposed restriction unnecessary as detailed in our discussion of the restriction below.

telemarketing acts or practices. 15 U.S.C. 6102. It further charged the FTC with including in its rules requirements that telemarketers not undertake a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of such consumer's privacy and restrictions on the hours when unsolicited telephone calls can be made to consumers. 15 U.S.C. 6102(a)(3)(A),(B).

Again, however, we decline to address the extent to which the FTC's Do-Not-Call regulations may or may not cover nonemployer party solicitations or use of the phones to investigate eligibility issues. Even if these regulations are applicable, the result will be that a nonemployer party will be obligated to comply with Do-Not-Call as it might relate to potential members of the petitioned-for (or existing) bargaining unit. Thus, for example, a nonemployer party would have to refrain from making calls outside certain hours, and making calls to a person when the person previously has stated that he or she does not wish to receive a call from the party or when the person's telephone number is on the do-not-call registry.

In sum, in response to all the comments challenging the propriety of the proposals relating to the disclosure of eligible voters' contact information, the Board emphasizes that nonemployer parties will not have free rein to utilize email addresses and phone numbers in a manner that violates other federal laws that are found to cover such nonemployer party conduct. Rather, to the extent that any such laws are found applicable to the nonemployer parties' use of the contact information, those parties would be required to conform their conduct to the governing legal standards.[216] In much the same

[216] Similarly, to the extent state laws, such as the Washington Commercial Electronic Mail Act, Wash. Rev. Code. 19.190 et seq. (cited by RILA), are found to cover

way, a nonemployer party to a representation case who receives home addresses under current *Excelsior* requirements is not excused from complying with other applicable laws, such as trespass.[217]

2. Timing

In the NPRM, the Board proposed to shorten the time for production of the voter list from the current 7 calendar days to 2 work days, absent agreement of the parties and the regional director to the contrary in the election agreement, or extraordinary circumstances specified in the direction of election.[218] Many comments argue that the 2-day time period following a regional director's direction of election, or approval of an election agreement, is too brief for an employer to produce the voter list, particularly if the Board requires the additional information—the personal email addresses, home and personal cell phone numbers, work locations, shifts, and job classifications of the eligible

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nonemployer party use of email or telephone technology and such laws are not preempted, nonemployer parties would be required to conform their conduct to those laws as well.

[217] ACE expresses concern that the proposed voter list requirements may conflict with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(a)(5)(A), (B) (Supp. IV 2006). ACE observes that although FERPA allows colleges and universities to release students' "directory information," schools are nevertheless required to provide notice that such information will be released and to give students the opportunity to opt out of the release. However, as ACE also appears to acknowledge, the proposed rule and FERPA could only come into conflict if graduate student employees are permitted to organize under the Act, which is not currently the case. See *Brown University*, 342 NLRB 483 (2004). (This issue is implicated in a case now pending before the Board. See *Northwestern University*, Case 13-RC-121359). In any event, if the issue arises, the conclusions expressed above with regard to the CAN-SPAM Act and the Do-Not-Call Rule would apply equally here.

[218] Although the NPRM preamble indicated that employers would have 2 work days to produce the list, the proposed regulatory voter list sections did not explicitly so provide. Compare 79 FR 7333 with 79 FR 7354, 7360.

voters—to be disclosed on the list.[219]

However, the Board concludes that advances in recordkeeping and retrieval technology as well as advances in record transmission technology in the years since *Excelsior* was decided warrant reducing the time period for production, filing, and service of the list from 7 calendar days to 2 business days.[220] Shortening the time period from 7 calendar days to 2 business days will help the Board to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided. In many cases the list will be produced electronically from information that is stored electronically and then will be served electronically in an instant—a far cry from workplace realities when the Board first

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[219] See, e.g., GAM; AAE; Vigilant; Buchanan; U.S. Poultry II; Testimony of Peter Kirsanow on behalf of NAM II.

[220] As suggested by Nicholas E. Karatinos, the Board will interpret the rule to mean that employers have 2 *business* days (i.e. excluding Saturdays, Sundays, and legal (i.e., federal) holidays—rather than 2 calendar days—to produce the eligibility list. This interpretation is consistent with § 102.111(a) of the Board's prior rules, which this final rule leaves undisturbed. Thus, § 102.111(a) provides that when computing time periods of less than 7 days in the Board's regulations, intermediate Saturdays, Sundays, and holidays are excluded.

Moreover, in accordance with Karatinos' suggestion, the Board has decided to explicitly provide in §§ 102.62(d) and 102.67(l) of the final rule that the employer has two *business* days after the regional director directs an election or approves the parties' election agreement to furnish the list to the nonemployer parties and the regional director. The Board concludes that adoption of this additional language will provide useful guidance to the parties and render this particular requirement of the rule more transparent.

As noted above, the Board's prior rules indicated that legal holidays were not included in the time calculation for due dates shorter than 7 days. The Board has interpreted legal holidays to mean "federal holidays." The Board declines Karatinos' additional suggestion to list the particular holidays in the final rule, because the number of federal holidays may change over time and the Board does not wish to have to amend its rules each time the number of federal holidays changes.

established a 7-day time frame for producing the list, when employers maintained their employees' records in paper form, and virtually no employer had access to personal computers, spreadsheets or email. Indeed, the AFL-CIO points out that even in 1966, under the 7 calendar day requirement, many employers were actually producing the list in only 2 work days. The AFL-CIO's comment posits that of the original 7 days, 2 days were lost to the weekend and 3 more days were dedicated to service of the list by regular mail because there was no existing option for priority, express or overnight mail, let alone for instantaneous electronic service via email. The Board views it as significant that while the Chamber specifically replies to the AFL-CIO's *Excelsior* analysis, it does so only to contend that many employers did, and do, work on the list over the weekend. The Chamber's reply does not dispute that even under the technological constraints of the 1960s, employers could and did produce voter lists, at least for deposit into the mails, in 4 calendar days or fewer. Thus, the advent of electronic filing and service via email alone warrants a substantial reduction in the time provided, and in the Board's view, technological advances fully justify the move to 2 business days for production of the final voter list.

Indeed, even some of the comments opposed to the new time frame tacitly admit that, while challenging, it is nonetheless possible. For example, the Indiana Chamber of Commerce (Indiana Chamber) concedes that "It is not that the manual collection of this information itself would take extreme amounts of time, but it becomes a hardship when imposed concurrently with all of the other, new obligations under the compressed schedule." Similarly, the Bluegrass Institute does not argue that employers cannot compile the list under the new time frame, but contends that "the cumulative effect" of

the new obligations "on small businesses could very well be devastating."[221] Yet, the hearing testimony of retired field examiner Michael Pearson implicitly contradicts such concerns by recalling approximately one dozen cases in which employers were able to file *Excelsior* lists on the same day as they signed election agreements—thus demonstrating an ability to simultaneously prepare an *Excelsior* list while resolving all of the issues to be potentially covered in a pre-election hearing. Indeed, as more fully discussed below in reference to § 102.63, the Board does not agree that the obligations imposed on employers in connection with the Statement of Position form vary dramatically from what a reasonably prudent employer would have done in any event to adequately prepare for a pre-election hearing under the prior rules. Likewise, the 8-day time frame for the hearing's opening, which may be extended for up to 2 business days upon request of a party showing special circumstances and even longer upon a showing of extraordinary circumstances, is in line with the best practices of some regions under the prior rules, and in any event, does not differ dramatically from the overall 10-day median for scheduling pre-election hearings, and the 13-day median for opening pre-election hearings under the prior rules.[222]

Additional factors likewise persuade us that the 2-business day time frame is appropriate for production, filing, and service of the list. First, in many cases the employer will have provided a preliminary list of employees in the proposed or alternative units as part of its Statement of Position before the clock ever begins running

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[221] For similar comments, see GAM; Sheppard Mullin; AHA.

[222] This information concerning FY 2011 through FY 2013 was produced from searches in the Board's NxGen case processing software.

on the new 2-day deadline for production of the voter list. As discussed below in connection with § 102.63, that initial list will be due no sooner than 7 days after service of the notice of hearing, and so the employer will have the same amount of time to produce the preliminary list as it had under *Excelsior*. Accordingly, to produce the voter list required by § 102.62 (or § 102.67 in directed election cases), the employer need not start from scratch, but need only update that initial list of employee names, work locations, shifts, and job classifications, by adding employees' contact information and making any necessary alterations to reflect employee turnover or changes to the unit.[223] Second, the description of representation case procedures which is served with the petition will explicitly advise employers of the voter list requirement—just as the opening letter does currently—so that employers concerned about their ability to produce the list can begin working immediately; before an election agreement is approved or an election is directed and thus *before* the clock begins running on the 2-business day time period.[224]

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[223] Some employers may have an additional reason to begin compiling at least part of the voter list as soon as they receive a petition. An employer which doubts that the petitioner has enough employee support to warrant an election may provide a payroll list to facilitate the regional director's administrative investigation of the issue. See Case Representation Manual Section 11020. Because the payroll list must be submitted promptly, see id., such an employer will likely begin preparing it immediately upon receiving a petition. Furthermore, as noted above, an employer which anticipates filing a statement of position and the accompanying initial employee list will also need to compile much of the information on the voter list for that purpose, prior to the start of the 2-day time frame.

[224] Thus, Casehandling Manual Section 11009.2(c) provides that the initial letter to the employer following the filing of the petition should advise the employer: "In the event an election is agreed to or directed, the Agency requires that a list of the full names and addresses of all eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties in the case. The list must be furnished to the Regional Director within 7 days of the direction of, or approval of an agreement to, an election, and the employer is being advised early of this requirement so that there will be

Third, in the Board's experience, the units for which lists must be produced are typically small— with half of all units containing 28 or fewer employees over the past decade— meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task, contrary to the comments that suggest otherwise.[225] Finally, the final rule will enable parties to enter into agreements providing more time for employers to produce the list subject to the director's approval, and the final rule will further enable the regional director to direct a due date for the voter list beyond two days in extraordinary circumstances.[226] In sum, the Board is not persuaded that the bulk of employers will be unduly burdened by the final rule's voter list time frames.[227]

Many comments suggest categorical exemptions for various industries. For example, AGC argues that the Board should exempt construction industry employers from the requirement that they produce the voter list 2-days after a direction of election

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ample time to prepare for the eventuality that such a list may become necessary."

[225] See, e.g., Ranking Member Enzi and Republican Senators; COSE; CNLP; Testimony of Elizabeth Milito on behalf of NFIB II.

[226] National Mining Association and David A. Kadela complain that "extraordinary circumstances" is a vague standard that may be administered differently by different regional directors. However, this standard has been in place since the original *Excelsior* requirements were articulated, and the Board has not experienced the problems forecasted by the comments. See *Excelsior*, 156 NLRB at 1240 fn. 5 ("In order to be timely, the eligibility list must be *received* by the [r]egional [d]irector within the period required. No extension of time shall be granted by the [r]egional [d]irector except in extraordinary circumstances * * *.") Accordingly, the Board is not persuaded that it should use different language.

[227] In addition, as noted below, the Board has decided to make it presumptively appropriate to produce multiple versions of the list when the data required is kept in separate databases, thereby reducing the amount of time that employers might need to comply with the voter list requirement.

or approval of an election agreement. According to AGC, construction industry employers, who may handle personnel matters on a decentralized basis at the individual jobsite level, cannot timely produce the list, because 2 days is simply not enough time to review 2 years' worth of payroll records as required by the *Daniel/Steiny* construction industry eligibility formula.[228]

The Board does not agree that the *Daniel/Steiny* formula warrants carving out a categorical exemption for construction industry employers in every case. In the first place, construction industry employers will not be required to review 2-years' worth of payroll records to produce the list in all cases. In some cases, the parties may stipulate that formula not be used. See *Steiny*, 308 NLRB 1323, 1328 n.16 (1992); *Signet Testing Laboratories, Inc.*, 330 NLRB 1, 1 (1999). Moreover, as AGC acknowledges elsewhere in its comment, some petitions filed in construction industry cases involve situations where the petitioned-for units are already covered by 8(f) collective-bargaining agreements. Such 8(f) collective-bargaining agreements frequently require the signatory employer to make fringe benefit contributions to benefit funds on behalf of the unit employees and to file reports of its employees' hours with those benefit trust funds. Accordingly, at least in those cases, the employer may have ready access to the

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[228] The *Daniel* / *Steiny* formula, provides that, in addition to those eligible to vote in Board conducted elections under the standard criteria (i.e., the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc*. ("*Steiny*"), 308 NLRB 1323, 1326-27 (1992), and *Daniel Construction Co., Inc. ("Daniel")*, 133 NLRB 264, 267 (1961), *modified,* 167 NLRB 1078, 1081 (1967).

information necessary to produce lists complying with the formula. In addition, not every construction industry employer will have intermittently employed large numbers of employees over a two-year period. Those employers who have employed stable workforces will not face the same burden. And while employers may maintain records on different jobsites due to the decentralized hiring claimed by AGC II and other construction industry commenters, we anticipate that they will be able to transmit the records to a central location via modern technology or verbally report the information contained in the records.[229]

The Board also finds it highly significant that, as AGC acknowledges, under the Board's current rules, construction industry employers, whether decentralized or not and whether large or small, already only have 7 days to produce the *Excelsior* list. The Board believes that the same changes that justify the reduction in time to produce the final list in cases outside the construction industry, likewise justify reducing the time in cases involving the construction industry. Thus, given the advances in record-keeping/retrieval technology and in the technology for transmitting documents that have taken place since *Daniel* was decided in 1961 and since *Excelsior* issued in 1966, the Board simply does not believe that as a rule it is "impossible" for construction industry employers to comply with the requirement, as suggested by NFIB.

As noted above, employers generally will have more than a week to prepare the voter list, assuming they begin work when they receive the petition and are explicitly

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[229] For example, if the person responsible for completing the form needs records stored at a separate location, those records can be faxed (or scanned and then emailed) quickly, and failing access to that technology, a phone call would surely suffice for all but the largest bargaining units.

advised of the voter list requirement in the description of representation case procedures served with the petition. And, employers will have still more time in those cases where weighty issues are litigated at the pre-election hearing that require resolution by the regional director, because they can continue preparing the list after the hearing closes while they await the decision by the regional director. Finally, it bears repeating that under the final rule, the regional director has discretion to grant an employer more time to produce the list, upon a showing of extraordinary circumstance which may be met by an employer's particularized demonstration that it is unable to produce the list within the required time limit due to specifically articulated obstacles to its identification of its own employees.

A number of other comments claim that the 2-day requirement is particularly burdensome for other types of employers either because of the nature of their operation, the types of employees they employ, or the size of their workforces. However, these comments fail to offer any persuasive explanations for why their particular circumstances make compliance with the 2-business day deadline unworkable.

For example, the National Mining Association argues it will be difficult for employers in the mining industry to comply with the time frame for producing the final list because they operate on a 24-hour basis. But the fact that shifts of miners rotate through a mine on a 24-hour basis does not render the employer unable to furnish a list in 2 business days. Similarly, ACE argues that colleges and universities will be particularly burdened because they are decentralized, may include multi-site units, and may have difficulty identifying adjunct faculty or graduate students that a petitioner seeks to organize. The mere fact that an employer is decentralized, or that a party may propose a

multi-site unit, does not demonstrate that complying with the new rule is unduly burdensome for colleges and universities. Moreover, as noted above, ACE's concerns about graduate student organization are at best premature.[230] And although ACE contends that gathering detailed information on adjunct faculty would be difficult under the new time frames, it does not deny that gathering such information is feasible under the Board's current requirements and offers no explanation for why the new time frames would prove "nearly impossible" to comply with.

Con-way argues that the 2-day period is unworkable in those cases where an employer uses employees provided by a temporary agency, because the employer will be dependent on the temporary agency to supply it with the information. However, it is by no means clear that "temporary employees" provided by a third party will as a matter of course even be included in a bargaining unit. See *Oakwood Care Center*, 343 NLRB 659 (2004) (employees of staffing agency may not be included in a unit of another employer's employees unless both employers consent).[231] If the temporary employees are not included in the unit, then the fact that an employer uses employees provided by a temporary agency plainly provides no reason to depart from the timeframes in the rule, for the temporary employees will not need to be included on the list. When a third party's employees are included in the unit, the unit may be a multiemployer bargaining unit or the third party may be found to be a joint employer, and the entities may be jointly

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[230] As noted above, this issue is currently pending before the Board.

[231] However, we note that there is a case currently pending before us, *Bergman Brothers Staffing, Inc.,* Case No. 05-RC-105509, in which a party is seeking to have us overrule *Oakwood*.

charged with filing the list or lists. See, for example, *K-Mart, A Div. of S.S. Kresge Co.*, 159 NLRB 256, 262 n.10 (1966). Accordingly, the Board does not believe this circumstance warrants a blanket exemption.[232]

As for employers with large workforces,[233] the fact that a petitioned-for unit is large does not, in and of itself, make compliance with the rule burdensome for the employer.[234] Significantly, the Board's current rules do not grant employers employing large units more time to produce the *Excelsior* list than employers employing small units. The same advances in technology that reduce the time it takes to transmit the lists from days to seconds apply no less to large employers than to small employers.[235] The same holds true with respect to advances in record keeping technology. Indeed, the comments filed by, and on behalf of, small employers suggest or imply that large employers are more likely than small employers to possess the technology to produce the lists quickly.[236] To the extent that the compilation process takes longer in a larger petitioned-for unit, large employers are more likely to have dedicated human resources professionals on the payroll who can more easily devote the longer period of time to completing the

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[232] Nor does the Board believe that the fact that an employer relies on a third party to perform its payroll functions warrants a blanket exemption from the 2-business day timeframe. The Board notes in this regard that employers frequently hire third parties to handle such administrative tasks precisely because the third parties are able to perform the administrative tasks more efficiently.

[233] See, e.g., AHCA; Sheppard Mullin; AHA.

[234] This is also true of decentralized businesses, which Con-way argues will also be unduly burdened by the new time frame.

[235] As explained above, the Board does not believe that small employers without the best available technology will be particularly burdened by compiling the list.

[236] See, e.g., Chamber; Chamber reply; SIGMA.

task within the amended time frame.[237] Moreover, large employers, like small employers, can begin preparing the list before the director directs an election. Finally, the Board notes that § 102.67(l) permits a regional director in his direction of election to grant more time to produce the final list in extraordinary circumstances, and employers are free to describe those circumstances to the hearing officer before the close of the hearing when they set forth their positions regarding the election details.

Spartan Motors, Inc. complains that the rule requires employers to produce the information on the voter list within 2 days of receiving a petition. Spartan Motors is mistaken. Thus, an employer need only produce the voter list 2 business days after the director approves an election agreement or directs an election. An employer cannot be compelled to enter into an election agreement 2 days after the petition is filed—or ever. And an election cannot be directed until after a hearing closes, which, of course, will be more than 2 (business) days after the filing of the petition. Indeed, absent agreement otherwise, the hearing will open no sooner than 8 days after service of the notice under the amendments.

Several other comments attack the time frame for producing the voter list on the grounds that it will result in more inaccurate lists and thus more post-election litigation.[238] As already discussed, the Board does not view a 2-business day deadline for production of the list in the modern era as a particularly greater burden than was

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[237] See Testimony of Elizabeth Milito on behalf of NFIB II (clarifying that in her experience as the spokesperson for NFIB, employers of more than 50 employees tend to have dedicated human resources staff).

[238] See, e.g., Pinnacle; ALG; Constangy; LRI.

production of the list in 7 calendar days during the 1960s. Accordingly, the Board is unconvinced that the lists produced under the final rule will tend to be any less accurate than lists produced under *Excelsior*'s original formulation.[239] And given the expanded ability of petitioners to contact voters by phone and email with the new voter lists, the Board rejects the related comments predicting that list inaccuracies will result in petitioners having less access to voters under the final rule than under the current *Excelsior* rules.[240]

3. Format and Service of List

In the NPRM, the Board proposed that the voter list be provided in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form, and

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[239] Neither is the Board convinced that expanding the list beyond names and addresses will create any significant problems for employers in complying with the 2-day time frame. To the extent that aspects of particular industries may present challenges in identifying certain types of the newly required information, the Board believes that these issues can be dealt with in the implementation of the voter list (and related initial employee list) amendments. For example, Maurice Baskin explained that construction industry employees frequently change jobs and job sites, and Doreen Davis explained that retail industry employees frequently change departments or shifts. See Testimony of Maurice Baskin on behalf of ABC II and Doreen Davis on behalf of RILA II. It is the Board's preliminary view that there would be no impediment to employers in such circumstances noting that certain employees' classifications, shifts or locations are variable rather than fixed, providing their current classifications, shifts, and locations, and indicating, if known, where they will be going next. The need to make such a notation should not be particularly challenging to determine within the time frames set forth in the final rule. Contrary to the suggestion of Ms. Davis (*Id.*) and the related question raised by Baker & McKenzie, an employer need not continually revise the initial employee list provided with the Statement of Position or the voter list to reflect changes associated with employee information. However, if there is a change (due to employee turnover or transfer) between the time that the initial employee list and the voter list is provided, then it will be incumbent on employers to update the information at that time of the voter list's filing (and at that time only).

[240] See, e.g., Chamber; Sheppard Mullin.

that the employer serve the voter list on the other parties electronically at the same time it is filed electronically with the regional office. The Board received multiple comments supporting the electronic format and service proposals.[241] These proposals are included in the final rule with the slight modification that the General Counsel is substituted for the Board's Executive Secretary.[242] See amended §§ 102.62(d), 102.67(l).

The Board has concluded that requiring production of the list in electronic form (unless the employer certifies that it does not have the capacity to produce the list in the required form) would further both purposes of the *Excelsior* requirement. The Board has further concluded that requiring the employer to electronically serve the voter list directly on the other parties at the same time the employer electronically files the list with the regional office will likewise further both purposes of the *Excelsior* requirement and eliminate an administrative burden. As set forth in the NPRM, the Board's *Excelsior* rule requires only that the employer file the list with the regional director. 156 NLRB at 1239. *Excelsior* further provides that the regional director in turn shall make the list available to all parties. *Id.* at 1240. This two-step process thus requires the regional office to forward to the other parties the list filed in the regional office by the employer. This two-step process has also caused delay in receipt of the list and unnecessary litigation when the regional office, for a variety of reasons, has not promptly made the list available to all

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[241] See, e.g., GAM; UNAC/UHCP II; U.S. Poultry II.

[242] Upon further reflection, the Board has concluded that periodic approval of acceptable electronic formats for the voter list would be a more appropriate role for the agency's General Counsel, given the General Counsel's traditional duty of overseeing the agency's regional staff as they carry out the bulk of the Board's representation case procedures, including the handling of the voter list.

parties. See, e.g., *Ridgewood Country Club*, 357 NLRB No.181 (2012); *Special Citizens Futures Unlimited,* 331 NLRB 160, 160-62 (2000); *Alcohol & Drug Dependency Services,* 326 NLRB 519, 520 (1998); *Red Carpet Bldg. Maintenance Corp.,* 263 NLRB 1285, 1286 (1982); *Sprayking, Inc.,* 226 NLRB 1044, 1044 (1976). Moreover, some comments also complained about their experiences with delay when employers file the list with the regional office after business hours on a Friday, and the regional office subsequently does not forward the list to the petitioner until the following Monday.[243] The final rule eliminates this unnecessary administrative burden—as well as potential source of delay and resulting litigation—by providing for direct service of the list by the employer on all other parties. See amended §§ 102.62(d), 102.67(l).

Spartan Motors complains that small employers might not maintain their data in electronic form, and therefore they will be burdened by having to produce it in electronic form. The rule, however, exempts employers from having to produce the list in the required electronic format if the employer certifies that it does not have the capacity to produce the list in the required form. Baker & McKenzie questions what evidence an employer must provide to show its inability to produce an electronic list and what criteria the Board will apply in evaluating whether it is feasible for an employer to file and serve the list electronically. The Board does not expect this to be a major topic of litigation, and for that reason, the final rule provides for an employer to certify to the regional director its inability to produce the list in the required form, instead of making a special request that it be allowed to produce an alternative form of the list. The Board trusts that the good

[243] See Testimony of Darrin Murray on behalf of SEIU II; SEIU II.

faith of employers combined with the reasonableness of the format approved by the General Counsel, will lead to the smooth application of this process.

SEIU II suggests that the Board should require employers to provide their lists in a searchable format to ease the burden on petitioning unions in manipulating the list, and NUHW makes the related suggestion that the Board should require employers to provide the list in the same format to all parties—noting the alleged injustice suffered when NUHW received a voter list in a less useful format than that provided to the Board and to a rival incumbent union. The Chamber II specifically replies to SEIU's suggestion by asserting that providing the list in a searchable format may not be feasible for all employers and so the Board should continue to allow flexibility in the format of the voter list. We think that each of these concerns has merit. Thus, the Board agrees that it would be optimal for parties to provide lists in searchable formats, but acknowledges that may be beyond the technical expertise of certain employers. The Board expects that the General Counsel will establish guidelines that require voter lists in searchable formats where feasible to address the concerns expressed by SEIU and to maintain the necessary flexibility as advocated by the Chamber. The Board further expects that the General Counsel's guidance will require, at minimum, that the voter list be provided in the same format to all parties—including the situation where there are rival incumbent and petitioning unions.

Some comments, including those of SIGMA, suggest that it may take some effort to compile an electronic list using information from multiple databases.[244] SIGMA's

[244] See, e.g., Indiana Chamber; Vigilant; AHA; COSE.

point is well taken. The Board does not wish to burden employers with the need to merge electronic files that may be kept in distinct forms or potentially on distinct computer programs. Therefore, it will be presumptively appropriate under the final rule to produce multiple lists when the data are kept in separate files, so long as all of the lists link the information to the same employees using the same names, in the same order and are provided within the allotted time.[245] For example, if an employer keeps information about its employees' work locations, shifts, job classifications, phone numbers and email addresses in a different database from the database containing its employees' home addresses, then the employer can produce an alphabetized list of employees and their home addresses and a second alphabetized list of employees and their work locations, shifts, job classifications, phone numbers and email addresses so long as both lists are provided within the allotted time.

The Washington Farm Bureau requests that employers be allowed to choose whether to submit the information in electronic or hardcopy form. The Board thinks that the two purposes of *Excelsior* are better served by requiring the electronic form, rather than leaving the choice of format to an employer's discretion, provided of course that the employer has the capacity to produce the list in the required electronic form.

The Board also rejects the Chamber's II prediction that electronic service of the list will "invite abuse of the system and unauthorized use of the information contained"

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[245] The Board believes that this aspect of the final rule effectively answers AHA's argument that employers in the healthcare industry, who are obligated to upgrade information technology systems and bring down patient costs under other regulations, will be unduly burdened by the voter list timing requirements.

on the list.[246] As discussed above, we see no reason for assuming that "a union, seeking to obtain employees' votes in a secret ballot election, will engage" in abusive behavior. *Excelsior*, 156 NLRB at 1244. Although the Board recognizes that whenever information is conveyed in an electronic format, there is a heightened risk of inadvertent dissemination or unauthorized access by third parties, in today's modern workplaces, however, it is simple enough to turn any paper document into an email attachment. So, the Board fails to see how any dangers of misuse—real or imagined—will be avoided simply by requiring parties to continue to use slower and more expensive forms of communication when filing the list with the regional director and transmitting it to the petitioner.

The Board likewise rejects Vigilant's suggestion that, rather than have the employer serve the list on the other parties, the Board serve the list on the parties after the employer has filed the list with the Board. Vigilant asserts that such an intermediate step would allow for correction of errors or omissions, but as discussed above, such an intermediate step is currently in place and has caused avoidable delay, administrative burden, and unnecessary litigation. Moreover, the Board is not persuaded that employers generally need the Board's help to "proof" the lists they produce from their own records or that the Board could provide meaningful assistance in this regard as it is not the employer of the employees at issue.

The Board also disagrees with INDA II's reasoning for maintaining the current

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[246] Although the Chamber II's comment suggests that service of the eligibility list via email invites abuse, other comments from a cross-section of interested groups applaud the provision for electronic service of the list when feasible. See e.g., GAM, Buchanan.

two-step procedure. INDA, and others, alleges that it is appropriate to keep the burden of serving the voter list on petitioners with the regional staff, whose profession is administering the Act, and that more errors and litigation are likely to ensue by shifting the burden to employers, many of whom will have had no prior experience with the Board's representation case processes. While the Board certainly credits the statement that many employers are not repeat players in representation case proceedings and thus may be initially unfamiliar with the requirements, the final rule takes steps to remedy any ignorance on the part of employers by sending out a detailed explanation of those procedures as part of the first official communication that an employer will receive from one of the agency's regional offices. That explanation will cover the employer's eventual responsibility to serve a voter list on the nonemployer parties to the case (using the contact information listed on the face of the petition or provided in a Statement of Position or at the hearing) at the same time the employer files the list with the regional office. Furthermore, the Board believes that employers will typically have a wealth of experience sending important documents to entities outside of their organization, and should not be particularly challenged by emailing the voter list to the nonemployer parties' email addresses at the same time they email the list to the regional offices. Indeed, this task could be completed by transcribing the email address for the nonemployer party onto the recipient line of the same email bound for the regional office.[247]

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[247] To the extent that INDA II also argues that the age of the cases cited in the NPRM demonstrate that there are no contemporary problems occasioned by regional service of the voter list following its filing by an employer, the Board notes the recent case of *Ridgewood Country Club*, 357 NLRB No.181 (2012), where we were again called upon

At least one comment (Sheppard Mullin II) raises the concern that rule language stating that an employer's failure to file a timely list in a proper format "shall be grounds for setting aside the election whenever proper objections are filed" signals an inappropriate departure from prior Board law governing whether an employer has sufficiently complied with its *Excelsior* obligations. To the contrary, while the final rule changes an employer's obligations concerning the content, timing, and format of the voter list, the Board does not hereby overrule extant law interpreting whether an employer's efforts at compliance fall sufficiently short to justify setting aside an election's result. The quoted language above is taken directly from the original *Excelsior* decision itself, 156 NLRB at 1240, and has not impeded the Board from adding fact-specific glosses to whether the requirement was sufficiently met. See, e.g., *North Macon Health Care Facility*, 315 NLRB 359 (1994).[248]

Other comments suggest additional alterations to the voter list rules to protect employers who accidentally produce inaccurate lists. For example, ACE submits that the Board should automatically excuse inaccurate lists in large units when petitioners are unable to show an employer's intent to manipulate the process. The Board declines to

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to set aside an election due to regional office failures in transmitting the list to a petitioner.

[248] However, the Board has decided to slightly modify the NPRM language regarding the consequences for noncompliance with the voter list amendments to track the language from pre-existing § 103.20 with respect to the consequences for noncompliance with the obligation to post what was called prior to the NPRM," the Board's "official Notice of Election." Thus, amended § 102.62(d) and § 102.67(l) shall provide in pertinent part that "The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper *and timely* objections are filed." (emphasis added)

adopt these suggestions. As discussed above, the Board continues to agree with existing precedent on *Excelsior* compliance, and does not intend to limit the discretion of future Boards to apply adjudicative glosses to the rule based upon a variety of fact patterns yet to arise.[249]

Holland & Knight questions if it will be objectionable for an employer to omit from the voter list the contact and other information of employees whose eligibility is disputed. As discussed more fully below in connection with § 102.67, the answer is "yes." Prior to the NPRM, parties could agree that certain classifications or employees be permitted to vote subject to challenge just as a regional director could direct that certain classifications or employees be permitted to vote subject to challenge. See, e.g., Casehandling Manual Sections 11084.3 and 11338.2(b). In such cases, the employer was advised to provide the names and home addresses for such individuals on the *Excelsior* list. Similarly, the final rule requires the employer to provide the information for such individuals on the voter list. However, as discussed more fully below in connection with § 102.67, in order to ensure that the Board agent and the parties' observers will properly process employees who were directed to vote subject to challenge (or were permitted to vote subject to challenge by agreement of the parties), the final rule requires the employer

[249] The Board likewise disagrees with Karatinos' complaint that "there is no downside [under the proposals] to an employer producing an *Excelsior* list riddled with inaccuracies." As noted, just as was the case under the prior rules, the Board may set aside an election in which the union failed to obtain a majority of the valid votes cast if the employer's voter list was "riddled with inaccuracies." See, e.g., *Woodman's Food Markets*, 332 NLRB 503 (2000) (noting that the Board considers the percentage of names omitted, whether the number of omissions is determinative in the election, and the employer's reasons for the omissions); *Automatic Fire Sys.*, 357 NLRB No. 190 (2012) (applying this test and ordering a rerun election).

to provide the names and related information about such employees in a separate section of the list.

4. Restriction and Remedies for Misuse of the Voter List

In the NPRM, the Board proposed a restriction on the use of the voter list—barring parties from using it for any purposes other than the representation proceeding and related proceedings—and sought comments regarding what, if any, the appropriate remedy should be for a party's noncompliance with the restriction.[250]

Many comments address the proposed restriction and potential consequences of noncompliance. At the outset, labor organizations' comments point out that *Excelsior* did not contain any express restriction language and generally agree that the lack of historical evidence of *Excelsior* list abuses undercuts the need for any restriction.[251] In contrast, other comments envision, as discussed above, a wide variety of potential misuses should the Board implement its voter list proposal.[252]

Other concerns are shared by both labor organizations and employer associations. For example, some comments, such as those from the Chamber and SEIU, focus on the lack of clarity as to what activity would be encompassed by the restriction (i.e., what activity falls outside of "using the list"), while others, such as PCA's and UFCW's, assert that the Board could not effectively police any restriction it imposed, or that any remedy

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[250] Although the NPRM used the term "sanction," this usage was inapt because of its punitive connotation. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940) (explaining that the NLRA is essentially remedial).

[251] See, e.g., AFL-CIO II; UFCW; NNU.

[252] See, e.g., PCA (union selling employee information); NRTWLDF (harassment, identity theft, property crime); David Holladay II (threats to spouse or children).

would be de minimis with regard to the damage done (CNLP; NRTW). The National Education Association Staff Organization concludes that the restriction and remedy proposals would simply create more litigation concerning matters which the Board, in contrast to law enforcement and the civil courts, is ill-equipped to handle. Additionally, other comments complain that the proposed restriction is unclear as to what counts as "the representation proceeding and related proceedings."[253] In this regard, the Indiana Chamber worries that this phrase is overbroad, whereas by contrast, SEIU expresses concern that it will prove too narrow and restrictive of lawful union activity.

Nevertheless, many employer associations' comments propose a range of remedies including: setting aside elections, temporary bans on organizing, letters of apology, monetary penalties, referral to law enforcement where criminal conduct has occurred, and pursuing injunctive relief against the restriction's violators.[254] Meanwhile, labor organizations' comments stress that any sufficiently weighty remedy threatens to

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[253] See, e.g., Chamber; UFCW; Testimony of Thomas Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly.

[254] See, e.g., Chamber II; SHRM II; AGC; ALG; Indiana Chamber; CDW. Other comments propose less concrete remedies, such as "affirmative steps to remedy misuse" (SHRM) or "severe" consequences (Anchor Planning Group; LRI). On a slightly different note, in order to prevent misuse to begin with, NRTWLDF suggests that unions not be allowed to withdraw petitions once filed, and Anthony Benish suggests that a union be barred from filing another petition at that employer for one year after withdrawing a petition. The potential for the supposed abuses NRTWLDF and Benish seek to prospectively remedy already exists. Without any evidence of such risks regularly materializing and negatively affecting employees, the Board sees no need to change current practices. As shown, regional directors already have discretion to reject a petitioner's' request to withdraw its petition if the request would run counter to the purposes of the Act or to approve the withdrawal with prejudice to refiling. See Casehandling Manual Sections 11110, 11112, 11113, 11116, 11118.

unfairly penalize employees for the misdeeds of labor organizations[255] and question whether the Board has "appropriate remedial authority to address such circumstances."[256] In further contrast, the Chamber suggests that remedies should be "no fault" (applying to any misuse of the list, regardless of the petitioner's intent), while the UFCW urges that the Board limit any remedy to "clearly defined circumstances involving willful and egregious noncompliance with the rule."

After careful consideration of the comments, the Board has slightly modified the proposed restriction language. The final rule shall read in relevant part: "The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." See amended §§ 102.62(d), 102.67(l). This change sufficiently clarifies the circumstances under which unions may use the list, balancing both privacy concerns and the interests, noted above, in the fair and free choice of bargaining representatives and the expeditious resolution of questions concerning representation.

The restriction language will plainly allow the nonemployer parties to use the contact information to provide employees with information regarding the election and to investigate eligibility issues. Parties can also use the information on the list for such purposes as investigating challenges and objections and preparing for any post-election hearings on determinative challenges and/or objections. Parties may likewise use the information on the list in connection with unit clarification proceedings to decide the

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[255] See, e.g., SEIU (reply); UFCW.

[256] See AFL-CIO. AFL-CIO further points out that non-Board remedies are already available for the possible misuses identified by opponents of the rule.

status of individuals whose status was not determined by the regional director or the Board or who voted subject to challenge in an election but whose ballots were not determinative. See Casehandling Manual Section 11490.1. Parties may also use the information on the list to investigate, and prepare for hearings regarding, unfair labor practice charges concerning the employer's employees that are filed before or after the election takes place. And, just as is the case currently, if post-election objections are filed, a union (or decertification petitioner) could continue to use the list to maintain their support and to campaign for votes in connection with any rerun election that is held. In each of these examples, the nonemployer parties would be using the list for purposes of the representation proceeding, Board proceedings arising from it, and related matters. At the same time, the Board believes it goes without saying that nonemployer parties would run afoul of the restriction if, for example, they sold the list to telemarketers, gave it to a political campaign or used the list to harass, coerce, or rob employees.[257]

While the Board thinks it is self-evident that misuse of the voter list that adversely affects unit employees should result in some remedy, the Board has concluded that it would not be appropriate at this time to specify a remedy, or set of remedies, that would be applicable in all situations. The Board notes in this regard that while the *Excelsior* Board stated that it would "provide an appropriate remedy" if a union used the list to harass or coerce employees (*Excelsior*, 156 NLRB at 1244), the *Excelsior* Board did not

[257] It is conceivable, as the Indiana Chamber comments, that a party alleged to have misused the list might claim in its defense that it managed to obtain the information independently of the employer's provision of the list, and therefore that it was not "using" the list when it engaged in the challenged conduct. That issue, like so many other issues, raises a question of fact for the factfinder.

specify the remedies it would provide. Like the *Excelsior* Board, we will leave the question of remedies to case-by-case adjudication.

For example, the Board rejects the notion advanced in some comments[258] that misuse of the voter list should always warrant setting aside the results of an election won by the party misusing the list. As noted below in connection with §§ 102.64 and 102.66, the purpose of the election is to answer the question of representation. For example, the purpose of an election in an initial organizing case is to determine whether employees in an appropriate unit wish to be represented for the purposes of collective bargaining by the petitioner. There is a strong presumption that ballots cast in a secret ballot election reflect the true desires of the participating employees. Accordingly, the burden is on the objecting party to demonstrate that the election results "did not accurately reflect the unimpeded choice of the employees." *Daylight Grocery Co., Inc. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982). A party seeking to overturn the outcome of an election based on another party's conduct has the burden of showing not only that the conduct complained of occurred, but also that it "interfered with the employees' exercise of free choice to such an extent that it materially affected the [results of the] election." *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988). Accord *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). The Board has indeed set aside elections when union coercion resulted in objections to an election that were sustained.

But not every misuse of the list can be said to have interfered with employee free choice in the election, let alone be said to have materially affected the results of the

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[258] See, e.g., Chamber; Indiana Chamber.

election. For example, if a union misuses the list *after* the election, by, for example selling the list to telemarketers, the misuse could not possibly have affected employee free choice in the election because the misconduct occurred after the election. Even if the union were to sell the list before the election, it could not be said to have impeded employee free choice if no employee knew about it. Setting aside the results of the election in such circumstances would interfere with employee free choice and would be contrary to the Act's policy in favor of industrial stability. Accordingly, while the Board certainly does not wish to convey that a party's misuse of the voter list could never warrant setting aside an election, the Board does not feel that it is appropriate to adopt a rule that would set aside election results in every case where the union chosen by employees misused the list in some way. At the same time, the fact that misuse of the list could not warrant setting aside the results of an election does not mean that the misuse should not be remedied in a manner appropriate to the circumstances.

Similarly, the Board concludes that it would not be appropriate to adopt a per se rule that would bar a labor organization from engaging in future organizational drives whenever (and however) the labor organization misused the list, for such a remedy would interfere with the right of employees to petition for a specific labor organization to represent them.[259] The Board also declines to adopt a rule that would require the General

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[259] Nor is it at all clear whether the Board even possesses the requisite statutory authority to ban a union from filing future representation petitions because of previous misbehavior. In any event, the Board has long been loath to restrict employee free choice with respect to union representation on the basis of union misconduct. See *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962) ("[I]nitially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to

Counsel to seek injunctive relief in federal district court whenever a party misuses the list. Injunctive relief is not the norm in our system, and while the Board does not wish to rule out seeking injunctive relief in an appropriate case, it does not believe that seeking such relief as a matter of course would necessarily be appropriate.[260]

AGC suggests that misuse of the voter list should be deemed a violation of Section 8(a)(1) or 8(b)(1). The Board rejects this suggestion at this time for reasons similar to those that led us to reject the suggestion that any misuse should warrant setting

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select their bargaining representative."); *Handy Andy, Inc.*, 228 NLRB 447, 454-56 (1977) (rejecting employer's argument that a union's practice of race discrimination preclude it from being certified as an exclusive bargaining representative).

Nevertheless, § 102.177 of the Board's Rules and Regulations appears broad enough to cover an attorney's or party representative's failure to abide by Board rules, including the rule announced today regarding misuse of the voter list, depending on the facts and circumstances of the violation. See § 102.177(d) ("Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.") Moreover, if violations of the voter list restrictions should occur that do not fall within the provisions of § 102.177, the Board may look to amend that provision in the future.

[260] Similarly, the Board hesitates to adopt a rule that would require parties in all cases to apologize for misusing the list. An apology would amount to an admission of guilt. Regional Directors, acting on behalf of the General Counsel, regularly approve settlements involving alleged unfair labor practices—even though the settlements contain non admissions clauses—where they conclude that the settlements effectuate the policies of the Act. The Board does not wish to preclude regional directors from resolving cases involving alleged misuse of voter lists in a manner the directors deem acceptable merely because the parties alleged to have misused the lists refuse to admit to having done so.

As for monetary sanctions, the Board observes that while it does have the authority to make employees whole for their losses, it lacks authority to impose penalties, as noted above. Accordingly, the Board does not believe that a monetary sanction will be appropriate in all cases of voter list misuse. Regarding CDW's suggestion that the Board refer criminal conduct to law enforcement authorities, the Board observes that under Casehandling Manual Section 11029.3, the Agency already forwards evidence of forgery to the appropriate law enforcement authorities.

aside the election results. There may be situations in which the Board finds that a party has misused the voter list in violation of Section 8(a)(1) or 8(b)(a). Even if no such violation is found, the misuse may constitute objectionable conduct, which could trigger a new election. The Board believes that case-by-case adjudication is the appropriate way to consider circumstances in which a remedial order is appropriate so that it can tailor its order to the specific misuse and ensure that the remedy it imposes is effective. As with all of the foregoing proposals, the point is that in determining the appropriate remedy for a proven misuse, the Board believes that it is appropriate to consider all the circumstances and provide a remedy, where appropriate, which is tailored to the misconduct found to have been committed.

MEMA II argues that any restriction must be accompanied by requiring advanced security protocols to be implemented by petitioning unions, and cites as models the regulatory regimes developed under the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. 6801, the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. 1320d, and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a. We disagree. The personal information at issue in those statutes is far more sensitive than what will be disclosed as part of the voter list amendments we announce today. We do not believe that we can rationally equate the financial and health-related information regulated by those statutes with employee contact information, and identification of their work location, shift, and job classification.[261] In addition, MEMA's comment loses sight of the fact that

[261] The legislative and administrative histories of the GLBA, the HIPAA and the FCRA support our position that financial and medical information is special and requires a closer degree of protection than other types of information. See, e.g., U.S. Sen. Conrad Burns Holds Hearing on Privacy on the Internet Before Sen. Subcomm. on Commc'ns,

the nonemployer party who receives the list in a given case may not be a large sophisticated institution like an international union, but might be an unsophisticated individual who files a decertification petition. Thus, in addition to the information's relative lack of sensitivity, the Board believes that it would be unrealistic to think that it could require individual employees or small labor organizations to—as advocated by MEMA—designate a security officer or develop a written security program.

Finally, regarding a petitioner's retention of the information after a representation campaign ends, the Board observes that petitioners are currently entitled to retain the list indefinitely under *Excelsior*, and, as shown, there are certainly legitimate reasons why petitioners might use the list after the election. Moreover, the Board does not believe that a petitioner's retention of the information on the list would implicate any privacy concerns beyond those implicated by the initial disclosure under *Excelsior*. The Board therefore declines the suggestion that petitioners be required to destroy voter list information after a set period of time or upon an individual employee's request.[262] We reiterate, however, that the Board will provide an appropriate remedy under the Act if

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106th Cong. 1999 WL 542117 (1999) ("Last week we unanimously testified in favor of legislation that would protect the privacy of financial records, because financial records are different. I would say the same thing about medical records."); Standards for Privacy of Individually Identifiable Health Information, 64 FR 59918, 59919-20 (proposed November 3, 1999) (codified at 45 CFR parts 160 and 164) (discussing why medical records specifically warrant privacy protections); *Statement of Mr. Stephen Brobeck Before H. Comm. on Fin. Servs.*, 2003 WL 21541527 (2003) (discussing the need for revisiting and expanding the privacy protections in the FCRA because of the exceptional nature of financial information); see also Fact Sheet on Fin. Privacy and Consumer Prot., 1999 WL 270108 (1999) (discussing need to protect medical and financial information due to their particularly private and important natures).

[262] See, e.g., Chamber; Daniel Wroblewski.

misconduct is proven and it is within the Board's statutory power to do so. In addition, individuals may have recourse in other judicial fora.[263]

5. Waiver

Although the proposed regulatory language did not explicitly so state, the preamble section to the NPRM indicated that consistent with existing practice, reflected in *Mod Interiors, Inc.*, 324 NLRB 164 (1997), and Casehandling Manual Section 11302.1, and as recently noted by the Board in *The Ridgewood Country Club*, 357 NLRB No. 181, n.8 (2012), an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served, unless this requirement is waived by the parties entitled to the list.

SEIU urges that instead of requiring the employer to provide the voter list to the union within 2 days after the direction of election with the ensuing 10-day pre-election period, the Board should require the employer to provide a "preliminary" list of employees (including contact information) to the union within 2 days after it receives the union's election petition, and to update this list as necessary at the pre-election hearing. SEIU points out that if this alternative requirement were imposed, the 10-day practice

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[263] To be clear, the Board will not abdicate its responsibility to utilize its statutory authority to remedy any misuse that may occur following implementation of the voter list amendments merely because the possibility of remedial authority exists under a separate civil or criminal statutory scheme. Indeed, the Board remains mindful of the possibility raised by J.Aloysius Hogan (Testimony on behalf of the Competitive Enterprise Institute II) that the voter list amendments could be found by a court to preempt state statutes that might otherwise provide breach of privacy remedies. Nevertheless, the Board is unprepared at this time to say that no set of future circumstances will be appropriate for the Board to defer remediation to another state or federal judicial forum, and it cannot assume that every statute potentially relevant to misuse of the voter list will be preempted.

would be largely unnecessary since the union would have obtained the voter list at an earlier point in the process. SEIU also requests that a post-direction period of up to 10 days be available for the union to contact any employees who were added to the list at the pre-election hearing. However, the *Excelsior* Board justified the required disclosure in part because the interest in the fair and free choice of a bargaining representative must be deemed substantial when the regional director has *found* that a question of representation exists or the employer *admits* that such a question exists by entering into an election agreement. See *Excelsior*, 156 NLRB at 1245. Absent an election agreement, however, the director cannot find that a question of representation exists and direct an election until the hearing closes. Under the final rule, the hearing ordinarily will open 8 days after service of the notice. Accordingly, the Board rejects SEIU's request that the employer be required to furnish the other parties with the employee contact information 2 days after the filing of the petition—i.e., before either the director has found that a question of representation exists or the employer has admitted such a question of representation exists.

ALFA and SHRM assert that the waiver of the 10-day period should not be permitted on the grounds that the 10-day period is provided for the benefit of employees rather than unions, and that the 10-day period is always necessary to permit employees to receive information from their employers. In this respect, these comments assert that a waiver of the 10-day period contributes to the overall shortening of the period between the filing of a petition and the election effected by the rule amendments, which they oppose. SHRM, quoting *Excelsior*, emphasizes the priority of avoiding "a lack of information with respect to one of the [ballot] choices available."

However, the comments take the quoted language out of context: the Board imposed the requirement on the employer to disclose the list of employee names and addresses in order to maximize the likelihood that the voters will be exposed to the *nonemployer parties' arguments.* Thus, as shown, the *Excelsior* Board observed (156 NLRB at 1240) that in contrast to the union, "[a]s a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation." The Board went on to note that "by providing all parties with employees' names and addresses, we maximize the likelihood that all of the voters will be exposed to the arguments for, as well as against, union representation." *Id.* at 1241. Similarly, in upholding the requirement, the Supreme Court reasoned that the disclosure requirement allows "unions the right of access to employees that management already possesses." *NLRB v. Wyman-Gordon Co.*, 394 U.S. at 767. The *Excelsior* rule was accordingly found necessary to provide the *nonemployer* parties with an opportunity to communicate its message at least to the extent of having access to employees' names and home addresses. Neither the employer's nor the employees' interest is compromised by the union's exercise of the waiver of the 10-day period, since that results in a reduction only of the union's opportunity to further communicate with employees; and the union can be expected to exercise the waiver only when it is confident that employees have heard its message. The objection that a waiver of the 10-day period shortens the opportunity for employers to communicate with employees is therefore relevant not to the union's use of the *Excelsior* list, but rather to the other rule amendments at issue here. That objection is

addressed in connection with The Opportunity for Free Speech and Debate above.

SHRM also contends that if the waiver is retained, the waiving party should be treated as also waiving the right to file election objections based on the voter list, any failure of the employer to properly post election notices, "and any other potential procedural objection." We are not persuaded by the suggestion that nonemployer parties should not be permitted to waive all or part of the 10-day period to use the list unless they also agree to waive objections to an employer's failure to fulfill its obligations under the Board representation case rules. For example, the fact that a union believes that it needs only 5 days to communicate with the electorate if the employer furnishes it with an *accurate* list of the eligible voters' contact information certainly does not mean that the union has agreed that it only needs 5 days to communicate if the employer furnishes it with an *inaccurate* list of the eligible voters' contact information. Accordingly, a union should not be deemed to have waived its right to object to an employer's failure to provide an accurate voter list merely because it waived its right to use the list for the full 10-day period. Similarly, that a union agrees to waive part of the time for using the voter list certainly does not mean that a union should be held to have forfeited its right to object if the employer alters, or fails to post, the Board's election notice and thereby misleads, or fails to inform, employees as to the election details. In sum, although the final rule does not so state, we reiterate that consistent with current practice, an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served, unless this requirement is waived by the parties entitled to the list.

Sec. 102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing.

A. Introduction and Overview of Changes from NPRM

The Board proposed in the NPRM that, absent special circumstances, the regional director would set the hearing to begin 7 days after service of the notice of hearing. The Board further proposed that, with the notice of hearing, the regional director would serve the petition, the "Initial Notice to Employees of Election," the description of procedures in representation cases, and the Statement of Position form on the parties. The NPRM also proposed that the regional director specify in the notice of hearing the due date for Statements of Position, which would be due no later than the date of the hearing. The Board specifically sought comments on the feasibility and fairness of these time periods and the wording and scope of the exceptions thereto. 79 FR 7328.

The Board received a great number of comments about these matters. Comments criticizing the Statement of Position form attacked the scope of the information solicited by the form[264] and the due date for its completion,[265] as well as its binding nature and the consequences of failing to complete it.[266] Comments also criticized the proposed time frame for the pre-election hearing[267] and the wording and scope of the exceptions thereto.[268] Comments praising the proposals argued that the Statement of Position form

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[264] See, e.g., ACC; Chamber; Chamber II; NAM; NAM II.

[265] See, e.g., COLLE; Indiana Chamber; NAM; Chamber Reply; Chamber II.

[266] See, e.g., Chamber; Chamber II; NRF; MEMA.

[267] See, e.g., Washington Farm Bureau; CDW; ACC.

[268] See, e.g., Testimony of Russ Brown on behalf of LRI; Chamber Reply.

and proposed time frames largely mirror best existing casehandling practices.[269] However, some of these comments suggested that the Board require completion of the Statement of Position form even earlier.[270]

The Board has carefully considered the comments and, as explained more fully below, has decided to adopt the proposals with certain significant changes:

1) Except in cases presenting unusually complex issues, the regional director will set the hearing to open 8 days—rather than 7 days—from service of the notice of hearing excluding intervening federal holidays. However, the regional director may postpone the opening of the hearing up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances. Accordingly, parties will have at least 8 days notice of the hearing.

2) The Statement of Position will be due at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice of hearing. Although the regional director may set the due date for the position statement earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from the service of the notice, parties will have 7 days notice of the due date for completion of the Statement of Position form in all cases. The Statement of Position form will be due no later than at noon on the business day before the hearing so that it may serve its intended purposes of facilitating entry into election agreements

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[269] See, e.g., AFL-CIO; AFL-CIO Reply; AFL-CIO II; SEIU; NELP.

[270] See, e.g., SEIU and UFCW.

and narrowing the scope of any hearing that must be held, thereby enabling the Board to expeditiously resolve questions concerning representation.[271]

3) In the event the employer contends as part of its Statement of Position that the proposed unit is not appropriate, the employer will not be required to identify the *most similar* unit that it concedes is appropriate or provide information about the employees in such a unit. However, the employer will be required to state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it *an* appropriate unit, and the employer will be required to disclose information about the individuals in the classifications, locations, or other employee groupings that the employer contends must be added to the proposed unit to make it an appropriate unit, so that the petitioner will be able to evaluate the employer's position and decide whether to amend its petition to conform to the unit proposed by the employer.

4) The final rule will not require the employer to disclose as part of its Statement of Position any contact information for employees in the proposed unit or for employees in any alternative unit proposed by the Employer.

5) The final rule clarifies the required Statements of Positions in RM and RD cases to make them parallel to the required Statement of Positions in RC cases, which will facilitate entry into election agreements and narrow the scope of pre-election hearings in those cases.

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[271] Just as is the case with respect to the opening of the hearing, the regional director may postpone the due date for filing and service of the Statement of Position up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances.

6) The final rule states explicitly that the regional director may permit parties to amend their Statements of Position in a timely manner for good cause.

7) The final rule also retitles the proposed "Initial Notice to Employees of Election" as the "Notice of Petition for Election," and clarifies that within 2 business days after service of the notice of hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted**,** and shall also distribute it electronically if the employer customarily communicates with its employees electronically, and that failure to do so may be grounds for setting aside the election.

B. Statement of Position Form

The Board proposed in the NPRM that the Statement of Position form would solicit the parties' positions on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate. In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors. Finally, parallel to the proposed amendment to the contents of petitions described in relation to § 102.61 above, the non-petitioning parties

would be required to designate, in their Statement of Position, the individual who will serve as the party's representative in the proceeding, including for service of papers. 79 FR 7328.

The NPRM also proposed that, as part of its Statement of Position, the employer would be required to provide a list of all individuals employed by it in the petitioned-for unit. The list would include the same information described in relation to proposed § 102.62 except that the list served on other parties would not include contact information. If the employer contends that the petitioned-for unit is not appropriate, the NPRM proposed that the employer also would be required to file and serve a similar list of individuals in the most similar unit that the employer concedes is appropriate. 79 FR 7328-7329.

Under the proposed amendments, the list filed with the regional office, but not the list served on other parties, would also contain available email addresses, telephone numbers, and home addresses. The regional office could then use this additional information to begin preparing the electronic distribution of the Notice of Election discussed in relation to proposed § 102.67. 79 FR 7329.

As set forth in the NPRM, completion of the Statement of Position form would be mandatory only insofar as failure to timely file it would preclude a party from raising issues, such as the appropriateness of the unit, and participating in their litigation. A party would also be precluded from litigating most issues that it failed to raise in a timely filed Statement of Position. However, a party would not be precluded from contesting the Board's statutory jurisdiction to process the petition, or from challenging the eligibility of a particular voter during the election. 79 FR 7328, 7329, 7330, 7358.

The NPRM set forth the Board's view that the information requested by the Statement of Position would facilitate entry into election agreements and narrow the scope of pre-election hearings in the event parties are unable to enter into such agreements. The Statement of Position form would guide prehearing preparation, thereby reducing the time and other resources expended in preparing to participate in representation proceedings. The NPRM also explained that parties who enter into one of the forms of election agreement described in § 102.62 prior to the due date for completion of the Statement of Position would not be required to complete the Statement. 79 FR 7328-29.[272]

The NPRM provided that the Statement of Position would be due no later than the date of the hearing. 79 FR 7328. Some comments in favor of the Statement of Position argue that if the statement is to fulfill its intended purposes, then parties should be required to complete and serve it before the hearing. UFCW; SEIU; Testimony of Melinda Hensel on behalf of IUOE, Local 150 II. We agree. Requiring completion and service of the Statement of Position such that it is received by the parties named in the petition and the regional director at noon on the business day before the opening of the hearing will help facilitate meaningful negotiations concerning election agreements and will narrow the scope of preelection hearings in the event parties are unable to enter into election agreements. If the Statement of Position were not due until the opening of the hearing, then an employer would not need to disclose the information required by the

[272] The Board believes that parties may be able to enter into election agreements without awaiting completion of the Statement of Position when the petitioned-for unit is presumptively appropriate and when the nonemployer parties to the case are confident they are familiar with all the employees.

form to the petitioner until the hearing actually opened. As more fully explained below, this would mean that if, as is often the case, the parties attempted to negotiate an election agreement before the opening of the hearing, the petitioner would lack much of the information necessary to intelligently evaluate the merits of the employer's positions. In fact, the parties to a representation case frequently attempt to negotiate election agreements the day before a hearing opens as the immediate prospect of litigation—and its attendant costs—serves to focus the parties' attention on the matter at hand. Accordingly, requiring the filing and service of the Statement of Position at noon on the business day before the opening of the hearing should help the parties negotiate election agreements at a time when they typically are actively engaged in doing that very thing.

Requiring filing and service of the Statement of Position at noon on the business day before the opening of the hearing will also help the parties narrow the scope of the hearing in the event parties are unable to enter into election agreements, thereby saving party and government resources. For example, even if the parties are unable to enter into an election agreement, the Statement of Position will enable the parties to know which issues will actually be contested at the hearing, so that it can run more smoothly and efficiently. In addition, as Caren Sencer testified on behalf of Weinberg, Roger & Rosenfeld II by enabling the parties to know what the disputed issues are prior to the day the hearing opens, the requirement of a Statement of Position could result in parties' needing to pull fewer employees from the workplace to testify at the preelection hearing, which could result in fewer disruptions to the employer's business.[273]

[273] Other commenters such as UNAC/UHCP likewise complained that when employers refuse to tell unions what their issues are with a petition, unions are forced to prepare for,

The *Croft* Board held that 5 days (excluding intervening weekends and holidays) constituted sufficient notice for an employer to prepare for a hearing. *Croft Metal, Inc.*, 337 NLRB 688, 688 (2002). As explained below, the Board believes that the Statement of Position form largely requires parties to do what they currently do to prepare for a pre-election hearing."[274] Accordingly, under amended § 102.63(b)(1-3), a party will be provided with 7 calendar days (5 business days) notice of the due date for completion of the form, and the hearing will ordinarily be set for 8 days from service of the notice so that the parties have approximately 1 business day to use the information on the form before the hearing opens.

Although many employer comments attack the time frame for completion of the Statement of Position form, its binding nature, and the consequences of failing to complete it, even the Chamber does not object to the proposal that parties be required to take positions on at least some of the matters addressed by the Statement of Position form. For example, the Chamber states in both its comments regarding the 2011 NPRM and the 2014 NPRM that in general it does not object to the proposed requirement that the employer state whether it agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce, except with respect to the timing and legal effect of the Statement of Position form. Similarly, the Chamber does not object in general to the proposed requirements that the employer state

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and find witnesses to testify on, all possible issues. Testimony of Kuusela Hilo on behalf of UNAC/UHCP II.

[274] In some respects, the Statement of Position form requires less than what parties frequently do to prepare for a hearing. For example, completion of the Statement of Position form does not require witness preparation.

whether it agrees that the proposed unit is appropriate, and if the employer does not so agree, state the basis of its contention that the proposed unit is inappropriate, except with respect to the timing and legal effect of the Statement of Position form. Chamber; Chamber II. Nor does the Chamber object in general to the requirement that the employer raise any election bars, and state the name and contact information of its representative. Chamber; Chamber II.

It is not surprising that the Chamber does not object to the requirement that an employer state whether it agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce; that the employer state whether it agrees that the proposed unit is appropriate, and if the employer does not so agree, state the basis of its contention that the proposed unit is inappropriate; that the employer raise any election bars; and that the employer state the name and the contact information of its representative.[275] After all, requiring the employer to provide such information plainly facilitates entry into election agreements and helps narrow the scope of hearings in the event parties are unable to enter into election agreements. For example, if the employer explains why it believes that the proposed unit is not appropriate before the hearing, the petitioner may decide that the employer is correct and amend its petition to meet the employer's objections, thereby obviating the need for a hearing. Similarly, if the parties are unable to enter into an election agreement but the employer provides the requested commerce information and agrees that the Board has jurisdiction before the

[275] Although the final rule provides for Statements of Position from different parties depending upon the type of petition filed, most of the comments focused on employers completing forms in the RC petition context. For simplification of the discussion, we will focus on that context for the remainder of the section.

start of the hearing, the parties are spared the time and expense of litigating that issue.[276] Moreover, regional employees currently request such information prior to the opening of the pre-election hearing.[277] And, of course, requiring the employer to provide the name of, and contact information (including an email address and fax number) for, its representative will enable the Board and the other parties to utilize modern methods of communication to communicate with the employer to resolve election issues and transmit case-related documents.

To be sure, as comments by the Chamber (Reply) and CDW point out, the Statement of Position form is a departure from current practice because it mandates, rather than simply requests, that employers share such information prior to the hearing. However, the information sharing goals underlying the Statement of Position form are nothing new. Indeed, they are reflected in best practices promoted more than a decade ago, as well as the Casehandling Manual and the Hearing Officer's Guide. A model representation-case opening letter circulated in 1999 and the Casehandling Manual provide that regional personnel should arrange a conference at least 24 hours before the opening of the pre-election hearing, in order to explore entry into election agreements or to narrow the issues for hearing. In conjunction with the prehearing conference, regional

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[276] Because the Board must have statutory jurisdiction, the final rule clarifies in § 102.63(b)(2)(iii) and (b)(3)(i),(iii) that the employer's Statement of Position in RM and RD cases likewise must state whether the employer agrees that the Board has jurisdiction over it and provide the requested information about the employer's relation to interstate commerce.

[277] See Casehandling Manual Sections 11008, 11009, 11012, 11016, 11025, 11030, 11187, 11189, 11217; Guide For Hearing Officers in NLRB Representation and Section 10(k) Proceedings ("Hearing Officer's Guide") at 2-5, 14-18.

office personnel solicit many of the same positions requested by the form, and although not requiring information disclosure, they encourage parties to share all available information at the pre-hearing conference. In particular, they seek the employer's permission to share a list of names and classifications of all employees at issue with all parties because it is "an excellent aid in resolving many of the eligibility and unit questions that arise during case processing." See OM Memo 99-56, *http://www.nlrb.gov/reports-guidance/ operations-management-memos*; Casehandling Manual Sections 11012, 11016, 11025.1.

Similarly, the Hearing Officer's Guide provides that the hearing officer should meet with parties' representatives prior to the hearing to discuss the issues they intend to raise, and that in preparation for the hearing, the hearing officer should question the parties regarding jurisdictional facts, unit scope, unit composition, availability of a list of employee classifications, inclusions and exclusions, and the issues that will be raised at the hearing. Hearing Officer's Guide at 2-5. The Guide instructs the hearing officer to encourage the parties at the prehearing conference to share information and documents, and to discuss the nature of the evidence to be presented. Hearing Officer's Guide at 4-5. Put simply, the Board believes that the information at issue is so helpful and important for purposes of facilitating entry into election agreements and narrowing the scope of pre-election hearings that the employer should be required to produce the information or be precluded from litigating certain issues if it refuses.

The Board also finds that use of the Statement of Position form is consistent with *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994), where the Board observed,"[I]n order to effectuate the purposes of the Act through expeditiously providing for a

representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." Thus, the amendments give all parties clear, advance notice of their obligations, both in the rules themselves and in the statement of procedures and Statement of Position form. However, the amendments are not intended to preclude any other formal or informal methods used by the regional offices to identify and narrow the issues.

Although the Chamber does not object to some of the information solicited by the Statement of Position form, the Chamber and many others do object to the requirement that the employer provide certain items of information. For example, many comments object to the requirement that the employer: (1) describe the most similar unit that it concedes is appropriate if it contends that the proposed unit is not appropriate;[278] (2) provide the lists of employees in the proposed unit and in any proposed alternative unit;[279] (3) identify any individuals occupying classifications in the proposed unit whose eligibility to vote the employer intends to contest at the pre-election hearing, and the basis for each such contention;[280] (4) identify all other issues it intends to raise at the hearing;[281] and (5) state its position on election details such as the type, date, time, and location of any election.[282]

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[278] See, e.g., Chamber; Chamber II; ALFA; SHRM.

[279] See, e.g., SHRM; CDW; Prepared Testimony of David Kadela on behalf of Littler Mendelson.

[280] Chamber; Chamber II.

[281] Chamber; Chamber II.

[282] See, e.g., ALFA; Chamber; Chamber II.

Except as noted below, the Board is not persuaded by the comments objecting to the content of the information requested by the Statement of Position form. Thus, the Board believes that the Statement of Position form asks parties to provide information that would facilitate entry into election agreements and narrow the scope of hearings in the event parties are unable to enter into such agreements, so as to eliminate unnecessary litigation and help the Board expeditiously conduct an election if it determines that a question of representation affecting commerce exists. By doing so, the Statement of Position form helps the Board to fairly and expeditiously resolve questions concerning representation.[283] The Board also believes that the Statement of Position largely requires parties to do what they currently do to prepare for a pre-election hearing." Amy Bachelder, a former NLRB field attorney of 25 years, agrees. She testified that "the issues related to the required Statement of Position in the pre-election hearing reflect little more than what is current standard pre-election hearing practice."[284]

1. Identification of Alternative Unit

Numerous comments address the Board's proposal (in § 102.63(b)(1)(i)) that, in those cases in which the employer takes the position that the proposed unit is not an appropriate unit, it would be required to "describe the most similar unit that the employer

[283] The Board categorically denies the National Small Business Association's accusation that the Statement of Position form is intended to coerce employers into entering into election agreements. We take this opportunity to repeat that the form is designed to facilitate election agreements and to narrow the scope of pre-election hearings in the event parties are unable to enter into election agreements. Thus, the form is intended to help the Board avoid unnecessary litigation and expeditiously resolve questions concerning representation.

[284] See also National Nurses United (NNU) ("The requirement for a prompt Statement of Position simply memorializes what Board Agents assigned to processing petitions already try to do.")

concedes is appropriate." Many comments also address the Board's related proposal (in § 102.63(b)(1)(iii)) that, if the employer contends that the proposed unit is not appropriate, it would be required to file and serve a list of individuals in the "most similar unit" that it concedes is appropriate. As discussed in the NPRM, these proposed changes were intended to assist the parties in identifying issues that must be resolved at a pre-election hearing and thereby facilitate entry into election agreements. They were also intended to codify parties' existing practice where they contend that the proposed unit is not appropriate because the smallest appropriate unit includes additional classifications or facilities. See, e.g., *Westinghouse Electric Corp.*, 137 NLRB 332 (1962).

A large number of comments oppose these proposals. In general, those comments argue that an employer should not have to concede the appropriateness of any unit before evidence is presented at a hearing and the petitioner clarifies who specifically it wants included in, or excluded from, the unit. For example, NAM contends that the requirement that an employer posit an alternate appropriate unit "places the employer, as the *non-petitioning party*, in the extraordinary position of having to concede the appropriateness of a unit where it may oppose the propriety of the unionization effort and where it is without determinative evidence that its employees wish to be unionized." SHRM, among others, contend that this proposed requirement is vastly different from the Board's current representation case procedures, which, "[a]t most * * * require non-petitioning parties to take a position with respect to the appropriateness of the petitioned for unit."

Other comments, such as SHRM's, question the Board's statutory authority for requiring non-petitioning parties to define the "most similar unit" when the current rules permit parties to propose alternative units that merely may be appropriate under the

particular circumstances. Those comments further contend that the Board should explain the specific legal framework that it will use to determine whether the alternative units proposed by employers are, in fact, the "most similar" to the unit described in the petition. SHRM further seeks clarification that employers will not be required to identify *all* potentially appropriate units or else risk waiver of any arguments regarding such alternative unit descriptions at the hearing given the large number of potentially appropriate bargaining units and the potential difficulty in determining which alternative unit would be the "most similar."

Similarly, comments like CDW's object on the ground that the Act does not require that elections occur in the *most* appropriate unit. See *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) (the Board need not determine "that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'") (emphasis in original). CDW further contends that the proposed "most similar unit" rule unfairly favors unions by permitting them to choose among the complete array of potential "appropriate" units while, at the same time, limiting employers to a single potential unit that is "most similar" to what the union has proposed.

The Chamber argues that, unless and until the proposed unit has been subject to examination at a hearing and either been agreed upon by the parties or deemed appropriate by the Board, the proposed "most similar unit" requirement poses a significant burden on employers. Other comments, including the Chamber's, argue that the proposed requirement that an employer not only agree or disagree with the union's petitioned-for unit, but go further and make a proposal itself, "amounts to a forced

pleading and raises serious due process and free speech concerns."

At least one comment questions the need for the proposed "most similar unit" rule in the acute health care field. Thus, AHA asserts that there is no need for an employer in the acute health care field to recommend an alternative unit, as there are only eight appropriate units under the Board's regulations, and unions organizing under those rules are familiar with what constitutes an appropriate unit.

After careful consideration of all the comments concerning the "most similar unit" requirement proposed in the NPRM, the Board has decided to modify this aspect of the NPRM. Accordingly, the final rule will not require that, in those cases in which the employer takes the position that the proposed unit is not an appropriate unit, the employer "describe the most similar unit that the employer concedes is appropriate." Rather, in those cases where the employer takes the position that the proposed unit is not an appropriate unit, § 102.63(b)(1)(i) of the final rule will require the employer to "state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit."[285]

The Board believes that the final rule will assist the parties in identifying issues—including the appropriateness of the proposed unit—that must either be agreed to by the parties and approved by the regional director, or be resolved at a pre-election hearing.

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[285] The amendments thus leave employers "free to propose any alternative unit that may be appropriate under the particular circumstances." ACE II. The final rule also imposes similar requirements on the individual or labor organization in the RM context and on the employer and the certified or recognized representative of employees in the RD context. Amended §§ 102.63(b)(2)(i) and (b)(3)(i).

Specifically, identification of the precise objections to the appropriateness of a proposed unit before the pre-election hearing will facilitate entry into election agreements and narrow the scope of hearings in the event parties are unable to enter into such agreements. Accordingly, the Board believes that the requirement will enable it to more promptly resolve questions concerning representation.

To begin, the Board disagrees with comments, including SHRM's, that argue that the proposed unit-appropriateness requirements are vastly different from the Board's current representation-case procedures. Merely by virtue of explaining the alleged problems with the proposed unit, the employer typically must identify the necessary changes to that unit. Thus, for example, if an employer with multiple facilities says that a proposed single facility unit is not appropriate, the only way to explain or support this argument is to point out what it believes is inappropriate about it, i.e, that it excludes the employees of its other facility, located across the street, who do the same work under the same conditions and who frequently transfer back and forth between the two facilities. And the employer is free to later agree to the appropriateness of a different unit if the petitioner alters its position regarding the unit in response to the position taken by the employer. As such, the final rule merely codifies and standardizes the best party practices under the current representation case procedures and, therefore does not differ dramatically from the current procedures.[286] The biggest difference, as explained above, is that employers will be required, rather than requested, to share their positions on unit

[286] To the extent that comments perceived that the "most similar" language charted a different path from current practice, the change in the final rule should alleviate those concerns.

appropriateness, including inclusions and exclusions of certain job classifications, locations, or other employee groupings at noon on the business day before the hearing.

The Board believes that the change to the final rule language moots comments based on statutory concerns for the proposed "most similar unit" requirement since the Act does not require that elections occur in the *most* appropriate unit, only *an* appropriate unit. Some of those comments contend that it could be extremely difficult for non-petitioning parties to determine which possible alternative unit would be the "most similar" to the proposed unit, especially where the proposed rules do not define what is meant by "most similar."[287] In response, the final rule makes clear that an employer only has to specify the changes necessary to make *an* appropriate unit. And the Board hereby clarifies, in response to SHRM's comment, that under the final rule, a non-petitioning party that takes the position that the proposed unit is not an appropriate unit does *not* have to identify all potentially appropriate units; rather, it would merely have to specify the basis for its contention, and state the classifications, locations or other employee groupings that it believes must be added to or excluded from, the proposed unit to make it *an* appropriate unit (singular).

The Board concludes that the final rule will not significantly burden employers. As explained above concerning the Statement of Position form more generally, the Board believes that the time and resources expended by employers to determine which classifications, locations or other employee groupings must be added to or excluded from, the proposed unit to make it an appropriate unit are largely the same resources that would

[287] See, e.g., ACE; SHRM.

be expended in any event by a reasonably prudent employer in preparing to either enter into an election agreement or take contrary positions at a pre-election hearing under the current rules.

The Board also disagrees with AHA's assertion that there is no need for an alternative unit requirement in the acute health care field. Under the final rule, if an employer takes the position that the proposed unit is not an appropriate unit under the Board's regulations that specifically apply to the acute health care field, the employer will simply have to specify the classifications, locations or other employee groupings that it believes must be added to or excluded from, the proposed unit to make it an appropriate unit under those regulations.

Other comments, such as the Chamber's, object that the proposed rules absolve the Board of its responsibility to determine the appropriate unit. To the extent that the rationale of those objections also applies to the amended language of the final rule, the Board believes that they are nevertheless in error. As the Chamber's comment correctly points out, it is the Board's responsibility under Section 9(b) of the Act to make appropriate unit determinations. Nothing in the final rule changes that. Indeed, the final rule ensures that the Board will have sufficient evidence in the record to make an appropriate unit determination even if the employer fails to complete its Statement of Position. Specifically, if the employer fails to take a position regarding the appropriateness of a proposed unit that is not presumptively appropriate, then as discussed below in connection with § 102.66, the regional director may direct the hearing officer to permit the petitioner to introduce evidence regarding the appropriateness of the proposed unit.

Thus, contrary to CDW, the final rule does not permit the Board to direct an election in an inappropriate unit simply because the employer does not suggest an alternative unit in the Statement of Position. Moreover, contrary to comments by ALFA and ACE, among others, the Board has not shifted the burden. The final rule is consistent with *Allen Health Care Services*, 332 NLRB 1308 (2000), in which the Board held that even when an employer refuses to take a position on the appropriateness of a proposed unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The final rule thus permits the petitioner to offer evidence in such circumstances and merely precludes non-petitioners, which have refused to take a position on the issue, from offering evidence or cross-examining witnesses.

Likewise, there is no merit in Littler Mendelson's argument that, under the proposed rules, the unit-appropriateness question will necessarily turn on "the extent to which employees have organized," in violation of Section 9(c)(5) of the Act. Prepared Testimony of David Kadela on behalf of Littler Mendelson. In *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442 (1965), the Supreme Court made clear that, under Section 9(c)(5), the Board may consider the wishes of a petitioning union as a factor in the making a unit determination, but those wishes cannot be the *only* factor. Accordingly, in cases where the proposed unit is not presumptively appropriate, the Board cannot stop with the observation that the petitioning union proposed a particular unit, but must proceed to determine, based on community-of-interest factors, that the proposed unit is an appropriate unit. Again, nothing in the final rule changes that, and the deletion of the "most similar" language removes the application of the rule even further from Littler Mendelson's concern.

2. Initial Employee Lists

The NPRM proposed that the employer provide as part of its Statement of Position a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, to also provide a list of the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate. 79 FR 7355. The NPRM also proposed that the initial lists provided to the regional director, but not the parties, also include contact information for such employees. 79 FR 7355. Several comments, such as ALFA's, question why production of such employee lists (without personal contact information) is necessary until an appropriate unit is identified by the regional director. Others, like SHRM's, take issue with the necessity for multiple lists to be provided as part of the Statement of Position form when the employer proposes alternative groupings of employees to those petitioned for by the union. And COLLE claims (Testimony of Deakins on behalf of COLLE II) that the proposal to require employers to disclose names and job classifications as part of the Statement of Position conflicts with the NPRM proposal to defer deciding individual eligibility or inclusion questions under the so-called 20 percent rule. In contrast, SEIU's comment requests a blanket rule that employee lists complete with contact information be provided to the petitioner within 2 days of the petition being filed.

As discussed above, the final rule provides that in the event the employer contends that the proposed unit is not appropriate, the employer shall state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the

proposed unit to make it an appropriate unit. Amended § 102.63(b)(1)(i). The Board concludes that requiring the employer additionally to furnish a list of the names, job classifications, work locations, and shifts of the individuals in the proposed unit, a similar list for the individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and the names of the individuals**,** if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit will help the Board to expeditiously resolve questions of representation by facilitating entry into election agreements, narrowing the scope of the preelection hearing in the event that parties are unable to enter into an election agreement, and reducing the need for election-day challenges based solely on lack of knowledge of the voters' identities.

As an initial matter, the Board concludes that the lists will help ensure that all parties have access to the information they need to resolve disputes concerning the appropriate unit in which to conduct the election. As the comments of Caren Sencer (Testimony of Sencer on behalf of Weinberg, Roger and Rosenfeld II) and Supplemental Written Testimony of Thomas W. Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly demonstrate, one of the impediments to reaching an election agreement is that the parties sometimes talk past each other regarding the appropriate unit in which to conduct the election because, unbeknownst to them, they are using different terminology to describe the very same employees.[288] In our experience, parties also

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[288] Sencer testified:

> Frequently we have a problem where we talk past each other, The employee identifies themselves as a technician. The employer indentifying [sic] themselves as an associate. We say "Technicians are in" and they say, "We have no technicians, we only have associates." And we might

sometimes use different terms to describe work locations and shifts. The requirement that employers disclose the names, job classifications, work locations and shifts of employees will enable the parties to discover if that is the problem, and therefore assist the parties in entering into an election agreement.

Requiring employers to furnish this information to the nonemployer parties to the case plainly facilitates entry into election agreements and helps narrow the issues in dispute in the event the parties are unable to enter into election agreements even if the parties do not have a terminology problem. Under the current rules, the names of the individuals occupying classifications (or falling within other employee groupings) that the employer would like added to or excluded from the unit in many cases are unknown to the petitioning union. Often, the union also does not know where and on what shifts individuals in those classifications (or in those employee groupings) work, what they do, or even how many employees in each such classification (or employee grouping) there are. Accordingly, the petitioner cannot make an informed decision about whether it agrees with the employer's objections to the proposed unit and with the employer's proposed alterations to the unit. However, with information from such lists, a petitioner, in consultation with its employee supporters, should be able to make informed decisions

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> 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 * * *.

See also Supplemental Written Testimony of Meiklejohn on behalf of Livingston, Adler, Pulda, Meiklejohn & Kelly ("When the Employer finally disclosed the names of the employees in the 'disputed' job classifications, it turned out that we were in agreement on many of the employees. The first two days of hearing had, in large part, been devoted to issues that were not in contention.")

about whether to amend its petition to conform in whole or in part to the alternate unit suggested by the employer.[289] Accordingly, the requirement that the employer provide the information in question serves the goals of facilitating entry into election agreements which obviates the need for pre-election litigation and by narrowing the number of issues in dispute between the parties in the event the parties are unable to enter into an election agreement.

Indeed, as illustrated by comments like NNU's, without the information contained in the initial lists, petitioning unions are often "in the dark" as to the actual contours of any alternative units proposed by an employer, including the alternative unit's size. If parties are to reach reasonable agreements concerning which classifications, locations or employee groupings the bargaining unit should include, then nonemployers should have access to the information that is necessary for them to intelligently evaluate an employer's claim that certain classifications, locations or other employee groupings should be added to or excluded from, the petitioner's proposed unit. The Board is not persuaded that employers should be allowed to keep plainly pertinent information to themselves that would clearly assist parties to knowledgeably reach a voluntary resolution of the issue.

The Board also concludes, in agreement with AFL-CIO II, that the information will serve the salutary function of facilitating entry into *Norris-Thermador* agreements, whereby parties definitely resolve issues of eligibility by constructing a list of eligible

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[289] Similarly, if a petitioner petitions for a single facility unit and the employer contends that the petitioned-for unit is not appropriate because it does not also include the employees at its other facility, the employer must so state and provide the list of employees at the second facility.

voters and including it in their election agreement. See Casehandling Manual Section 11324 (discussing *Norris-Thermador Corp*., 119 NLRB 1301 (1958)). Such agreements obviously can expedite the period between the conduct of the election and the certification of the results by essentially limiting the potential universe of post-election disputes to those involving election objections. Put simply, it will be easier for the nonemployer parties to enter into a *Norris-Thermador* agreement if the employer is required to disclose as part of its Statement of Position the names, job classifications, work locations and shifts of employees in the proposed unit and for any alternative unit it proposes.

The Board further concludes that the production of employee lists complete with each employee's name, work location, shift, and job classification prior to the opening of the pre-election hearing furthers the second purpose articulated by the Board in *Excelsior*. Thus, production of the initial lists of employees should reduce the need for election-day challenges based solely on lack of knowledge of the voters' identities by giving the nonemployer parties more time to investigate and formulate knowledgeable positions about the eligibility of any such employees.

For all these reasons, amended § 102.63(b)(1)(iii) of the final rule requires the employer to provide a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, to (1) separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit and (2) indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate

unit.[290] And because, as shown, the information on the lists is useful for purposes beyond resolving individual eligibility issues, we reject COLLE's claim (Testimony of Deakins on behalf of COLLE II) that there is a conflict between the initial list disclosure requirements in § 102.63 and the Board's conclusion discussed below in connection with §§ 102.64 and 102.66 that resolution of disputes concerning the eligibility or inclusion of individual employees ordinarily is not necessary in order to determine if a question of representation exists, and, therefore, that such disputes can be resolved, if necessary, post-election.

To be sure, facilitating agreements and thereby avoiding litigation of these issues might best be served by mandating disclosure of employee list information (including contact information) within 2 days of a petition's filing (and well before the opening of a pre-election hearing), as SEIU suggests. However, as discussed above in connection with § 102.62, the Board does not believe it would be appropriate to require disclosure of employee contact information to the nonemployer parties to the case before the regional director finds that a question of representation exists (or the employer admits that a question of representation exists by entering into an election agreement). Moreover, given employer protests about their abilities to prepare for a hearing in 7 days (when a petition's filing actually takes them by surprise), the Board is hesitant to impose a blanket requirement that such disclosures should occur so quickly after every petition. At a minimum, the Board believes that stipulations concerning the unit will be better

[290] Senior Member Miller and Democratic House Members characterize the proposal to give such basic information to the nonemployer parties as a small but important improvement.

facilitated and any pre-election hearings will avoid unnecessary litigation, if the additional information is made available 1 business day before the hearing is set to open. Accordingly, the final rule provides that employee lists complete with full names, job classifications, work locations, and shifts, will be part of the Statement of Position, to be provided to the nonemployer parties to the case at noon on the business day before the opening of the pre-election hearing.

This amendment is yet another effort to build upon the existing best practices in the Board's regional offices. Regional personnel currently request from the employer—early in a representation case's processing—a list of employees' names and job classifications in the petitioned-for unit *and* each other unit that the employer contends is appropriate for purposes of checking the showing of interest *and* resolving potential eligibility and unit issues.[291] Because regions know that the provision of such information to all parties to the case is an excellent aid in resolving many of the eligibility and unit questions that arise during case processing, regions encourage the employer to permit the region to provide the lists to the petitioner and all other parties. See Casehandling Manual Sections 11009, 11025.1, 11030.5; OM Memo 99-56; Hearing Officer's Guide at 2-5. But employers currently are not required to provide such information. Indeed, an employer's refusal to do so currently has no legal consequences beyond inhibiting the

[291] For example, Casehandling Manual Section 11025.1 provides that in its initial communication with the employer, the region should request that the employer submit an alphabetized list of the full names and job classifications of the employees in the petitioned-for unit and, as the case develops, in any alternative units proposed by the employer. Casehandling Manual Sections 11025.1 and 11030.5 indicate that the purpose of such lists is not just to check the showing of interest, but also to resolve possible eligibility and unit issues.

Board agent's efforts to resolve eligibility and unit issues. The Board agrees with the AFL-CIO that parties should be able to more promptly resolve disputes if this information is required to be provided to both the Board and the nonemployer parties before any pre-election hearing has begun, and therefore the rule precludes the employer from litigating certain issues if the employer fails to share the information.[292] As discussed above, the final rule's provision for the initial employee list(s) being provided to the nonemployer parties no later than at noon on the business day before a pre-election hearing is set to open should, consistent with the AFL-CIO's analysis, make election agreements more likely and, in the event a hearing is required, reduce the issues to be litigated and therefore reduce cost and resources otherwise expended.

The Board rejects the notion, raised by SHRM and others, that the initial employee lists constitute improper unilateral pre-hearing discovery. In fact, as the AFL-CIO points out (Reply), the Statement of Position form—of which the initial employee lists are a part—constitutes the employer's response to positions already taken by a union in its petition, including: a description of the unit it desires to represent, categories of employees it believes should be included in or excluded from the unit, an estimate of the unit's total size, and the type, date(s), time(s) and location(s) of election it seeks. As

[292]The Board believes that the purposes of the form will best be realized if parties are faced with litigation preclusion for failing to complete it. However, the Board is equally persuaded that implementing the Statement of Position form would be an improvement over the status quo even if it were not coupled with the threat of preclusion, because we believe at least some employers would complete and serve the form if the Board's rules explicitly required it, and the form would guide hearing preparation. Thus, the Board would mandate service of the form by petitioners (102.60(a)), completion of the form by the nonpetitioning parties named on the petition (102.63), and introduction of the form at the opening of the hearing (102.66(b)), even if use of the form was not enforced through mandatory litigation preclusion.

described more fully in § 102.66 below, immediately after the Statement of Position is received into evidence at the hearing, the petitioning union is required to respond to each position raised in the statement. In the Board's view, there is no additional bilateral discovery that employers would need from a petitioning union to adequately contest unit issues at the hearing. After all, it is nearly always the employer who is in possession of the relevant evidence on virtually all issues likely to be contested at a pre-election hearing concerning the proposed bargaining unit. Thus, as discussed more fully below, the employer knows its employees' terms and conditions of employment because it established them. And, as shown, regions already ask employers for name and classification information.

As noted, the NPRM proposed that the initial lists provided to the regional director, but not the parties, would include employee contact information for the employees on the list(s). 79 FR 7355. Some comments, such as those filed by ACE and the Chamber II, question the need for that information. The NPRM proposed that the regional office would use the email addresses and telephone numbers from this separate list to begin preparing for electronic transmission of the election notice that is issued once the parties enter into an election agreement or the regional director directs an election. 79 FR 7329. ALFA criticizes the proposal on the grounds that the provision of greater information through the vehicle of initial employee lists will generate more issues for litigation.

However, as discussed below in connection with § 102.67, the Board has decided to reject the proposal in the NPRM to require the regional director to serve the affected employees with the election notice. Accordingly, the Board has likewise decided to reject

the proposal in the NPRM to require the employer to disclose to the regional director as part of its Statement of Position contact information for employees on the initial lists. Accordingly, employers will not be required to disclose employee contact information to either the regional director or the nonemployer parties to the case as part of its Statement of Position.

Cook Illinois, among others, express concerns about petitioners misusing information received from an initial employee list, and Littler Mendelson fears unions filing petitions simply to acquire employee information concerning units that it has no intention of representing. As expressed in § 102.62 above, the Board has not experienced significant misuse of information long-provided in *Excelsior* lists, and it does not reasonably expect misuse of employee names simply because that information will be provided prior to a direction of election. Nor does the Board expect such misuse simply because the employer will now be required to disclose job classifications, work locations, and shifts. If such misuse occurs, then the Board can provide a remedy. Currently, in appropriate circumstances, a regional director may limit a petitioner's ability to refile a petition as a condition for approving the withdrawal. See Casehandling Manual Section 11118. Similarly, as mentioned in § 102.60, the regional directors and the Board will continue to have discretion to reject a petitioner's request for withdrawal of the petition if the request would run counter to the purposes of the Act. See Casehandling Manual Section 11110.

Some comments argue that it will be particularly burdensome to produce multiple lists, but the Board believes that with modern record-keeping and retrieval technology,

the requirement can be easily met by most employers.[293] Whether the employer asserts that the unit should go far beyond what the petitioner proposed is, of course, up to the employer. For example, employers sometimes assert that a proposed unit containing a handful of employee classifications must instead be "wall-to-wall" (including every employee classification at the location) in order to be appropriate. If the employer's position on the unit is proven correct, or nearly so, then the full information about all or most of those employees would have to be provided pursuant to an amended petition anyway when the election is directed. If the employer's position is untenable, then the burden of producing a list of employees in that alternative unit is truly self-imposed because the employer chose to take an extreme litigating position. In any event, as discussed above, the final rule language no longer contains a requirement that the employer produce lists corresponding to "the most similar unit that the employer concedes is appropriate." So, to the extent some comments foretold a need to produce multiple alternative unit lists because of a lack of clarity concerning which concededly appropriate iteration was "most similar" to the petitioned for unit, that concern should be alleviated. Instead, if the employer contends that the unit described in the petition is inappropriate, the final rule clarifies that the employer need only produce one alternative list containing information about employees in the unit that the employer contends is an appropriate unit. Moreover, as discussed above, the Board has decided to reject the proposal that employers provide separate lists to the regional director containing contact information. In short, employers will be required to produce fewer lists under the final

[293] SHRM; ACE; ACE II; NAM II.

rule than the NPRM proposed, and the employer may file the same list(s) with the regional director that it provides to the nonemployer parties to the case.

We are not persuaded by SHRM's contention that there is little reason to require the initial employee lists because they will not necessarily reflect an accurate list of eligible voters. As already explained above, the initial lists provided to the nonemployer parties to the case should facilitate entry into election agreements and narrow the scope of pre-election hearings in the event parties are unable to enter into election agreements. Moreover, the nonemployer parties to a case may still find it prudent to begin their investigation of the eligibility of any unknown employees notwithstanding the possibility of turnover in the unit—between the date the initial lists are provided and the close of the eligibility period—in which the election is ultimately directed. That the initial lists may not entirely eliminate the need for election-day challenges in all cases certainly does not mean that provision of the lists cannot reduce the need for at least some election-day challenges in some cases. Thus, the Board believes that more information earlier in the process will avoid unnecessary delay in conducting elections and resolving questions of representation

Baker and McKenzie questions whether the employer will be obligated to update the employee information that it provides in connection with the Statement of Position when it provides the voter list pursuant to § 102.67 after an election is directed. The answer is "yes." To be sure, some of the information required to be produced as part of the Statement of Position is also required to be produced as part of the voter list in the event an election is agreed to or directed. For example, both the Statement of Position and the voter list amendments require employers to furnish the employees' names, job

classifications, work locations, and shifts. However, there may be employee turnover between the time the Statement of Position is filed and the eligibility date for voting in the election, even assuming the unit in which the election is conducted does not differ from the petitioned-for unit. It is also possible that employee job classifications, work locations, and shifts may change during this interval. It would hardly serve the purpose of maximizing the likelihood that all eligible voters be exposed to the nonemployer party arguments concerning representation if the employer were permitted to provide the nonemployer parties with an outdated list of employees. Nor would it serve the goal of avoiding challenges based solely on lack of knowledge of the identities of the voters if the employer were permitted to provide the nonemployer parties with a list of eligible voters containing outdated information about them.[294] Moreover, although an employer is not required to furnish the nonemployer parties with employee contact information as part of its Statement of Position, the employer is required to furnish the nonemployer parties with employee contact information shortly after the parties enter into an election agreement or the regional director directs an election. Accordingly, as the amendments to §§ 102.62(d) and 102.67(l) make clear, once an election is agreed to or directed, the employer must furnish the nonemployer parties to the case and the regional director with an (up-to-date) list of the full names, work locations, shifts, job classifications and

[294] The possibility of having to update employee information already existed under the prior rules. Thus, prior to the NPRM, employers were required to furnish a list of the names and home addresses of all eligible voters once an election was agreed to or directed even though, as noted, the region had previously requested the employer to submit an alphabetized list of the full names and job classifications of the employees in the petitioned-for unit and in any alternative units proposed by the employer. Casehandling Manual Sections 11025.1 and 11030.5.

contact information (including home addresses, available personal email addresses and telephone numbers) of all eligible voters, and in a separate section of the list the same information for those individuals the parties have agreed to permit to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.[295]

3. Identification of Individual Eligibility and Other Issues

As noted above, the NPRM proposed that as part of its Statement of Position, the non-petitioner identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote it intends to contest at the pre-election hearing and the basis for each such contention, and describe all other issues the non-petitioner intends to raise at hearing.[296] Comments criticize these requirements as imposing unfair and unrealistic burdens because, for example, it may not be possible to identify all legal issues until testimony is taken.[297]

The Board is not persuaded by these comments. It clearly facilitates entry into

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[295] Consistent with the amendments to § 102.62, the final rule provides that the list(s) of names shall be alphabetized and be in an electronic format approved by the General Counsel, unless the employer certifies that it does not possess the capacity to produce the list(s) in the required form.

The NPRM proposed in § 102.63(b)(1)(v), (2)(v), and 3(v) that the employer would be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing if the employer fails to timely furnish the lists of employees as part of the Statement of Position. 79 FR at 7355-7366. The final rule moves this language to amended § 102.66(d) in the paragraph entitled "Preclusion."

[296] The final rule uses the single term "proposed unit" in place of the two terms "proposed unit" and "petitioned-for unit" that the NPRM used in § 102.63 to describe Statement-of-Position obligations. 79 FR at 7355.

[297] See, e.g., Chamber; ACC.

election agreements and helps narrow the scope of the hearing if all parties state what they believe the open issues (including eligibility issues) are and what they seek to litigate in the event of a hearing. It is thus not surprising that Board agents currently ask the parties to do precisely that now. For example, prior to the scheduled hearing, Board agents attempt to secure the basic facts with respect to each potential issue, including bargaining unit and eligibility issues, and they use the payroll lists to resolve eligibility and unit issues. Casehandling Manual Sections 11009, 11012, 11016, 11025, 11187. As also shown, the hearing officer attempts to meet with parties' representatives prior to the hearing to discuss the issues they intend to raise, and the hearing officer is instructed to discuss at the pre-hearing conference "*each* party's position on *each* issue." Hearing Officer's Guide, 2-3, 5, 15-18 (emphasis added); OM Memo 99-56.

Given that Board agents are already asking the parties to state the issues (including individual eligibility issues) that they intend to raise at the hearing, we reject the argument that it is unfair and unrealistic for the Board to require the parties to do so as part of their Statements of Position. Some comments, such as the Chamber's and ACC's, complain that it will be difficult to identify individual eligibility questions if the union's petition describes the unit in vague terms. However, that situation could arise under the prior rules and the employer may move to amend its Statement of Position if union clarification of its positions at the hearing calls for more nuanced responses from the employer.[298]

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[298] UFCW requests that if an employer intends to contest at the pre-election hearing the eligibility of an individual on the basis of supervisory status, the employer should be required to identify in its Statement of Position the particular indicia of supervisory status that the individual possesses. The Board declines to require the employer to do so. The

4. Election Details

The NPRM also proposed that the Statement of Position form require the non-petitioning party to state its preferences with respect to the type, date(s), time(s), and location(s) of the election and the eligibility period. 79 FR7328, 7355. The final rule adopts this proposal.[299] This requirement eliminates unnecessary barriers to the expeditious resolution of questions concerning representation in two ways. First, it facilitates entry into election agreements. Parties enter into election agreements only if they agree, among other things, on the election details. It plainly serves the goal of making it easier for parties to promptly enter into election agreements if the petitioner is advised of the nonpetitioner's position on those matters prior to the hearing. Second, in

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Board notes in this regard that a union currently is not required to identify on its petition why it believes that the employees in its petitioned-for unit share a community of interest. We think that for purposes of determining whether to enter into an election agreement prior to the opening of a hearing, a union can begin to evaluate the propriety of an employer's contention that a particular individual is a supervisor even if the employer declines to identify the particular indicia of supervisory status in its Statement of Position. For example, the union may consult with its supporters about the authority of the alleged supervisor. The Board notes, however, that in the event a regional director permits litigation of individual eligibility issues, the employer bears the burden of proving that such individuals are in fact supervisors.

[299] The final rule makes explicit in amended §§ 102.63(b)(1)(i), (b)(2)(i), (b)(3)(i) that nonpetitioning parties must state their positions regarding election details in RM and RD cases as well as in RC cases. Amended §§ 102.63(b)(1)(i), (b)(2)(iii), and (b)(3)(iii) also require the employer to state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date, information which Board agents have long requested as it is useful for purposes of setting the eligibility date. See, for example, Casehandling Manual Section 11086.3_("The payroll period for eligibility should be designated as "the period ending," etc. Normally it should be the last period ending before the Regional Director's approval of the agreement.");_Casehandling Manual Section 11312.1 ("If there is an issue as to an unusual eligibility date, i.e., the use of a date other than the payroll period ending before the approval of the agreement or the Direction of Election, * * * the Board agent * * * should obtain the information necessary for resolution of this issue.")

cases where the parties are unable to enter into an election agreement, the amendment (in conjunction with the provision in § 102.66(g) that the hearing officer solicit all parties' positions concerning the election details) ordinarily will make it possible for the regional director to specify the election details in the direction of election, and to simultaneously issue the Notice of the Election with the Decision and Direction of Election, because the parties will have provided their positions on the election details prior to, and at, the hearing.

Currently, however, the regional director frequently is unaware of the parties' positions concerning the election details when the director issues the direction of election, and, not surprisingly, the decision and direction of election frequently does not specify those details. Instead, a Board agent must contact the parties after the direction issues to solicit their positions. After obtaining the positions, the regional director must decide those details and then draft and serve the official Notice of Election on the employer for posting. This takes time and can unnecessarily delay the election.

The Chamber objects that until the appropriate unit is determined, an employer cannot develop a reasoned position on the type, date(s), time(s), and location(s) of the election and the eligibility period. To the extent the Chamber is suggesting that the requirement is unreasonable because an employer may have one position on these matters if the petitioned-for unit is found to be appropriate, but another position if the director finds some other unit, such as an employer's alternate unit, appropriate, the Board disagrees. The employer will be permitted to state its preferences in the alternative. And as the amendments to § 102.66(g) indicate, the hearing officer shall solicit the parties' positions on the election details prior to the close of the hearing. Thus, if the petitioner

has modified its position on the unit during the hearing in response to the employer's Statement of Position, the employer will be able to present its position regarding any new unit sought by the petitioner. Moreover, given the relatively small size of bargaining units in representation cases, the Board anticipates that it will be the exceptional case, rather than the norm, where differences between the petitioned-for unit and any other unit would cause the employer to feel the need to take such alternative positions regarding the election details.[300]

ALFA characterizes this requirement as indicating a possible "abandonment of the long-established Board presumption favoring manual ballot elections at employers' premises." However, the new requirement is not intended to change Board policy in this respect.

C. Scheduling of Pre-Election Hearing

A great number of comments responded to the Board's call for comments on the feasibility, fairness and proper scope of the proposed exceptions to the NPRM provision that, absent special circumstances, the regional director would set the hearing to begin 7 days after service of the notice of hearing.[301] As explained in the NPRM, this proposal reflects the current practice of some regions, but would make the practice explicit and uniform, thereby rendering Board procedures more transparent and predictable. Under the

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[300] In addition, as noted below in connection with § 102.67, the final rule grants regional directors discretion to consult with the parties concerning election details after issuing a direction of election where unusual circumstances warrant, such as when the decision issues substantially after the close of the hearing, or the election is directed in a unit very different from that proposed by either the employer or the union.

[301] See, e.g., King & Ballow; GAM; Chamber; ALG; Arizona Hospital and Healthcare Association; COSE.

proposed amendments, parties served with a petition and description of representation procedures, as described in relation to proposed § 102.60, would thus be able to predict with a high degree of certainty when the hearing will commence even before service of the notice. 79 FR 7328.

In the NPRM, the Board proposed that the amendments would be implemented consistent with the Board's decision in *Croft Metals, Inc*., 337 NLRB 688, 688 (2002), requiring that, "absent unusual circumstances or clear waiver by the parties," parties "receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays." The amendments would thus not require any party to prepare for a hearing in a shorter time than permitted under current law. Rather, as the Board held in *Croft Metals*, 337 NLRB at 688, "By providing parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all."[302] Thus, contrary to PCA, the NPRM's choice of a 7-day time frame was not arbitrary. The existing regional best practice is to set the hearing in 7 days, and that practice comports with the minimum notice standard that has governed Board hearings for the last decade.

Several comments directly suggest that the Board should alter the proposed language governing exceptions to the hearing and Statement of Position time frames.

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[302] To be clear, the date of the petition's filing was irrelevant to the Board's holding in *Croft Metals*. Although the hearing had been scheduled to open 14 calendar days from the petition's filing in that case, it was undisputed that the employer did not receive notice of the hearing until 3 working days before the hearing was scheduled to open. Thus, the Board's holding in *Croft Metals*, just as its proposal in the NPRM, was keyed only to the time from service of the notice of hearing to the opening of the hearing itself.

Specifically, the Board proposed that the regional director would set a pre-election hearing to open in 7 days "absent special circumstances." Dissatisfied with the standard's perceived leniency, the AFL-CIO argues that "special circumstances" should be exchanged for "unusual circumstances" consistent with *Croft Metals*, while SEIU advocates that "extraordinary circumstances" would be the appropriate descriptor. Attorney Nicholas Karatinos urges the Board to allow regional directors to delay the opening of the hearing by 1-3 days upon a showing of hardship, and the Chamber (reply) submits that the Board should adhere to section 11082.3 of the Casehandling Manual's guidance that "requests for postponement of the hearing will be granted only for good cause." Maury Baskin, testifying on behalf of ABC II, argued that "sufficient cause, sometimes called good cause," is a "good standard." Curiously, COLLE opines that regional directors' rigid adherence to internal time targets make it a fool's errand to consider which exception language would be most appropriate. Thus, in COLLE's view "the Board's invitation to suggest language to guide exceptions to the target, even if it results in a stated test for doing so that is not unreasonable, is likely to be ignored in practice by the Regional Directors."

The Board has carefully considered the comments in this area—including COLLE's fatalistic assertion—and believes that the competing interests represented would best be balanced by altering the language in the proposed rules in several ways. First, as shown, consistent with *Croft Metals*' concern for adequate hearing preparation, § 102.63 of the final rule, will guarantee employers (and all nonpetitioning parties) 8 days notice of the hearing and 7 days notice of the due date for completion of the SOP form. Second, as also shown, in order to ensure that the Statement of Position serves its

intended purposes of facilitating entry into election agreements and narrowing the scope of any pre-election hearings that must be held, § 102.63(b)(1) of the final rule requires the form to be filed with the regional director and served on all parties such that it is received by them at noon on the business day before the opening of the hearing. Third, to allow for both changes listed above, § 102.63(a)(1) of the final rule provides that except in cases presenting unusually complex issues, the regional directors will set pre-election hearings to open, in 8 days from service of the notice excluding intervening federal holidays, not 7.[303] (Of course, if the 8th day would fall on a weekend or federal holiday, then the rule provides that the regional director shall set the hearing to open on the following business day.) Thus, based on the regional director's analysis of the complexity of the issues raised by the petition, a director will have discretion, even without a party filing a motion, to set the opening of the hearing beyond the normal 8-day time frame if the director concludes such extra time is warranted. Fourth, even if the director sets the hearing for the normal 8-day time frame, the director will retain discretion under § 102.63(a)(1) of the final rule to extend the opening of the hearing for up to 2 business days upon request of a party showing special circumstances. By cabining the regional directors' discretion to extend the hearing's opening to 2 business days, the Board trusts that contrary to concerns exhibited in some comments, the exception will not swallow the

[303]Although the Board has selected a hearing-opening baseline of 8 days from service of the notice, in part, to allow parties to use the completed Statement of Position form to explore entrance into election agreements and to try to narrow the scope of the hearing for approximately 1 business day before the hearing, the Board views an 8-day baseline as an independent improvement over the current regional variation in scheduling hearings. Accordingly, the Board would implement an 8-day hearing baseline even in the absence of the final rule's introduction of a Statement of Position form.

rule. Finally, because the Board is persuaded that there may be the exceptional case that should not go to hearing within that time frame, regional directors will retain discretion under § 102.63(a)(1) of the final rule to postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. The Board has concluded that the hearing scheduling amendment will help the Board to expeditiously resolve questions concerning representation because, absent an election agreement, the Board may not conduct an election outside of the 8(b)(7)(C) and 9(e) contexts without first conducting a pre-election hearing. The amendment will also render Board procedures more transparent and uniform across regions.[304]

Some union comments suggest that the Board specify that regional directors serve the notice of hearing immediately.[305] We decline to do so, because the regions, among other things, check the showing of interest prior to serving the notice. However, in our experience, regions currently are promptly serving the notices, and we anticipate that the directors will issue the notices as soon as is practicable. SEIU suggests that the regional director should mark any correspondence regarding the hearing notice as "urgent" so as to help ensure that the recipient will pay proper attention to it. The Board agrees, and has so indicated in its statement of the general course.

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[304] The IFA II argues that the timeline is too short in cases where a union's petition raises novel or complex issues. But, as the AFL-CIO II points out (Reply), such cases are relatively rare, and, as discussed above, the final rule permits the regional director on the director's own initiative to schedule the hearing to open at a later date if the case presents unusually complex issues. The final rule also provides a mechanism by which parties can request postponements if they need additional time to prepare for a hearing based on the novelty or complexity of the issues raised by the petition.

[305] UFCW; SEIU.

Many employer comments attack the proposed time frames. Although, as shown, the final rule provides that, except in cases presenting unusually complex issues, the hearing will open in 8 days—not 7 days—from the notice and that parties will always have at least 7 days notice of the due date for completion of the Statement of Position form, we shall assume that all comments opposing the proposed time frames would similarly object to the 8-day hearing / 7-day Statement of Position time frames.[306]

A number of comments assert, with little legal analysis, that the time frames for the opening of the pre-election hearing and completion of the Statement of Position violate employer due process rights.[307] However, due process does not require the Board to conduct a pre-election hearing. See *Inland Empire District Council v. Millis*, 325 U.S. 697, 707, 710 (1945). But, to be sure, Section 9(c) does require a pre-election hearing in the event parties are unable to reach an election agreement. And, in determining whether the notice given under the amendments is "due notice" as required by Section 9(c), the procedural due process case law provides some helpful analogies.

"[T]he timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), three factors are weighed in evaluating the adequacy of the notice: 1) the gravity of the private

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[306] The ACC, ACE II, and others found it troubling that the NPRM's proposals would seemingly allow the Statement of Position form to be due even sooner than 7 days from the regional director's service of the notice of hearing. As shown, however, under the final rule parties will always have a minimum of 7 days notice of the due date for completion of their Statements of Position.

[307] See, e.g, Seyfarth Shaw; NAM; Senator Alexander and Republican Senators II.

interest that will be affected by the official action, 2) the value of procedural safeguards, like additional time, in reducing the risk of error, and 3) the public interest—including the burden of additional time on the government.

The Board believes that the 8-day hearing / 7-day Statement-of-Position-form time frames provide parties with "due notice." The final rule provides in amended § 102.60 that the petition, which describes the unit sought, is served upon the employer as soon as it is filed in order to insure that the earliest possible notice of the pendency of a petition is given to all parties. Served together with the petition is an Agency form describing the Board's representation case procedures, and a copy of the Agency's Statement of Position form. Soon thereafter, the regional director serves the notice of hearing, specifically informing the parties of the time, place and subject of the hearing, and the deadline for the position statement. Amended § 102.63(a)(1) provides that except in cases presenting unusually complex issues, the hearing will be "8 days [after] the date of service of the notice [of hearing] excluding intervening federal holidays," and that the Statement of Position will be due at noon on the business day before the hearing, i.e. no sooner than 7 days from the notice of hearing.

The courts have held that less than 8 days notice constitutes due notice even when very substantial interests are at stake. For example, in *Wilkinson v. Austin*, 545 U.S. 209, 213, 216 (2005), the Supreme Court addressed the appropriateness of an Ohio procedure for placing prisoners in a "Supermax" prison. The procedures involved at least 48 hours written notice of the issues that would be addressed at the hearing. The unanimous Court held that the procedures satisfy due process. *Id.* at 229. In *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974), the Court held that before a hearing on inmate

discipline, "[a]t least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance [at the hearing.]" This advance notice was required in order to "give the charged party a chance to marshal the facts in his defense." *Id.*

In the federal context, employees facing termination for criminal conduct have a statutory right to "a reasonable time, but in any event not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of [their position]." 5 U.S.C. 7513(b)(2). This provision has been upheld against constitutional attack. *Perez v. Dep't of Justice*, 480 F.3d 1309, 1312 (Fed. Cir. 2007) (discussing cases). In *Schapansky v. Dep't of Transportation*, 735 F.2d 477, 480, 486-88 (Fed. Cir. 1984), for example, the Federal Circuit upheld the agency's firing of PATCO strikers after 7-days notice. See also *Darnell v. Dep't of Transportation*, 807 F.2d 943, 944-46 (Fed. Cir. 1986) (discharges not unlawful where air traffic controllers had 7 days to prepare and respond to notices of termination). And, in some cases, the interests at stake are considered of such minor significance and the value of additional preparation time so small that notice may be provided orally and contemporaneous with the hearing: "There need be no delay between the time 'notice' is given and the time of the hearing." *Goss*, 419 U.S. at 582 (suspension from school of 10 days or less).

Under the first *Mathews* factor, the arguable employer private interest at stake in pre-election litigation typically concerns the contours of the unit in which the election will be conducted, for the employer risks losing the right to deal directly with the unit employees. This interest, though important, is generally not so important to the employer as the question at stake in the election itself—that is, whether the Section 9 relationship

will form. To the extent that the employer has a legally cognizable interest in being free to deal with its employees directly, the pre-election hearing cannot deprive the employer of that freedom, because an employer loses the right to deal directly with bargaining unit employees only if the union wins the election. In any event, the time given is sufficient to account for even the serious interests under *Wilkinson*, *Wolff*, and *Perez*.

The Board also is of the opinion that the time frames in question pose little risk of error, the second *Mathews* factor. The Board has substantial experience applying the NLRA to various industries over the last 7 decades. The factual subject matter that is the focus of the hearing typically is not all that complex to litigate, and is intimately familiar to the employer, permitting very rapid preparation. As discussed, the Board need not direct an election in the most appropriate unit; it need only select *an* appropriate unit. In determining whether a group of employees constitutes an appropriate unit, the Board analyzes whether the employees in that unit share a community of interest by examining the employees' terms and conditions of employment, the employees' job duties, skills, training, and work locations, the employees' supervision, the extent of employee interchange and contact with one another, and the history of collective bargaining. The employer already knows all those things before the petition is even filed. Thus, the employer knows its employees' terms and conditions of employment because it established its employees' terms and conditions of employment. The employer knows its employees' job duties, work locations, and supervision, because it assigned those job duties, work locations, and supervisors to its employees. The employer knows its employees' skills because it sets the skill requirements for its positions, and hires and evaluates its employees. Similarly, the employer is aware of the collective bargaining

history of its employees, as well as the level of employee interchange and contact, and the training it provides for its employees.[308] The employer likewise knows its connection to interstate commerce, and whether the petitioned-for employees are covered by a collective-bargaining agreement or participated in a valid election in the preceding 12-month period, thereby barring an election. Even if preparation within "a few hours" would not be feasible in some cases, within a few days an employer should reasonably be able "to gather his thoughts and his evidence and to make an informed decision about the best way to respond" regarding the community of interest and other issues. *Staples v. City of Milwaukee*, 142 F.3d 383, 385-86 (7th Cir. 1998). Furthermore, in those cases where the timeline would be too short, the final rule provides exceptions so that, in practice, there should be no impact on the likelihood of error.

The Board also believes that the proposed time frames serve very important public interests, the third *Mathews* factor. Put simply, permitting a timely choice of representative is of inherent value under the Act; each delay in resolving the question

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[308] Some attorney commenters contend that when they start asking their clients questions about community-of-interest factors, such as employee interchange, they sometimes are met with "a blank look" and are told "research" is necessary. See, e.g., Testimony of Maury Baskin, on behalf of ABC II. The Board rejects any suggestion that this anecdotal testimony renders the time frames inappropriate. In the first place, in the case of very small employers where the owner directly supervises, and even works alongside, rank and file employees, it seems unlikely that the owner will lack direct knowledge of the facts necessary to take positions on the relevant issues. In any event, even if the owner or CEO who might meet with an attorney does not have first-hand knowledge of these things, it should not be particularly challenging or time-consuming to identify the manager who would have that information readily available. The Board is also confident that counsel can minimize the likelihood of a "wasted" first meeting simply by communicating in advance with the client that counsel needs to meet with someone with first-hand knowledge of such matters as what the petitioned-for employees do and how often they fill in for one another.

concerning representation causes public harm by denying the employees their right to bargain collectively through representatives of their own choosing—or denying employees their right to rid themselves of an unwanted incumbent representative. Moreover, Congress has already determined that the expeditious resolution of questions concerning representation "safeguards commerce from injury, impairment or interruption." 29 U.S.C. 151. As favorable comments indicate, providing such standard time frames also has the salutary effect of conveying to the employees that the Board, not the parties, is in charge of the process, and reduces chances of manipulation of the process by the parties.[309] The establishment of uniform time frames across the regions also has the salutary effect of affording employees' Section 7 rights the same treatment across the country.[310] The ability to exercise Section 7 rights should not turn on the particular region where the petition is filed. The timeline will also reduce the Board's expenses and make the process more economically efficient by discouraging abusive delays by the parties and encouraging prompt settlement without litigation.

For all the foregoing reasons, the Board believes that the time frames do not run afoul of constitutional due process or statutory due notice requirements. The Board also rejects the argument of many comments that, as a matter of policy, the time frames proposed in the NPRM are wholly insufficient,[311] virtually impossible,[312] draconian,[313]

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[309] See AFL-CIO; Testimony of Margaret McCann on behalf of AFSCME.

[310] See Joel Cutcher-Gershenfeld.

[311] Chamber; Chamber II.

[312] Ranking Member Enzi and Republican Senators.

[313] COLLE.

facially absurd,[314] unconscionable,[315] and just too short.[316] A major premise of many of these comments is that employers are completely unaware of any union organizing until the petition is filed, and therefore have not even begun to think about contacting an attorney or other advisor about how to respond to a petition. However, as discussed more fully above in connection with the opportunity for free speech and debate, these comments offer no reliable empirical evidence establishing that employers are frequently blindsided by the petition, and our experience and recent scholarly research suggest the opposite. Put simply, in the multitude of cases where employers are aware of the union drive before the petition, they have more, often much more, than 7 days to contact an attorney or advisor or otherwise begin to consider the issues listed on the Statement of Position form and to prepare for a possible hearing.

But even in cases where employers are caught completely unaware by the petition, we reject the notion that employers will be unable to consult advisors, complete the Statement of Position form, and prepare for the hearing in the allotted time frames. As some of the comments appear to concede, at least some employers facing petitions will have ready access to labor counsel. Although we recognize that some employers may not have labor counsel on retainer, in our experience, employers are able to promptly retain advisers and prepare for the hearing in relatively short order. For example, as the testimony of Russ Brown on behalf of LRI and of Michael Pearson, a retired NLRB field examiner with nearly 34 years of experience, indicate, under the Board's current rules,

[314] NCISS II.

[315] Indiana Chamber.

[316] GAM.

management consultants regularly survey public notice of the filing of representation petitions to offer their services to employers named in the petition, and they would continue to be able to do so under the final rule. Indeed, this is such a widespread practice that a regional director's model opening letter to employers to accompany service of the petition advises employers that they may be contacted by organizations or persons who seek to represent the employer before the Board in connection with the representation case, but that such persons or organizations do not have any "inside knowledge" or "favored relationship" with the Board. See OM Memo 99-56.[317] Similarly, the retired field examiner commented that it was his experience that even small employers were able to obtain competent legal counsel in short order. Michael Pearson supplemental statement; Testimony of Pearson.

Indeed, despite the comments to the contrary, the proposed time frames do not constitute a radical change from the status quo. Under the final rule, hearings ordinarily will be scheduled to open 8 days from service of the notice of hearing, but a party may for special circumstances move to postpone the hearing by up to 2 business days and for extraordinary circumstances for more than 2 business days. A 1997 Report of the Best

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[317] Ranking Member Enzi and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption under the Labor Management Reporting and Disclosure Act. See 76 FR 36178. Other commenters share this view. See, e.g., COLLE II; NRF II. The Board doubts the accuracy of this prediction given DOL's stated goal of publicizing the interactions between employers and anti-union consultants, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to DOL and not the NLRB. If changes in the legal landscape prevent parties from obtaining representation in a timely fashion, the Board will take that into consideration in determining whether to grant a party's request to postpone the opening of the hearing and, more generally, whether there is a need to revise the final rule's time frames.

Practices Committee provided that hearings should open between 10 to 14 days of the petition's filing. GC 98-1. A model opening letter in 1999 indicated that the hearing should open no later than 7 days after service of the notice, which should issue no more than 3 days after the filing of the petition. OM 99-56. The 2002 Board held that 5 business days notice was sufficient: "By providing parties with at least 5 working days notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all." *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002). And, according to ALFA, "[m]any Regions now schedule hearings within seven (7) days and are reluctant to grant any postponements." Most pre-election representation case hearings last only 1 day. Accordingly, the reality is that under the current rules, employers sometimes must already formulate, assert, and produce supporting evidence for all their positions before a hearing officer within 7 days even though the current rules do not mandate completion of a Statement of Position form.[318] Because the proposed time frames are not radically different from the status quo and the Statement of Position form largely requires an employer to do what it currently does to prepare for a hearing, the Board rejects the Bluegrass Institute's contention that the proposed time frames will result in significantly higher legal fees for employers.[319]

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[318] If, as some comments, including Fox Rothschild's, suggest, a party's preferred witnesses are unavailable and no other available witness has comparable knowledge, that party is free to move to postpone the hearing. The fact that special circumstances may exist to postpone some hearings, however, hardly warrants delaying the opening of all hearings. No matter when the hearing is scheduled to open, there is always the possibility that a witness may have a conflict. Similarly, counsel may also adjust the order of his planned presentation if it appears that the hearing may run more than one day and a witness is not available the second day.

[319]To be clear, consistent with the reasoning in *Croft Metals*, the Board would set the

The Board likewise rejects the notion that the amended scheduling provisions are unfair because if a union does not know the correct individual to serve, the petition might not be received by the proper recipient for a day or more. Cook-Illinois; California Healthcare Association (CHA) II. Thus, the same possibility existed under the prior rules. Moreover, as shown, the region will also serve the petition, the Statement of Position form, and related papers with the notice of hearing (§ 102.63(a)(1)), and it is the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate the election process. See Casehandling Manual Section 11010. The Board likewise rejects COLLE's suggestion that the Board is incapable of timely serving the notice of hearing on the person specifically named in the petition as the employer representative to contact. In any event, a nonpetitioning party may move to postpone the opening of the pre-election hearing (and the date for filing the Statement of Position) if it does not receive the notice of hearing (or the Statement of Position form) in a timely manner.

Although many comments complain about the consequences of failing to note something on the Statement of Position form, the fact of the matter is that the Board's prior rules and case precedent already required parties to raise contentions at specified times in the process or face preclusion. Indeed, even taking the preclusion provisions into

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baseline due date for the Statement of Position form at 7 days even in the absence of the hearing being scheduled in 8 days. Even if the pre-election hearing were to be held at a point more distant than 8 days from service of the notice, the timely sharing of the information contained in the Statement of Position form should encourage the timely entrance into election agreements and narrow the scope of the pre-election hearing in the event parties are unable to enter into such agreements, thereby contributing to the Board's goal of expeditiously resolving questions concerning representation.

account, the 7-day time frame for completion of the Statement of Position—which can be extended up to two business days for special circumstances and even further for extraordinary circumstances—does not constitute a material change from what could, and sometimes did, occur under the Board's prior rules and case precedent. Prior to the NPRM, the Board held that a hearing officer may refuse to allow an employer to introduce evidence regarding the supervisory status of employees in certain job classifications if the employer refuses to take a position on their status and their inclusion or exclusion from the unit. *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994). Similarly, under the rules in effect prior to the NPRM, a party could "not [in a request for review of a regional director's decision and direction of election] raise any issue or allege any facts not timely presented to the regional director." 29 CFR 102.67(d) (2010). Accordingly, even under the Board's prior rules, if a party failed to present facts or take a position before the hearing officer at a hearing, including one which opened and closed within 7-days of the notice, it could not do so later.[320]

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[320] There were numerous other examples prior to the NPRM of parties being required to raise contentions at specified times in the process or face preclusion. For example, under the rules in effect prior to the NPRM, a party could not challenge the eligibility of voters for the first time *after* an election by filing an election objection. *HeartShare Human Services of New York, Inc.*, 317 NLRB 611, 611 n.1 (1995), *enforced*, 108 F.3d 467 (2d Cir. 1997). See also *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994) (disagreeing with regional director, Board states that because employer refused to take a position at the pre-election hearing regarding the supervisory status of leadpersons and quality control inspectors and the regional director included those classifications in the unit, the employer may not, absent changed circumstances, challenge their votes on the basis that they are supervisors). Similarly, the courts have held that because the representation proceeding is the forum designed for parties to contest the appropriateness of the unit, any issue that can be raised in the representation case proceeding must be raised there and cannot be raised for the first time in response to a complaint alleging an unlawful refusal to bargain with a newly certified union. See *Pace University v. NLRB*, 514 F.3d 19, 20, 23-27 (D.C. Cir. 2008)(employer precluded from justifying its refusal to bargain with the

In view of the foregoing, the Board rejects as unfounded those comments that complain that the proposed time frames are so short as to inevitably cause parties to make mistakes.[321] Moreover, the Board indicated in the preamble to the NPRM that the hearing officer would retain discretion to permit parties to amend their Statements of Position for good cause. 79 FR at 7330. In its reply comment, the Chamber complains (Reply) that the proposed regulations themselves did not so provide.[322] In response to the comment, the Board has modified §§ 102.63 and 102.66 to provide that the regional director may permit parties to amend their Statements of Position in a timely manner for good cause.[323]

The dissent argues that the Statement-of-Position and preclusion provisions should be modified so that a party retains the right to address issues it did not raise in its initial Statement of Position in response to another party's contentions. No modification is necessary. The Statement of Position in large part constitutes a response to positions previously taken by the petitioner in its petition. For example, after a union files a petition which identifies the unit it seeks, the employer is required to state whether it

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certified union on the ground that the bargaining unit is inappropriate because employer did not raise its contention in the underlying representation case proceeding).

[321] See, e.g., COSE; LRI.

[322] Other commenters, such as U.S. Poultry II also appear to question whether the proposal would permit parties to amend Statements of Position at the hearing.

[323] As discussed below in connection with § 102.66, the Board received a number of comments complaining about the hearing officer's authority under the proposed amendments. Accordingly, the Board has decided that the regional director, rather than the hearing officer, should be the one to decide whether parties may amend their Statements of Position.

Comments addressing the consequences of failing to timely complete the Statement of Position are also addressed below in relation to § 102.66.

agrees that the petitioned-for unit is appropriate and whether there is a bar to conducting an election in that unit. The final rule also provides that the regional director may permit a party to amend its Statement of Position in a timely manner for good cause. And a party typically will have good cause to timely amend its Statement of Position to raise an issue that is presented by virtue of a petitioner's amending its petition. For example, it would constitute good cause for an employer to amend its Statement of Position to raise for the first time a contract bar issue if a petitioner amended its petition to change the petitioned-for unit from one which is entirely unorganized to one including employees who are covered by an existing collective-bargaining agreement. Contrary to the dissent, the good-cause standard governing amendments of statements-of positions is less strict than the *Pergament* standard governing whether the Board may find a violation that was never alleged in an unfair labor practice complaint. See *Pergament United Sales, Inc.*, 296 NLRB 333, 333-334 (1989) (Board may find a violation even in the absence of a specific complaint allegation if the unalleged violation is closely connected to the subject matter of the complaint and has been fully litigated). Thus, if a union seeks to amend its petition in a fundamental way, an employer may have good cause to amend its Statement of Position even if the amendment is not closely related to the original position taken by the employer. Moreover, it is not clear how many of the retrospective criteria used to determine whether *Pergament*'s fully-litigated prong has been satisfied could have any kind of coherence in the context of the position statement, particularly where amendment is sought early in the process.

At least one comment suggests that the Board should make clear that the Statement of Position is required only to alert the Board to issues that need to be decided

during the pre-election stage, not to foreclose legitimate issues that may be raised after the election. The Board believes that the proposed language already does so. Certainly, nothing in the NPRM or final rule suggests that a party must raise *post*-election issues, such as objectionable conduct, in its *pre*-election Statement of Position.

Although some employer comments concede that requiring completion of the Statement of Position form is a good idea in theory, many complain that it will be a bad idea in practice because the time frame for completing it—coupled with the preclusion provisions—will cause employers to list every conceivable issue on the form to preserve their right to litigate such issues, which will only lengthen (and increase the number of) hearings.[324] The Board disagrees. As shown, we do not believe that the information sought, time frames and preclusion provision are unreasonable. To the contrary, they are similar to what could occur under the Board's prior rules and case precedent. And, as shown, under existing rules, most hearings currently last only a day, and the Board's current rules and case precedent obviously are not preventing the parties from entering into election agreements.

Moreover, the Board is of the opinion that some of the comments suggest that the Board adopt time frames which bear no relation to reality. For example, NADA suggests that a 30-day period to complete the Statement of Position form is necessary. Other comments suggest a much shorter period is necessary, though not as short as the 7 day period set forth in the amendments. Thus, the Indiana Chamber suggests a period of 14-

[324] See, e.g., NADA II; Indiana Chamber; Miners; Pinacle Health Systems of Harrisburg; Vigilant; Associated Oregon Industries; Ohio Grocers Association II; US Poultry II; the Textile Rental Services Association (TRSA) II.

18 days. Put simply, we categorically reject any notion that the Statement of Position form will routinely require such long periods of time to complete. As shown, the Statement of Position form largely requires parties to do what they currently do to prepare for a pre-election hearing. The *Croft* Board held that 5 days (excluding intervening weekends and holidays) constituted adequate notice of such a hearing, and some hearings are already occurring within 7 calendar days.

We also find it significant that parties commit to enter into stipulated election agreements in 7 days or less. Under current rules, by entering into a stipulated election agreement, a party waives the right to raise issues at a pre-election hearing, and is precluded from later challenging matters such as the appropriateness of the unit. See, e.g., *Micro Pacific Development, Inc. v. NLRB*, 178 F.3d 1325, 1335-1336 (D.C. Cir. 1999). As is well known, approximately 90 percent of Board elections are conducted pursuant to election agreements. Frankly, the Board finds it difficult to believe that an employer would commit to enter into a stipulated election agreement—and thereby waive its right to raise issues at a pre-election hearing—before satisfying itself that the Board did in fact have jurisdiction over it, that there were no bars to an election, and that the unit described in the agreement was appropriate. Indeed, as Jonathan Fritts testified on behalf of CDW, "it's hard to say that negotiating a stip[ulated election agreement] would necessarily take less time than preparing for the hearing[.] I think that 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." Testimony of Fritts on behalf of CDW II.[325] In other words, the fact that parties currently agree to enter into stipulated election agreements in 7 days constitutes powerful evidence that employers can in fact obtain advisers and have the conversations necessary to formulate positions on the issues covered by the Statement of Position form (and that would be addressed at a pre-election hearing) in the time frames set forth in the final rule. And the Board is confident that, if parties do not enter into election agreements, the offer-of-proof procedures discussed below in connection with § 102.66 provide tools for the region to swiftly dispose of unsupported contentions that a party may set forth in its Statement of Position simply to avoid triggering the preclusion provisions.[326]

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[325] Accordingly, we reject the contention of the NGA that the time spent on the Statement of Position form would be better spent trying to reach an election agreement. Testimony of Kara Maciel on behalf of NGA II. As noted, the final rule gives the parties approximately 1 business day—after completion of the Statement of Position—to negotiate an election agreement. In response to concerns raised by CDW and others, the Board wishes to clarify that parties remain free to file joint postponement requests when they need additional time to finalize election agreements. Nothing in the final rule is intended to deprive regional directors of the discretion they currently enjoy to postpone hearings when they conclude that it is highly probable that the parties will be able to enter into an election agreement.

[326] Contentions that the Statement of Position form is analogous to an appellate brief, such as the one made by the National Meat Association, are wildly off the mark. The Statement of Position form does not require a party to provide any legal citations for its positions. For example, the Statement of Position form requests the employer to state its position regarding election details such as the type, date(s), time(s), and location(s) for the election, and the names of, and information about, the employees in the petitioned-for unit and in any alternative unit proposed by the employer. Providing such information does not require case citations. Similarly, the employer need not provide case citations in providing information about its connection to interstate commerce. Nor does an employer

The Chamber II argues that the Board should have analyzed the impact of the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *affd sub. nom*, *Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013) before making the proposals in the NPRM. However, *Specialty Healthcare* has not had, and is not likely to have, a significant impact on representation case processing by the Board. *Specialty Healthcare* sets forth a clear test for unit determinations when an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. *Specialty Healthcare*, slip op. at 14. These issues are not addressed by the NPRM, which does not affect the appropriateness of bargaining units. Likewise, *Specialty Healthcare* does not implicate representation-case procedures, which are addressed by the NPRM. Before *Specialty Healthcare*, regional directors were required to determine whether the petitioned-for unit was appropriate prior to directing an election but were not required to resolve all individual eligibility issues in the pre-election decision, and both remain true after *Specialty Healthcare*.

Some comments argue that *Specialty Healthcare* renders the proposed time periods too short.[327] They claim that more time is needed because *Specialty Healthcare*

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need to provide case citations to support a contention that an election is barred because the petitioned-for unit is covered by a collective-bargaining agreement or participated in a valid election within the preceding 12-month period. The employer likewise need not cite cases to explain why it disagrees that the petitioned-for unit is appropriate. We similarly reject contentions that completing the Statement of Position form should be subject to the same timelines as filing a response to a complaint in federal court. See Clear Channel Outdoor; MEMA.

[327] See, e.g., Chairmen Kline & Roe II; COLLE II; Chamber II; SHRM II; Acme-McCrary and 56 other representatives of small, medium and large businesses (Acme) II.

constitutes a dramatic change in the law and heightens the employer's burden when it wishes to contest the appropriateness of the petitioned-for unit. However, the premises for that argument were rejected in *Specialty Healthcare* and in the litigation which followed. See *Specialty Healthcare*, slip op. at 14 ("Our dissenting colleague is simply wrong when he says that '[t]oday's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction.' Our decision adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent."). Thus, *Specialty Healthcare* holds that "the traditional community of interest test * * * will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule," and sets forth a clear test—"using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit"—for those cases in which an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. *Ibid*. In such cases, the Board held, "the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees." *Ibid*.

When the employer subsequently challenged the *Specialty Healthcare* standard in the Sixth Circuit, the employer and amici such as COLLE and the American Health Care Association, raised the same argument that *Specialty Healthcare* had fundamentally changed the standard for determining whether the petitioned-for unit is appropriate. See 2012 WL 1387314 *3, *44 (employer brief); 2012 WL 1494162 * 3-4 (COLLE amicus brief); 2012 WL 1494157 *17 (American Health Care Association amicus brief). The Sixth Circuit squarely rejected the argument. See *Kindred Nursing Centers East, LLC v.*

NLRB, 727 F.3d 552, 561 (6th Cir. 2013) ("Kindred argues that this overwhelming-community-of-interest standard represents a 'material change in the law' and is not a mere reiteration nor clarification. But this is just not so. The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* II is not new.").

We also agree with the AFL-CIO that *Specialty Healthcare* makes preparation easier by clarifying the standard. Reply II. As the Board made clear in *Specialty Healthcare*, "employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria *before* the Board applies the overwhelming-community-of-interest standard to the proposed larger group." *Specialty Healthcare*, slip op. at 11 n.25 (emphasis added). And the employer possesses the evidence relevant to whether the petitioned-for employees constitute a readily identifiable group;[328] whether the petitioned-for employees share a community of interest,[329] and whether the employees it seeks to add share an overwhelming community of interest with the petitioned-for employees.[330] Accordingly,

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[328] For example, employees can be readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors. *Specialty Healthcare*, slip op. at 12. It is the employer who designates the job classifications and functions of its employees, and it is the employer who assigns its employees to their departments and work locations. The employer knows the skills of its employees because it sets the skill requirements for its positions, interviews applicants, and trains and evaluates its employees.

[329] Thus, it is the employer that establishes the terms and conditions of employment of the petitioned-for employees.

[330] The employer also establishes the terms and conditions of employment of those employees that it wishes to add to the petitioned-for unit. Because the employer establishes the working conditions of all its employees, it also possesses the evidence

we reject the contention that *Specialty Healthcare* renders the proposed time frames unworkable in the typical case. In any event, as discussed above, if a petition raises an unusually complex issue, the regional director has discretion to set the hearing for a later date on the director's own initiative, and parties remain free to file postponement requests themselves.[331]

A number of comments also request exemptions from the time frames proposed in the NPRM for particular employers, industries, or types of petitions. We deal with these in turn.

1. Small Employers

Many comments complain that the time frames are particularly unworkable for small employers because they may not have ready access to labor relations advice and have no experience with Board proceedings.[332] Some of these comments, such as that

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necessary to determine the extent to which the employees it seeks to add to the petitioned-for unit share a community of interest with the petitioned-for employees. See *Specialty Healthcare*, slip op. at 9 n.19 ("It is highly significant that, except in situations where there is prior bargaining history, the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. * * * *[M]ost of the facts at issue (lines of supervision, skill requirements wage rates, etc) are established by the employer," and the employer also typically draws "the lines across which those facts are compared," such as the lines between "job classifications . . ., departments, functions, facilities, and the like.").

Employers also possess the evidence necessary to determine whether a union has petitioned for a fractured unit, such as when a union petitions for all employees occupying a nominally distinct classification, but when the employees in that classification do not in fact perform distinct work under distinct terms and conditions of employment. See *id.*, slip op. at 13 & n.31.

[331] Comments about *Specialty Healthcare* are also discussed below in connection with § 102.66.

[332] See, e.g., Chamber; Chamber II; ALG; Arizona Hospital and Healthcare Association; American Feed Industry Association; NAM; NAM II; CDW; Precision Fittings II; NGA

filed by COSE, also complain that the amendments "disproportionately harm[] small businesses," because they do not have large staffs, and the requirements will distract them from running their businesses.

The Board declines to carve out an exemption for small employers in all cases. Prior to the NPRM, the Board did not have one set of best practices for cases involving small employers and a different set of best practices for cases involving large employers. Moreover, as shown, the timing of the pre-election hearing under these amendments will not be dramatically different from that which existed prior to the amendments. Small employers, no less than large employers, are intimately familiar with the factual subject matter of the Statement of Position form and the hearing. Thus, for example, they know their employees' terms and conditions of employment because they established those terms and conditions. As previously discussed, small employers, like large employers, may learn of the union drive prior to the petition, in which case they may well retain advisors before the filing of the petition. Even when the filing of the petition catches small employers by surprise, they may retain advisors in relatively short order. In some cases, they may well be solicited by firms providing labor relations advice. As we note above in connection with the section discussing the opportunity for free speech and debate, the well-documented growth of the labor relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly. And, small employers, like their larger counterparts, may be members of trade organizations which provide assistance in responding to the petition and in locating counsel. Testimony

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II; INDA II; NFIB II.

of Sencer on behalf of Weinberg Roger & Rosenfeld II; Testimony of Maciel on behalf of NGA II. As a former examiner commented, it was his experience that small employers, like their larger counterparts, were able to retain counsel in short order. Pearson supplemental statement; Testimony of Pearson. The rule also provides that parties may move that the opening of the hearing be postponed up to 2 business days based on special circumstances and may move that the hearing be postponed for an even longer period of time based on extraordinary circumstances.[333]

In the final analysis, however, the Board believes that small employers, like their

[333] In the case of a very small employer with only "one boss" who is scheduled to be away on business or a pre-planned vacation on the date of the hearing (CNLP), the employer remains free under the amendments to file a motion for postponement setting forth such matters as the precise nature of the conflict, the harm caused by rescheduling the other matter, and the length of the postponement requested. The same holds true if the only person in charge is away when the notice of hearing issues. We note in this regard that small business owners may be away or have conflicts when notices of hearing are served under the current rules.

RILA suggests that the time frames are inappropriate if the petition is filed during "holiday season" when retail stores are busy. The Board is confident that regional directors will continue to exercise their discretion appropriately in the event a retail employer files a motion to postpone a pre-election hearing. We note in this regard that a petition filed just before Christmas concerning the employees of a small, "mom and pop" retail store would appear to raise different considerations than a petition filed at the same time concerning the employees of a large department store.

We also reject Elizabeth Milito's testimony that the time frames are unfair because small employers "wouldn't have a clue" what to do after they receive an election petition. Just as was the case under the prior rules, employers and their advisors may communicate with the Board agent assigned to the representation case and may consult the Board's Web site which features links to a variety of useful information, including the Casehandling Manual. Moreover, as set forth above, the amendments provide that all employers will be served, along with the petition, documents describing Board representation procedures and providing information about their responsibilities and employee rights. The Statement of Position form will also guide the parties' preparation for any hearing that must be held. We believe that, as a result of these amendments, employers will have more guidance about "what to do" than they had under the prior rules.

larger counterparts, will be able to appropriately respond to the filing of a petition. Congress deemed it appropriate to grant Section 7 rights to employees, notwithstanding any resulting distractions to employers, even those of relatively small size. The Board is confident that small employers can locate competent advisors, should they choose to do so, within the time frames set forth in the rule.

Nevertheless, the Board emphasizes that the final rule fully protects small employers with respect to the two issues that, in our experience, most concern small employers. First, even if a small employer fails to complete a Statement of Position form, the small employer will be able to challenge the Board's statutory jurisdiction at any time. Second, even if a small employer fails to complete a Statement of Position form, it will be able to challenge the eligibility of a particular individual at the polls. See amended § 102.66(d). Accordingly, we reject as mistaken comments such as the National Meat Association's that argue that a small employer would waive "even objections to [statutory] jurisdiction" if they did not raise the issue in a Statement of Position.

2. Faculty Managerial Cases

ACE argues that the Board should exempt institutions of higher education from the Statement-of-Position and hearing time frames. As justification, ACE stresses the difficulty of adequately preparing in such a short period for a hearing to determine whether petitioned-for faculty are employees entitled to the protection of the NLRA or managers without Section 7 rights to organize and bargain collectively. ACE II. The Board declines to carve out a generalized exemption because the parties may be able to complete the Statement of Position form and adequately prepare for hearing in that time frame. For example, where the Board has previously found the faculty at issue to be

statutory employees and the faculty are seeking to decertify the union currently representing them, the Board believes that the 7-day Statement of Position, 8-day hearing time frame would be appropriate.

However, the Board recognizes that petitions concerning faculty may sometimes present unusually complex issues prompting regional directors on their own initiative—or upon a party's motion—to set the opening of the hearing beyond the normal time frame. The legal test for determining the managerial status of college faculty involves consideration of "a long list of relevant factors" (*LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 57 (D.C. Cir. 2004)); requires "an exacting analysis of the particular institution and faculty at issue * * * [which] is made more difficult by the fact * * * that the Act is not easily applied to labor relations in the university setting" (*Point Park University v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006)); and has met with some criticism in recent years. See *id.* at 47-51; *LeMoyne-Owen College v. NLRB*, 357 F.3d at 57, 61. In addition, the nonpetitioner bears the burden of proving that the petitioned-for faculty are managers, and such cases typically involve large units. Accordingly, while the Board declines to carve out an exemption for all faculty managerial cases, the Board recognizes that cases involving numerous or complex factual or legal issues may require additional time and the rules provide a process by which the regional director on the director's own initiative may grant more time as well as a process by which the parties themselves can request additional time.

3. Construction Industry

Some comments argue that the Board should exempt construction industry employers from the time frames governing the hearing and Statement of Position. For

example, AGC appears to argue that there is no need to more expeditiously resolve questions concerning representation in the construction industry because, in contrast to typical representation cases, the petitioned-for construction industry unit may already be covered by a collective-bargaining agreement pursuant to Section 8(f) of the NLRA.[334]

The Board disagrees for several reasons that it should carve out an exemption for cases involving construction industry employers. By definition, AGC's argument has no force whatsoever in those cases where the petitioned-for unit is not already covered by an 8(f) collective-bargaining agreement. Moreover, there are important reasons to expeditiously resolve questions concerning representation even in those cases where the petitioned-for employees are already covered by an 8(f) collective-bargaining agreement. Section 8(f) imposes no enforceable obligations in the absence of a collective-bargaining agreement. *Allied Mechanical Services, Inc.*, 351 NLRB 79, 83 (2007), *enforced*, 668 F.3d 758, 761, 771 (D.C. Cir. 2012). Accordingly, as soon as the 8(f) collective-bargaining agreement expires, the employer is free to unilaterally change the existing terms and conditions of employment and withdraw recognition from the union as the representative of its employees. By contrast, an employer that has a Section 9(a) relationship with a union is obligated to maintain the status quo even after expiration of its collective-bargaining agreement. See *American Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 211, 214-15 (4th Cir. 1998). In short, because a Section 9(a)

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[334] Section 8(f) of the NLRA (29 U.S.C. 158(f)) permits a construction industry employer and a union to enter into a collective-bargaining agreement even though a majority of the employees have never designated the union to be their collective-bargaining representative. By contrast, it is unlawful for a nonconstruction industry employer to enter into a collective-bargaining agreement with a minority union. See *American Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 214 (4th Cir. 1998).

relationship provides much greater protection to the unit employees than a Section 8(f) relationship, a union and the unit employees it represents pursuant to Section 8(f) have ample reason to desire a prompt resolution of the union's 9(a) status through a Board-conducted election. See *M&M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047, 1048-50 (D.C. Cir. 2006). Similarly, employees already covered by an 8(f) collective-bargaining agreement may wish to rid themselves of union representation entirely or change their representative. Indeed, it may be especially important to expeditiously resolve questions concerning representation in the construction industry because construction industry work can be of short duration.

In addition, the Board finds it highly significant that construction industry employers frequently perform services on a common job site alongside many other employers and groups of employees. The Board is all too aware of how quickly labor strife between one employer and a union on a common site can spill over and embroil neutral employers, employees, and the public. See, e.g., *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 677-80, 688-92 (1951); *NLRB v. International Union of Elevator Constructors*, 902 F.2d 1297, 1303-05 (8th Cir. 1990). Accordingly, the Board is unable to conclude that the public has less of an interest in the expeditious resolution of questions concerning representation in construction industry cases than it does in cases arising outside the construction industry.

Alternatively, AGC, AGC II, ABC, ABC II, and many others argue that the time frames are simply not feasible for construction industry employers because of the

complexity of issues arising in that industry and the industry's unique nature.[335] For example, ABC argues that it will not be possible in the allotted time for them to produce the lists of employees in the petitioned-for unit and in their alternative units, because there is a special eligibility formula in the construction industry that requires analysis of 2-years worth of payroll records.[336]

The Board disagrees. As the comment filed by The Building and Construction Trades Department, AFL-CIO (BCTD) notes, the amendments do *not* require the employer to produce a preliminary *Daniel*/*Steiny* eligibility list as part of its Statement of Position. Instead, it need only produce lists of the individuals employed at the time the petition is filed, and the employer will have 7 days notice of the due date for the Statement of Position. In a contested case, an eligibility list complying with the *Daniel* / *Steiny* formula need only be produced 2 business days after an election is directed, which will be more than a week after service of the petition. ABC's and AGC's related comment—that they cannot produce the final voter list within the allotted time—is addressed in the sections dealing with the voter list issues generally.

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[335] See also C.J.M. Services, Inc. II; Sundt Construction II; Knife River Materials.

[336] As discussed above in connection with § 102.62, that formula, commonly known as the *Daniel* / *Steiny* formula, provides that, in addition to those eligible to vote in Board conducted elections under the standard criteria (i.e., the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc*. ("*Steiny*"), 308 NLRB 1323, 1326-27 (1992), and *Daniel Construction Co., Inc.* ("*Daniel*"), 133 NLRB 264, 267 (1961), *modified,* 167 NLRB 1078, 1081 (1967).

Comments, such as those filed by AGC and ABC, also argue that such an early hearing is not feasible because petitions involving construction industry employees present complex matters, such as the appropriate unit, disappearing and expanding units, craft issues, and the supervisory status of working foremen. However, as BCTD notes, Board precedent on these issues generally is long-standing and settled. Individual supervisory issues may end up being deferred, because, as discussed below in connection with §§ 102.64 and 102.66, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved prior to the election. And the number and difficulty of the issues presented will vary from case to case. Thus, for example, the issues are likely to be fewer in cases where an incumbent union seeks to convert its relationship from 8(f) to 9(a).[337] Accordingly, the Board disagrees that it should carve out a categorical exemption for all construction industry employers.

4. Businesses Whose Owners or Employees Speak Foreign Languages

CNLP comments that the time frames are unworkable in those cases where English is the not the primary language of the employer or the petitioned-for employees. We decline to carve out a categorical exemption for all such cases. Employers operating

[337] Some comments, such as those filed by AGC also suggest that it will be difficult for construction industry employers to comply with the proposed time frames because they have decentralized workplaces. However, the Board is confident that, with modern methods of communication such as email, fax machines, and cell phones, the party responsible for responding to the Statement of Position can obtain the necessary information to complete the form in a timely manner notwithstanding the employer may operate at more than one location. For example, if the person responsible for completing the form needs records stored at a separate location, those records can be faxed (or scanned and then emailed) quickly.

in the United States are subject to the laws of this country whether English is the owner's primary language or not. Some business owners and employees can understand English even if English is not their primary language. Even if certain business owners do not understand English at all, they may have advisors or assistants who do. In any event, employers remain free to file motions for postponements based on their particular circumstances. Similarly, employers (and unions) remain free to request that Board notices and ballots be translated into foreign languages based on the needs of unit employees. Casehandling Manual Sections 11315. In short, the Board is confident that regional directors will continue to reasonably exercise their discretion to accommodate the language needs of the public.

5. Other Industries

A host of other comments argue that additional industries, such as the healthcare industry, require exemptions from the standard time frames, but they offer no persuasive justifications.[338] For example, AHA complains that hospitals don't have the capability to focus solely on the completion of the Statement of Position for an entire week, that the rule will place putative supervisors and unit members under a week of scrutiny, and that the accelerated time frames will distract from the employers' primary goal of treating and caring for ill patients. However, they offer no specifics to support any of these assertions. For example, the comments do not show, and the Board does not believe, that hospitals will actually ask the medical professionals who provide direct patient care to complete the employee lists or decide what positions to take regarding a proposed bargaining unit.

[338] See, e.g., AHA; AHA II; CHA II; Con-way; Testimony of Robert Garbini on behalf of NRMCA.

Nor does the Board believe that the Statement of Position and hearing will require an entire week of preparation that necessitates employer surveillance. The employer already knows what its employees do because it assigns those duties to them, and the employer already knows their terms and conditions of employment because it established them. Indeed, AHA appears to take the position elsewhere in its comment that the Board's healthcare rule (29 CFR 103.30) eases the parties' task by setting forth the appropriate units for cases involving acute care hospitals.[339]

6. Decertification Cases

The SEIU argues that an exception should be created for decertification cases, because, in essence, the interest in expedition is not as strong where an employer is free to withdraw recognition without having to go through the election process. The Board disagrees. The Act makes no distinction as to the importance of expedition in these two situations, and we decline to do so here. Although employer agreement—whether by voluntary recognition, or withdrawal of recognition, or even by procedural election agreements—can eliminate delay in the effectuation of NLRA policies, as discussed elsewhere, this does not alter the NLRA policy in favor of timely representation procedures where no such agreement is forthcoming. The Board takes seriously its responsibility to expeditiously resolve questions concerning representation in the decertification context just as in an initial organizing context.

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[339] ALFA argues that the time frames are unworkable if the petition is filed when a facility "is in the middle of a state audit." Suffice it to say that the Board believes that a small facility may be able to show special circumstances, and even extraordinary circumstances, for requesting a postponement of a pre-election hearing if the hearing were scheduled during a state audit that required the administrator's attention, depending on the size and particular factors involved.

D. Mandatory Posting of Notice of Petition for Election

The final rule adopts in amended § 102.63(a)(1) the NPRM proposal that, along with the petition, notice of hearing, description of procedures in representation cases, and the Statement of Position form, the regional director will serve a revised version of the Board's Form 5492, currently headed Notice to Employees, on the parties. 79 FR 7328.[340] The revised form will bear the heading "Notice of Petition for Election," (rather than the proposed heading "Initial Notice to Employees of Election") to reflect that, as discussed below, although such petitions seek Board-conducted elections, elections do not necessarily occur in all cases after the filing of such petitions. It will specify that a petition has been filed, as well as the type of petition, the proposed unit, and the name of the petitioner; briefly describe the procedures that will follow, and, just as it does currently, it will list employee rights and set forth in understandable terms the central rules governing campaign conduct. The notice will also provide employees with the Board's Web site address, through which they can obtain further information about the processing of petitions. Unlike current Form 5492, which has no posting requirement, the final rule requires employers to post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted,[341] and

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[340] As discussed above in connection with § 102.60, the Board has concluded that service of the description of representation case procedures will aid non-petitioning parties' understanding of those procedures.

[341] The NPRM proposed that the employer post the proposed Initial Notice (which the final rule retitles as the "Notice of Petition for Election") where notices to employees are "customarily posted," and that the proposed final notice (which the final rule accordingly retitles as the "Notice of Election") be posted in "conspicuous places." 79 FR 7354, 7359. Upon reflection, the Board has concluded that to help ensure wide dissemination of the important information contained therein, the "Notice of Petition for Election" should be

employers who customarily communicate with their employees electronically will also be required to distribute the notice electronically. The final rule further requires that employers maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The Board has concluded that the Notice of Petition for Election will provide useful information and guidance to employees and the parties.

Baker & McKenzie question how soon the employer must post the notice to comply with the proposed requirement that the Employer "immediately" post it. While we believe that most employers should be able to comply with this provision by posting the notice on the same day that it is received, the Board will not judge an employer to have failed to comply with this provision so long as the notice is posted within 2 business days of receipt, and, accordingly, the final rule states that the employer shall post the Notice of Petition for Election within 2 business days after service of the notice of hearing. We leave to future case by case adjudication whether some unforeseen set of factual circumstances might justify an employer taking a longer period of time to post the notice. Accordingly, amended § 102.63(a)(2) further provides that the employer's failure properly to post or distribute the Notice of Petition for Election "may be" grounds for setting aside the election when proper and timely objections are filed. Just as is the case with respect to the election notice, a party may not object to the nonposting of notices if it is responsible for the nonposting, and likewise may not object to the nondistribution of

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posted "in conspicuous places, including all places where notices to employees are customarily posted," and amended § 102.63(a)(2) so provides. The Board has decided to use similar language in amended § 102.67(k) to describe where the "Notice of Election" should be posted.

the Notice of Petition for Election if it is responsible for the nondistribution.

Baker & McKenzie also question whether an employer needs to electronically distribute the notice to all employees in the petitioned-for unit if the employer customarily communicates with only some of the employees through electronic means. If the employer customarily communicates with all the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to the entire unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer need only distribute the Notice of Petition for Election electronically to those employees.

Few objections were expressed as to the merit of the mandatory posting requirement, and several comments emphasize the importance of timely informing employees of an impending representation proceeding and their related rights.[342] Prompt posting of the Notice of Petition for Election will inform not only the employees whose representation is at issue but also the employer of the rights and protective requirements imposed by the NLRA in the representation context. Such posting will also assist employees in obtaining additional information on a timely basis.

However, GAM expresses concern that the requirement to distribute the notice electronically if the employer customarily communicates with its employees electronically could lead to additional grounds for filing objections to the election and subsequent litigation. The possibility was also raised of unequal treatment of potential

[342] AFL-CIO; SEIU; GAM.

voters, since some will have electronic access and some will not.

The Board recognizes that electronic distribution to employees does not, in itself, guarantee that all eligible voters will receive the Notice of Petition for Election. However, electronic distribution will act in conjunction with the posting of paper notices in conspicuous places, including all places where notices to employees are customarily posted. Unless the employer can be shown to have departed from its customary practice in electronic distribution, there will be no basis for an objection and the requirement will only increase the desired flow of information to employees.

ALFA suggests that the notice should warn employees that final decisions have not been made regarding the unit and whether an election will be conducted. The Board agrees that such warnings would accurately describe the reality when the regional director furnishes the notice to the employer for posting and distribution. Accordingly, the final rule provides in § 102.63(a)(2) that the Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted.

ALFA and the ACC complain that the Board should have included a copy of the proposed Notice in the NPRM to permit the public to comment on it. However, as discussed in the NPRM, it has long been the Board's practice to ask the employer to voluntarily post a generic notice of employee rights—Form 5492—upon the filing of a petition; the NPRM described how the Board proposed to modify the contents of that notice, such as by including a description of the proposed unit and the name of the petitioner (79 FR 7324, 7328); and that notice was available to the public. Accordingly, the Board rejects any suggestion that the public was unable to comment on the proposal

to require the employer to post a notice after the filing of a petition but before an election is agreed to by the parties or is directed by the regional director.[343] As it has in the past, the Board will use due care in crafting the notices, the notices will be consistent with the regulations the agency has promulgated, and the notices will comply with all existing laws and regulations governing notices utilized by federal agencies, including the Paperwork Reduction Act as separately analyzed. Should a party feel there is any error in a notice as promulgated, it can bring that to the attention of the Board.[344]

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[343] The Chamber II notes that the District of Columbia Circuit and the Fourth Circuit struck down a Board rule requiring all employers subject to the NLRA to post a notice of employee rights in the workplace. The rule also noted that the failure to post could be found to be an unfair labor practice. 76 FR 54006 (August 30, 2011). The Board rejects any suggestion that the litigation over that rule calls into question the validity of the proposal to require an employer to post a notice upon the filing of a representation petition. As the text of amended § 102.63 makes clear, an employer will only be required to post the Notice of Petition for Election if it is the subject of a pending representation petition, and the failure to post the notice will not constitute an unfair labor practice. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.19 (D.C. Cir. 2013) ("Our conclusion here does not affect the Board's rule requiring employers to post an election notice (which similarly contains information about employee rights) before a representation election[.] Because the failure to post the required election notice does not constitute an unfair labor practice but may be a basis for setting aside the election, see *id.* § 103.20(d) [of the Board's prior rules], the rule does not implicate § 8(c).") *overruled in part, American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc). And the Fourth Circuit specifically distinguished the rule, which applied regardless of the pendency of an NLRA proceeding, from instances in which representation petitions have been filed with the Board. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 154, 156, 161, 163 (4th Cir. 2013).

[344] For much the same reasons, the Board likewise rejects the Chamber's complaint that the Board should have included the proposed Statement of Position form in the NPRM. As discussed, the NPRM set forth at length the specific information that the proposed form would solicit. 79 FR 7328-7329. Indeed, the Chamber concedes that "the substantive information to be supplied by the employer for the Statement of Position Form is described in the proposed amendments." The numerous detailed comments that were submitted on the Statement of Position proposal belie any suggestion that the failure to provide the form itself in the NPRM deprived any party of the ability to comment on the proposal. The Board similarly rejects the Chamber's additional complaint that the

Sec. 102.64 Conduct of Hearing

As explained in the NPRM, the proposed amendments to § 102.64 were intended to ensure that the pre-election hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question of representation. 79 FR at 7329. The final rule largely embodies the proposed amendments.

In amended § 102.64(a), the Board expressly construes Section 9(c) of the Act, which specifies the purpose of the pre-election hearing. The statutory purpose of the pre-election hearing is to determine if there is a question of representation.[345] A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.[346] If the regional director concludes, based on the record

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Board should have published the proposed description of representation case procedures in the NPRM. As the NPRM indicated, this description is a substitute for and an expanded version of Form 4812—and serves to inform interested parties of their rights and obligations in relation to the representation proceeding. 79 FR 7326, 7328, 7329. Form 4812 was publicly available during the comment period.

[345] Thus, Section 9(c)(1)(A) of the Act provides that the Board must provide for a hearing if it has "reasonable cause to believe that a question of representation affecting commerce exists," and that the Board must direct an election if it finds, based on the record of that hearing, that "such a question of representation exists."

[346] A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot arise under the Act unless the employees in the unit are employed by an employer covered by the Act. Thus, if any party contests the Board's statutory jurisdiction or contends that the Board has declined to exercise its full, statutory jurisdiction over the employer, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot exist under the Act if there is a bar to an election, so the regional director must rule on the existence of a bar prior to directing an election if any party raises the issue. Similarly, a proper petition can be filed by "an employee or group of

created at the hearing, that such a question of representation exists, the regional director should direct an election in order to resolve the question.[347]

Amended § 102.64(a) makes clear that, as discussed in the NPRM (79 FR at 7322, 7329), resolution of disputes concerning the eligibility or inclusion of individual employees ordinarily is not necessary in order to determine if a question of representation exists, and therefore disputes concerning individual employees' eligibility to vote and inclusion in the unit ordinarily need not be litigated or resolved before an election is conducted. Such disputes can be raised through challenges interposed during the election, if the disputed individuals cast a ballot, and such disputes can be both litigated and resolved, if necessary, post-election. The proposed rule provided in § 102.64(a) (79 FR at 7356):

> If, upon the record of the hearing, the regional director finds that such a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes

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employees or any individual or labor organization." Thus, if a petition is filed by an entity and any party contends that the entity is not a labor organization, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. Moreover, the final rule ensures that the nonemployer parties will have the opportunity to present evidence on these issues even if the employer declines to take a position on them. Thus, amended § 102.66(b) makes clear that even if the employer declines to take a position on issues such as the appropriateness of a petitioned-for unit that is not presumptively appropriate, the regional director has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary.

[347] The hearing officer will retain authority to develop the record relevant to any such contention using the ordinary procedures already in use, which are designed to avoid burdening the record with unnecessary evidence. For example, current rules give the hearing officer discretion to require a party to make an offer of proof before admitting evidence.

> concerning the eligibility or inclusion of voters that might affect the results of the election.

The final rule provides in § 102.64(a):

> Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists, the director shall direct an election to resolve the question.

The change in language is due to the final rule not adopting the "20-percent rule" as discussed below in relation to § 102.66. For that reason, the language, "unless specifically provided otherwise in these rules," has been removed. As more fully explained in relation to § 102.66 below, the amendment expressly preserves the regional director's discretion to resolve or not to resolve disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election. It also grants the hearing officer authority to exclude, at the regional director's direction, evidence concerning such disputes on the grounds that such evidence is not relevant to the existence of a question of representation. In addition, because a question of representation cannot exist under the Act if there is a bar to an election, see, e.g., *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1007 (1958) (contract bar); *Randolph Metal Works, Inc.,* 147 NLRB 973, 974-75 (1964) (election and contract bars); *Seven Up Bottling Co.,* 222 NLRB 278, 279 (1976) (certification bar), the Board has concluded that it is superfluous for the regulatory text to refer to both the existence of a question of representation and the absence of a bar. Accordingly, the final rule provides that if the regional director finds that a question of representation exists, the director shall direct an election to resolve the question. See Section 9(c)(1) of the Act ("If the Board finds upon the record of such hearing that such a

question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.")

The proposed rule provided in § 102.64 (b) (79 FR 7356):

> Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all genuine disputes as to material facts in order to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

The final rule provides in § 102.64(b):

> Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.

The Board has removed the "genuine disputes as to material-facts" language drawn from Federal Rule of Civil Procedure 56 in order to avoid the confusion evident in some comments concerning the role of the hearing officer. Therefore, amended § 102.64(b) will provide, "Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act." However, amended § 102.64(a) more clearly specifies the Board's or regional director's "duties under Section 9(c) of the Act," and thus gives clear guidance to hearing officers concerning what evidence is and is not necessary to develop a "full and complete record" upon which the Board or regional director can discharge those duties.

Few comments address the proposed amendments to § 102.64(a) and (b). Those that do, question our construction of Section 9(c) of the Act in § 102.64 on the grounds

that litigation of disputes concerning individual employees' eligibility to vote and inclusion in the unit should be permitted pre-election. These comments are addressed below in relation to § 102.66.

The Board's current rules provide that the hearing officer may, in the officer's discretion, continue the hearing from day to day or adjourn it to a later date. Although, as noted above, there was a great deal of comment about the proposal to open the pre-election hearing 7 days from service of the notice absent special circumstances, there were few comments about the proposal that the hearing continue day to day until completed absent extraordinary circumstances. 79 FR at 7356. The AFL-CIO and AFSCME submitted comments in support of this change. The AFL-CIO argues that "[t]his requirement is critical because the current process, under which a 3-day hearing may extend over several weeks, presents opportunities for manipulating the timing of the election and maximizing the delay before any election is conducted." AFSCME adds that the amendment should not be controversial and benefits all parties by injecting certainty into the election process. The AFL-CIO also points out that the proposed amendment would merely codify a "best practice" listed in the General Counsel's 1997 "Report of Best Practices Committee—Representation Cases."[348]

However, the AFL-CIO suggests that the Board should require parties to meet a stricter standard when seeking a continuance. Thus, the AFL-CIO suggests that instead of requiring that hearings be conducted on consecutive days "absent extraordinary

[348] See also Section 11082.3 of the Casehandling Manual, which provides that parties should be advised "that the hearing, once commenced, will be conducted on consecutive days, until completed, unless the most compelling circumstances warrant otherwise."

circumstances," the Board adopt the language "unless the most compelling circumstances warrant otherwise," which is used in Section 11082.3 of the Board's Casehandling Manual. In its reply to the AFL-CIO's comment, the Chamber requests (Reply) at a minimum that the Board not abandon the "extraordinary circumstances language." However, the Chamber also urges the Board to temper the requirement of consecutive day hearings. Thus, it suggests that the Board merely require a moving party to demonstrate "good cause" for a hearing's continuance. According to the Chamber (Reply), employers and their counsel will need to reschedule other matters in order to comply with the 7-day hearing and statement-of-position provisions, which will increase the chances of scheduling conflicts if the hearing runs more than 1 day.

After careful consideration, the Board has decided to adopt the proposed amendment with one change in amended § 102.64(c) to make clear that the regional director, rather than the hearing officer, will make the determination in question. The Board concludes that continuing the pre-election hearing from day to day until completed (absent extraordinary circumstances) will remove unnecessary barriers to the expeditious resolution of questions concerning representation because, absent an election agreement, the election that is designed to answer the question of representation cannot be held until the pre-election hearing is completed. Thus, eliminating unnecessary delay in concluding the pre-election hearing helps eliminate unnecessary delay in resolving questions of representation. The amendment also allows the Board, rather than the parties, to control the hearing schedule, and renders hearing scheduling more transparent and uniform across regions.

The Board declines to adopt the Chamber's suggestion—that the Board adopt a

good-cause standard for granting continuances—as largely being unnecessary in light of the final rule's adoption of revised language in § 102.63 regarding the scheduling of the pre-election hearing and the changes to § 102.64 and § 102.66 regarding the conduct of the hearing. As set forth in amended § 102.63, except in cases presenting unusually complex issues, the pre-election hearing will be scheduled to open 8 days from service of the notice, but parties may request that the hearing be postponed up to 2 business days for special circumstances, and for more than 2 business days for extraordinary circumstances. Moreover, the amendments to § 102.64(a), clarifying the purpose of the hearing and that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted, and the amendments to §§ 102.63 and 102.66, providing for Statements of Position and responses to the Statements of Positions, should serve to streamline the hearing, making it less likely that the hearing will continue over several days.

The Board likewise declines to adopt the AFL-CIO's suggestion. Once the hearing opens, the Board expects that the hearing will continue from day to day until completed. In the Board's view, the "extraordinary circumstances" language does not differ significantly from the existing Casehandling Manual guidance of "the most compelling circumstances," and in any event, is more widely used and easily understood by parties who are new to Board processes.

However, the Board has concluded that just as the regional director is the one who decides when the pre-election hearing will open, the regional director, rather than the hearing officer, should be the one to decide whether a pre-election hearing that requires more than 1 day should continue day to day until completed or should be adjourned to a

later date. Accordingly, amended § 102.64(c) provides that the hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.[349]

Sec. 102.65 Motions; Intervention; Appeals of Hearing Officer's Rulings

Consistent with the effort to avoid piecemeal appeals, the NPRM proposed to narrow the circumstances under which a request for special permission to appeal would be granted. More specifically, the NPRM proposed that such an appeal would only be granted under extraordinary circumstances when it appears that the issue will otherwise evade review. To further discourage piecemeal appeals, the NPRM proposed that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Consistent with current practice, the NPRM provided that neither the filing of a request for special permission to appeal nor the grant of such a request would stay an election or any other action or require impounding of ballots unless specifically ordered by the Board. The NPRM also proposed that neither a regional director nor the Board would automatically delay any decision or action during the time permitted for filing motions for reconsideration, rehearing, or to reopen the record. 79 FR at 7329, 7356-7357.

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[349] The proposed amendment to § 102.64 (b) also omitted pre-existing language providing that the hearing officer also has discretion to adjourn the hearing "to a different place, by announcement thereof at the hearing or by other appropriate notice." Upon reflection, the Board has decided to reject the proposed amendment, as hearings sometimes need to be relocated. However, consistent with the amendment vesting the regional director, rather than the hearing officer, with the authority to decide whether a hearing that requires more than a day to complete should continue day to day or whether it should be adjourned to a later date, the final rule also provides in amended § 102.64(c) that the regional director has discretion to adjourn the hearing to a different location by appropriate notice.

Upon reflection, the Board has decided not to adopt the proposed narrower standard to govern requests for special permission to appeal rulings of a hearing officer to the regional director. In the pre-election hearing, the hearing officer is developing a record upon which the regional director can make a decision. Moreover, the relation between hearing officers and regional directors is, in practice, more informal than that between a trial and appellate court or between a regional director and the Board, with hearing officers not infrequently seeking advice from the regional director during a hearing. For these reasons, the final rule does not apply the proposed narrower standard to requests for special permission to appeal rulings of hearing officers to the regional director. However, to discourage such piecemeal appeals, the final rule makes clear in amended § 102.65(c) that a party need not seek special permission to appeal in order to preserve an issue for later. Consistent with current practice, the amendments provide that the filing of a request for special permission to appeal will not stay the proceedings unless otherwise ordered by the regional director.

Consistent with the interpretation of Section 3(b) of the Act that our colleagues advanced in their dissent to the NPRM (79 FR at 7343 & n.108), the Board has also decided to substitute the request for review procedure, as modified as described below in connection with § 102.67, for the request for special permission to appeal procedure that the NPRM proposed to apply with respect to rulings made by the regional director prior to the close of a hearing in proceedings governed by Subpart C of Part 102. Accordingly, the Board has decided to amend §§ 102.65 and 102.67 to clarify that any party may request Board review of any action taken by the regional director under to Section 3(b) of

the Act except where the Board's rules provide otherwise.[350]

Few comments were submitted on the proposed amendments to § 102.65. AHCA contends that the Board provides no examples of issues that would meet the standard for "otherwise evades review." Constangy argues that limiting appeals to extraordinary circumstances, combined with preventing regional directors from staying proceedings to consider motions for reconsideration, will effectively result in the total preclusion of review of pre-election rulings, preventing appeal of legitimate disputes. AHCA and ALFA argue that special permission to appeal serves little purpose because it will not stay proceedings. The Board need not address these comments at length because, as shown, the Board is not adopting the proposed narrower standard to govern requests for special permission to appeal hearing officer rulings to the regional director; the Board likewise has rejected the proposed narrower standard to govern appeals (to the Board) of regional director rulings made prior to the close of the hearing; and, as discussed below in connection with § 102.67, the Board has decided to permit parties to request review of a regional director's post-hearing decision and direction of election prior to the election. Moreover, the final rule does not preclude the regional director or the Board from granting a stay. Rather the final rule merely provides in amended § 102.65(c) and amended § 102.67(c) that such filings will not result in an automatic stay.

The final rule adopts the proposed amendments to § 102.65(e)(3). The Casehandling Manual provides in Section 11338.7 that a Board agent should exercise

[350] For example, if a party enters into an agreement pursuant to § 102.62(c) of this subpart, providing for final regional determination of both pre- and post-election disputes, a party may not file a request for review of any regional director action.

discretion in deciding whether to allow a vote under challenge when a party claims that changed circumstances justify a challenge to voters specifically excluded, or included, by the decision and direction of election. Accordingly, the final rule adopts the proposal in the NPRM that if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending.[351]

The final rule makes a few additional amendments to § 102.65. Under the Board's prior rules, the regional director could rule on motions to intervene and to amend petitions or could refer such motions to the hearing officer. 29 CFR 102.65(a), (b) (2010). As discussed below in connection with § 102.66, the Board received a number of comments criticizing the authority of the hearing officer at the pre-election hearing. Upon reflection, the Board has decided to amend § 102.65(a) and (b) to provide that the hearing officer shall rule on motions to intervene and to amend petitions only as directed by the regional director. Thus, the amendments make clear that it will be the regional director who decides whether a party may intervene and whether a petition may be amended. The final rule also moves a sentence about the record from § 102.65(c) into amended §

[351] Upon reflection, the Board has concluded that Board agents should have discretion to challenge individuals who are explicitly included in the direction of election when a party has filed a motion as set forth above instead of having to rely on the moving party.

102.65(a). The final rule's other amendments to § 102.65 conform the provisions of this section to the remainder of the amendments.[352]

The NPRM also proposed that any person desiring to intervene in a representation case be required to complete a Statement of Position. 79 FR 7329, 7356. Upon reflection, the Board has decided to reject the proposed amendment. Intervention happens in a wide variety of circumstances and so regional directors should have discretion to follow the procedure that best facilitates development of the record in a particular case.

Sec. 102.66 Introduction of Evidence: Rights of Parties at Hearing; Preclusion; Subpoenas; Oral Argument and Briefs

In the NPRM, the Board proposed a number of amendments to § 102.66. The proposed amendments were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. As explained below, the final rule adopts only some of the proposals.

The NPRM proposed that hearing officers limit the evidence offered at hearings to that evidence which is relevant to a genuine dispute as to a material fact. The proposed amendments further provided that if, at any time during the hearing, the hearing officer determined that the only genuine issue remaining in dispute concerned the eligibility or

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[352] Because as discussed below in connection with § 102.67, the Board has decided to eliminate the transfer procedure, the final rule also omits references to the transfer procedure that previously appeared in § 102.65. The final rule also omits the now outdated references to "carbon copies" in this and other sections, and provides that extra copies of electronically-filed papers need not be filed with the Board. These amendments update the Board's representation case rules to reflect modern methods of communication.

inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer would close the hearing, and the director would permit those individuals to vote subject to challenge.

The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, statements of position, and then would require the petitioner to respond to any issues raised in the statements of positions, thereby joining the issues. The NPRM further proposed that after the issues were joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact.

The Board proposed that a party would be precluded from raising any issue that it failed to raise in its timely statement of position or to place in dispute in response to another party's statement, subject to specified exceptions.

The Board proposed in the NPRM that parties be permitted to file post-hearing briefs only with the permission of the hearing officer.

Finally, the NPRM proposed, consistent with existing practice, that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the 5 days provided in Section 11(1) of the Act.

A. Rights of Parties at Hearing; Disputes Concerning Less Than 20 Percent of the Unit

Section101.20(c) of the Board's pre-NPRM Statement of Procedures provided in

pertinent part, "The parties are afforded full opportunity [at the pre-election hearing] to present their respective positions and to produce the significant facts in support of their contentions." And the Board's pre-NPRM rules provided in § 102.66(a):

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

As discussed in more detail below, these provisions had been interpreted to give parties a right to produce evidence about issues that are not relevant to whether there is a question of representation.

The NPRM proposed to eliminate § 101.20 (and the rest of Subpart C of Part 101) and to amend § 102.66(a) to state as follows:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows:
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> * * * *

The Board also proposed to require the hearing officer to bar litigation of disputes concerning the eligibility or inclusion of individuals comprising less than 20-percent of the unit (the so-called "20-percent rule"). Thus, § 102.66(d) of the NPRM provided:

> (d) Disputes concerning less than 20 percent of the unit. If at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be

> eligible to vote, the hearing officer shall close the hearing.[353]

The proposed amendments were designed to maximize procedural efficiency by ensuring that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. As discussed in the NPRM, whether or not a particular individual falls within an appropriate unit and is eligible to vote is not ordinarily relevant to whether a question of representation exists. 79 FR at 7322. The NPRM expressed the Board's "preliminary view * * * that deferring both the litigation and resolution of eligibility and inclusion questions affecting no more than 20 percent of all eligible voters represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented." 79 FR at 7331.

As noted below in connection with Part 101, the final rule adopts the proposal to eliminate Subpart C of Part 101, which contained § 101.20(c). The final rule also amends § 102.66(a) to provide:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined

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[353] The NPRM also proposed in § 102.67(a) that "[i]f the hearing officer has determined during the hearing, or the regional director determines after the hearing that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge."

> orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.[354]

Rather than the proposed standard "genuine dispute as to a material fact," the Board has adopted the standard "significant facts that support the party's contentions and are relevant to the existence of a question of representation." The proposed standard, which had been borrowed from Federal Rule of Civil Procedure 56, suggested that the hearing officer would be responsible for summary judgment, which struck commenters as a signal that the hearing officer's role would change in a way that was likely to pose administrative and statutory problems. The standard of "significant facts" adopted in the final rule comes from current 101.20(c), and preserves the hearing officer's essential role. However, unlike current regulations, the final rule makes clear that the "significant facts" that support the party's contentions must *also* be "relevant to the existence of a question of representation."[355] As discussed below, paragraph (d) of proposed § 102.66 is deleted because the final rule does not adopt the 20-percent rule provisions, which would have *required* the hearing officer to exclude evidence regarding individual eligibility or inclusion issues involving less than 20 percent of the unit (and the regional director to defer deciding individual eligibility or inclusion questions involving less than 20 percent of the unit and to vote such disputed individuals subject to challenge). See 79 FR at 7332.

The final rule's amendment of § 102.66(a) together with the modification of the

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[354] In the proposed rule, the last two sentences were in a separate paragraph (e).

[355] Although parties also have the right to litigate at the pre-election hearing whether an election is barred, the Board has concluded that it is not necessary to specify this in the regulatory text because a question of representation cannot exist under the Act if there is such a bar. Accordingly, evidence that is relevant to a bar is also relevant to the existence of a question of representation.

language which previously appeared in § 101.20(c) removes the basis of the Board's holding in *Barre National, Inc*., 316 NLRB 877 (1995), that a hearing officer must permit full litigation of all eligibility issues in dispute prior to a direction of an election, even though the regional director and the Board need not resolve the issues prior to the election. Together with the amendment of § 102.64(a), the amendment of § 102.66(a) makes clear that, while the regional director must determine that a proposed unit is appropriate in order to find that a question of representation exists, the regional director can defer litigation of individual eligibility and inclusion issues that need not be decided before the election.

In its comment, Baker & McKenzie questioned how a hearing officer would determine whether proffered evidence was relevant to voter eligibility or voter inclusion as opposed to unit appropriateness. The same question arises under current procedures when both the regional director and the Board defer ruling on eligibility or inclusion questions until after the election. Thus, existing case law in which both regional directors and the Board have deferred deciding individual eligibility and inclusion questions until after an election will provide considerable guidance to hearing officers and regional directors.[356] Generally, individual eligibility and inclusion issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory exclusion and cannot be in the unit. For example, if the petition calls for a unit including "production employees" and excluding the typical "professional employees, guards and supervisors as defined in

[356] As discussed below, the final rule provides in amended § 102.66(c) that the regional director shall direct the hearing officer concerning the issues to be litigated at the hearing.

the Act," then the following would all be eligibility or inclusion questions: (1) whether production foremen are supervisors, see, e.g., *United States Gypsum Co*., 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, see, e.g., *PECO Energy Co.,*322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, see, e.g., *Lundy Packing Co*., 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, see, e.g., *Allegany Aggregates, Inc*., 327 NLRB 658 (1999).

One exception concerns professional employees. The regional director must address whether there are any professional employees in an otherwise appropriate unit containing nonprofessionals. Under Section 9(b)(1) of the Act, any professionals in a unit containing both professional and nonprofessional employees must be given the choice of whether they wish to be represented in such a mixed unit. Because this requires special balloting procedures, see *Sonotone Corp*., 90 NLRB 1236 (1950), the question of whether any employees included in the otherwise appropriate unit are professionals must be answered prior to the election.[357] Similarly, if a party contends that, under Board

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[357] On the other hand, if the unit description expressly excludes professional employees, then no *Sonotone* balloting question would be presented, and the issue would not have to be addressed. If any party contends that an individual is a professional, and if the individual wishes to vote, he or she can be permitted to vote subject to challenge and the question can be resolved after the election.

Although some comments similarly argue that the question of whether any employees in a unit containing non-guards are guards must be decided prior to the election, the Board disagrees. The Act does not require any special election procedures for guards equivalent to what Section 9(b)(1) requires for professionals. While Section 9(b)(3) precludes the Board from finding that a "mixed unit," i.e., one containing both guards and nonguards, is appropriate, if any party contends that an individual in an otherwise appropriate unit of nonguards is a guard, the regional director can find the unit "excluding guards" appropriate and, if the individual attempts to cast a ballot, he or she

precedent, an eligibility standard different than the Board's ordinary standard[358] should be used, the hearing officer may take such evidence as may be necessary to resolve that question since its resolution is a prerequisite to the conduct of the election.

Some comments on the proposed amendments argue that limiting evidence to that which is relevant to whether a question of representation exists is inconsistent with the statute's requirement that, absent an election agreement, the Board must hold an "appropriate hearing" prior to conducting an election.[359] The Board disagrees. Section 9(c)(1) of the Act provides that the Board must provide for a hearing if it has "reasonable cause to believe that a question of representation affecting commerce exists," and that the Board must direct an election if it finds, based on the record of that hearing, that "such a question of representation exists." Thus, as explained above in relation to § 102.64, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists. The amendments to §§ 102.64(a) and 102.66(a) are entirely consistent with Section 9(c)'s requirement that "an appropriate hearing" be held before the election is conducted. The two amendments are consistent with Section 9(c) because both permit parties to introduce evidence at the pre-election hearing that is relevant to

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can be permitted to vote subject to challenge and the question can be resolved after the election.

[358] For example, in the entertainment industry, given that employees may work intermittently with no expectation of continued employment with a particular employer, the Board may apply a different eligibility standard. See *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010); see also *Alaska Salmon Industry*, 61 NLRB 1508, 1511-12 (1945) (changing eligibility formula for seasonal industries).

[359] See, e.g., ALG; Constangy; NGA II. Other comments argue generally that Section 9(c) requires the Board to conduct a pre-election hearing on issues concerning eligibility and inclusion. See GAM; AHA; ALFA; COLLE; CDW; Testimony of Homer Deakins on behalf of COLLE II.

whether a question of representation exists. Indeed, the amendment to § 102.66(a) expressly vests parties with a right to present evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.

The final rule's amendment of §§ 102.64(a) and 102.66(a) is also consistent with the final sentence of current § 102.64(a), which the final rule does not amend, though the sentence will now appear in § 102.64(b). That sentence provides that the hearing officer's duty is "to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director *may discharge their duties under Section 9(c) of the Act*." (Emphasis added.) A hearing officer ensures "a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act" when he or she permits parties to present evidence of significant facts relevant to the existence of a question of representation. The Board's duty under Section 9(c) is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results. The final rule expressly allows the hearing officer to create a record permitting the regional director to do precisely that.

In short, the effect of the amendments is simply to permit the hearing officer, acting at the behest of the regional director, to prevent the introduction of evidence that is not needed in order to determine if a question of representation exists. By definition, if the hearing officer excludes evidence that is not relevant to whether a question of

representation exists, the hearing officer is not impeding the ability of the regional director or the Board to discharge their respective duties under Section 9(c) of the Act.

SHRM, among others, cites *Barre-National, Inc.*, 316 NLRB 877 (1995) for the proposition that both current rules and Section 9(c) of the statute compel litigation of these matters. The *Barre-National* Board cited both §§102.66(a) and 101.20(c) in holding that litigation was required. In support of its conclusions that the hearing officer erred by excluding the evidence and the regional director erred by permitting the disputed employees to vote subject to challenge, the Board quoted the portion of § 102.66(a), which then read:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary and other evidence.

The Board also quoted the portion of § 101.20(c), which then read:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Based on its reading of those two provisions, the Board reasoned that, "Section 102.66(a) of the Board's Rules and Section 101.20(c) of the Board's Statements of Procedure entitle parties at such hearings to present witnesses and documentary evidence in support of their positions." 316 NLRB at 878. The *Barre-National* Board went on to hold that, "Under all the circumstances, the pre-election hearing held in this case did not meet the requirements of the Act and the Board's rules and Statements of Procedures." *Id.* Because of the use of the conjunctive "and" rather than the disjunctive "or" and the fact that nothing in Section 9(c) of the Act can possibly be understood to give parties a right to

litigate questions of individual eligibility or inclusion prior to an election, as discussed further below, *Barre-National* cannot be read to rest on a construction of the Act. Rather, the *Barre-National* Board based its holding on its reading of §§ 102.66(a) and 101.20(c). In light of the regulatory changes made today, that reliance is no longer relevant.[360]

In addition, as explained in the NPRM, the result in *Barre-National* is not administratively rational. The Board in that case recognized that an entitlement to litigate issues at the pre-election hearing is distinct from any claim of entitlement to a decision on all issues litigated at the hearing, acknowledging that "reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election." *Id*. at 878 n.9. The Board has concluded that it serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. It serves no purpose to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can determine if a question of representation exists. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence. The final rule eliminates such wholly unnecessary litigation that serves as a barrier to the expeditious resolution of questions of representation.

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[360] Reliance on *NLRB v. S.W. Evans & Son*, 181 F.2d 427 (3d Cir. 1950), by CDW is similarly mistaken. The Third Circuit expressly limited its holding to an interpretation of the extant regulatory language—in this case regulatory language from 1945 which is long gone today. 181 F.2d at 429-430; see 10 FR 14498 *et seq.* (November 28, 1945).

Thus, the central question is whether Congress intended that the term "appropriate hearing" in Section 9(c) compel pre-election litigation of matters that would not be decided before the election—and likely would never need to be decided by the regional director. Commenters, most notably CDW II, argue that the answer is yes. We disagree.

The term "appropriate hearing" comes from the original 1935 Wagner Act. As stated by the Supreme Court: "The section is short. Its terms are broad and general * * *. Obviously great latitude concerning procedural details is contemplated." *Inland Empire Council v. Millis*, 325 U.S. 697, 706-710 (1945). Although the hearing should provide parties a "full and adequate opportunity to present their objections,"[361] nothing in *Inland Empire* suggests that the Board must give a hearing to matters which will not be decided. To the contrary, the phrase "an appropriate hearing" was intended to "confer[] broad discretion upon the Board as to the hearing [required]," so as to avoid unnecessary litigation delays. *Id.*[362] In 1947, when Congress revised the Act to ensure that a hearing was held before the election, it left this essential language intact.[363] Despite the many

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[361] In this regard, the rules continue to require the hearing officer "to inquire fully into all matters and issues necessary to obtain a full and complete record." § 102.64(b).

[362] *Inland Empire* held that the Board could hold the hearing after the election. This was changed by the Taft-Hartley amendments, as discussed. Notably, however, the language "appropriate hearing" was not changed, and thus *Inland Empire*'s discussion of the broad discretion given by the language remains relevant. Moreover, it should be noted that, in *Inland Empire*, the Board had "afforded the opportunity [to raise issues] in the proceedings to show cause held prior to the election," but the parties "brought forward nothing which required [the Board] to hold a further hearing for the taking of evidence." *Id.* at 708-709. The Court expressly declined to address whether this process "would have been adequate or 'appropriate.'" *Id.*

[363] After the vote on the Taft-Hartley amendments in 1947, Senator Taft placed in the record a "Supplementary Analysis of the Labor Bill as Passed." 93 Cong. Rec. 6858, 6860 (June, 12, 1947). In that analysis, Senator Taft explained that the Conference

comments on this matter, no one has identified any case in any legal or administrative context in which litigation was required regarding issues that were not being decided—except *Barre-National*.

Even assuming that the *Barre-National* Board did look to Section 9(c)—a point previously debated at length, see 76 FR 80165; 77 FR 25550-51; 77 FR 25562-63—the statutory analysis in *Barre-National* is essentially non-existent. There is no meaningful discussion of the statutory language, no analysis of the legislative history or the plain language of Section 9(c), and no explanation for why it would make sense to require litigation of issues that will not be decided—in short, nothing whatsoever to substantively support its supposed interpretation of the statute. On the contrary, the Board, for the reasons discussed above, believes that the legislative history shows the Board is not required to allow pre-election litigation of issues that will not be decided pre-election. It is beyond dispute that "reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election." *Barre-National*, 316

Committee had revised the amendments of Section 9(c)(4) of the Act to eliminate a provision permitting "pre-hearing elections." *Id.* at 6860. The Supplementary Analysis then stated, "That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. *We have not changed the words of existing law* providing a hearing in every case unless waived by stipulation of the parties. 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." *Id.* (emphasis added). CDW cites to the language "decide questions of unit and eligibility to vote" as support, but the problems with this approach are manifest. First of all, this is the statement of a single legislator, made after the dispositive vote, describing a term that he expressly admits the Act does not change. This cannot be used to alter the meaning of the language. The same flaw applies to CDW's discussion of still later legislative history of marginal relevance. Second, Senator Taft said "*decide* questions of unit and eligibility to vote"—not "litigate"—and where it is undisputed that the Board does not need to "decide" the question, Senator Taft's subsequent remarks cannot be read to compel litigation.

NLRB at 878 n.9. Put plainly, "deferring the question of voter eligibility until after an election is an accepted NLRB practice." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994).[364] This has been so since the early days of the Act. *Brown & Sharp Mfg.*, 70 NLRB 709, 709 (1946); *Humble Oil*, 53 NLRB 116, 126 (1943). As the Supreme Court expressly held in *NLRB v. AJ Tower Co.*, 329 U.S. 324, 330-35 (1946), the Board has authority to resolve voter eligibility through the election-day challenge procedure.[365] As discussed below in relation to the rejected "20-percent rule," this rule does not change which issues will be decided.

Therefore, in light of the broad discretion accorded by Section 9, and the express purpose of ensuring that litigation does not unnecessarily delay the proceeding, we do not find the interpretation of Section 9(c) posited by SHRM and CDW, or that of the *Barre-*

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[364] The United States Court of Appeals for the Second Circuit similarly held that "the determination of a unit's composition need not be made before the election." *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992). As stated in the NPRM, the Board has consistently sustained regional directors' decisions to defer resolution of individual employees' eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). See, e.g., *Sears, Roebuck*, 957 F.2d at 54-55. The Second Circuit has explained that the regional director has "the prerogative of withholding a determination of the unit placement of [a classification] of employees until after the election." *Id.* at 56. In *Northeast Iowa Telephone Co.,* 341 NLRB 670, 671 (2004), the Board characterized this procedure as the "tried-and-true 'vote under challenge procedure.'" See also *HeartShare Human Services of New York, Inc.*, 320 NLRB 1 (1995), *enforced*, 108 F.3d 467 (2d Cir. 1997). Even when a regional director resolves such a dispute pre-election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, e.g., *Silver Cross Hospital*, 350 NLRB 114, 116 n.10 (2007); *Medlar Elec., Inc*., 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682, 682-83 (2001); *Orson E. Coe Pontiac-GMC Truck, Inc*., 328 NLRB 688, 688 n.1 (1999); *American Standard, Inc*., 237 NLRB 45, 45 (1978).

[365] Again, as noted above, the legislative history of the 1947 amendments shows that Congress did not intend to require the Board to allow litigation of voter eligibility matters prior to conducting elections.

National Board, to be persuasive. In our considered view, Section 9 does not give parties a right to litigate questions of individual eligibility or inclusion at the pre-election hearing if the regional director will not decide those questions prior to the election. For these reasons, the Board hereby overrules *Barre-National*, together with cases resting solely upon its holding such as *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999).

The Board also concludes that without clear regulatory language giving the regional director authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case.[366] That specter, sometimes articulated as an express threat according to some comments,[367] hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long as the law, as embodied in the Board's regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself. Comments by the UFCW, LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements. Some commenters specifically stressed that the current rules

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[366] See generally Testimony of Roger King on behalf of SHRM II regarding which issues should be litigated at the pre-election hearing ("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.").

[367] See AFT; IBEW; LIUNA.

have the effect of disenfranchising statutory employees. According to these commenters, instead of resolving bargaining unit issues on their merits, election agreements are driven by the threat of a hearing devoted to the litigation of unnecessary issues.[368]

The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right under the current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) and the 25-day waiting period, both of which are triggered automatically when a case proceeds to hearing. Every experienced participant in the Board's representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the current rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 20 days to the process over the past decade. Accordingly, the bargaining units and election details agreed upon in the more than 90% of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation.

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[368] See CWA II; BCTD; Testimony of Brenda Crawford II; UNAC/UHCP II.

Of course, distinct aspects of the final rule eliminate the 25-day waiting period and the default position of allowing 7 and up to an additional 14 days to file a post-hearing brief. Yet in the Board's preliminary view at the NPRM stage (79 FR 7331), even without these collateral delays, there remained no persuasive reason to allow parties to lengthen the hearing and decisional process by unnecessarily litigating individual eligibility issues that are not relevant to the question concerning representation.[369] We did not, and do not, view permitting the litigation of individual eligibility issues as a cost-free proposition. Every non-essential piece of evidence that is adduced adds time that the parties and the Board's hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision. The Board expects that if irrelevant litigation at the pre-election hearing were reduced, then not only would hearings be shorter (with attendant savings to the parties), but also that regional directors would correspondingly have to spend less time writing pre-election decisions, and be able to issue those decisions in less time than the current 20-day median. Thus, the Board viewed its mandatory proposal of barring litigation or resolution of individual eligibility issues regarding less than 20% of a petitioned-for unit as an overall benefit to agency efficiency, in addition to being a

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[369] Some commenters challenge the premise that litigation of individual eligibility issues causes delay. For example, Homer Deakins testified on behalf of COLLE II that he could count on one hand the number of times a hearing has gone into the second day because of litigation of a supervisory issue. However, even if in some cases litigation of an individual eligibility issue would not add an extra day or days to the pre-election hearing, we are not persuaded that such litigation would not unnecessarily delay the election in those cases. After all, as shown, during the last decade it has taken regional directors a median of 20 days to issue their decisions following a pre-election hearing. Moreover, litigation of irrelevant issues that the regional director need not resolve imposes unnecessary costs on the parties and the government.

reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and in employees' interest in knowing who would be in the unit should they choose to be represented.

There is certainly reason to believe that the 20% figure proposed in the NPRM—and upon which the Board has historically relied in terms of deferring resolution of individual eligibility issues—is indeed an administratively appropriate balance. For example, more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not have compromised the Board's ability to immediately determine election results in the vast majority of cases.[370] Thus, had any thorny litigation issues concerning individual eligibility been deferred in those cases, it would likely have saved significant party and agency resources in that the pre-election hearings would have been shorter, the director's decisions issued quicker and with less effort, and the representation dispute resolved

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[370] In addition, post-election litigation of these challenges will only take place where the proponent of the challenge is winning after the unchallenged ballots are tallied—otherwise the challenge can simply be withdrawn. This should result in mooting about half of the remaining litigation, even in those cases where the vote margin is narrow. Thus, at most, only 15% of deferred issues will ever have to be addressed.

To be clear, the union win rate is irrelevant because both unions and employers could be contesting the relevant matters. We also wish to emphasize that this does not mean that 15% of all elections will have outcome determinative challenges: this is the maximum number reached by assuming that every election will defer 20% of voter eligibility questions. In reality, the vast majority of cases will involve far fewer such disputes, either because they are resolved by stipulation or because they are never contested at the pre-election hearing.

sooner, all without necessitating another post-election hearing to resolve those issues because they would have been proven by the tally of ballots to be non-determinative of the election outcome. And in the comparatively smaller percentage of cases in which the election margin required resolution of the challenged voters' ballots, the regional director could have committed resources to developing and analyzing the relevant evidence in a post-election hearing with full confidence that the effort would not be wasted.[371]

Nevertheless, the Board is mindful that a one-size-fits-all approach may not be the most desirable or necessary method to accomplish the gains in efficiency sought by the proposed 20-percent rule. Specifically, the changes to 102.64 and 102.66(a) provide regional directors with the tools to defer unnecessary litigation, and it may produce a better outcome on a case-by-case basis if regional directors retain discretion to apply those tools or to provide for litigation and resolution of discrete issues as the regional directors deem appropriate.[372] For example, the regional director may be able to quickly

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[371] In this regard we reject the testimony of Elizabeth Milito on behalf of NFIB II who claimed that the Board should abandon the 20% rule because many small business owners would "concede defeat" and not be able to afford to litigate deferred individual eligibility issues in a post-election hearing. As shown, deferring individual eligibility issues should reduce pre-election costs for all parties participating in pre-election hearings—including small employers—and in the vast majority of cases, there should never be a need to incur the extra costs of a post-election proceeding to determine the individual's eligibility to vote because the ballots cast by individuals permitted to vote subject to challenge are likely to be nondeterminative. In any event, the final rule grants discretion to the regional director to permit the litigation of individual eligibility issues, and parties are free to make whatever arguments they wish as to why the director should do so.

[372] Keeping discretion in the hands of the regional directors is sensible in that it is the directors who are responsible for issuing decisions and directions of elections following pre-election hearings, and it is directors who directly supervise the hearing officers in their conduct of the hearings. Moreover, under the final rule it is the directors who must resolve determinative challenges.

discern that certain eligibility issues—presented by the parties in their offers of proof—could be quickly and easily disposed of, in which case little would be gained from deferring the issue. Moreover, given the mandatory language of the proposed 20-percent rule, parties could argue that elections should be set aside based solely on the ground that the hearing officer and director made a minor computational error in concluding that the individual eligibility or inclusion issues they were deferring involved less than 20 percent of the unit. In our view, having to set aside elections merely because of computational errors (such as deferral of individual eligibility questions involving 21—rather than 20—percent) would be particularly unfortunate when the addition of the disputed employees to the unit would not be unfair to the voters (because it would not materially change the character or scope of the unit). We further conclude that the mandatory proposal could perversely encourage parties to raise frivolous individual eligibility issues that they otherwise would not have raised just so the 20-percent ceiling was breached.

Accordingly, the Board has decided to preserve the discretion that regional directors enjoyed even before the NPRM to defer resolving disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election or to decide such disputes before the election in the decision and direction of election. In the final rule, rather than *require* hearing officers to bar parties from introducing evidence regarding individual eligibility or inclusion issues involving less than 20 percent of the unit, the Board has decided to grant hearing officers the authority, on the instruction of the regional director, to exclude evidence concerning such disputes. However, the regional director is free to direct that such evidence be admitted if the director resolves to decide prior to the election the individual eligibility questions at issue, or if the director is

uncertain about whether to decide an issue. In sum, while we continue to believe that individual eligibility disputes ordinarily need not be litigated at the pre-election hearing or resolved in a direction of election, we no longer adhere to the preliminary view expressed in the NPRM that adoption of a bright-line, mandatory 20-percent deferral rule best serves the interests of the parties and the employees as well as the public interest in the effective administration of the representation case process.[373]

Several comments criticize the proposed 20-percent rule on policy grounds. For example, some comments argue that it is unfair to defer resolution of supervisory status questions, because employers need to know who their supervisors are so they know who they can require to campaign against employee representation.[374] Similarly, comments

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[373] The effect of our decision to reject the proposed 20-percent rule coupled with the amendments leaving to the director's discretion whether to defer litigation and resolution of individual eligibility or inclusion issues until after the election, means that the final rule does not establish any bright-line ceiling beyond which litigation and resolution of individual eligibility or inclusion issues cannot be deferred. We note, however, that the Board has uniformly held that a change affecting no more than 20 percent of the unit does not require a new election. On occasion, the Board has also permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters, though we have recognized that allowing 25 percent of the electorate to vote subject to challenge is not optimal. See, e.g., cases cited at 79 FR at 7331& n.54. We are confident that directors will consider that precedent in exercising their discretion under the final rule, and strongly believe that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. And, as with any other issue that comes before us, we will consider relevant case precedent in evaluating the merits of objections to the regional director's direction of election, the regional director's conduct of the election or the hearing officer's handling of the pre-election hearing. We would further expect regional directors to typically exercise their discretion in favor of approving parties' stipulated election agreements in which up to 20% of the unit is to be voted under challenge.

[374] See, e.g., Seyfarth Shaw; COSE; Indiana Chamber; U.S. Poultry II; CDW II. SHRM also suggests that deferring resolution of supervisory status questions might somehow threaten attorney-client communications if counsel communicates with an individual the

argue that employers need to know which employees are eligible to vote so they know whom to address concerning the question of representation.[375] Numerous comments additionally express the position that deferral of eligibility questions under the 20-percent rule would impair employee rights. More specifically, many comments assert that deferral would deprive employees of knowledge about the precise parameters of the bargaining unit, thereby depriving them of the right to cast an informed ballot[376] or impeding their ability to determine whether they share a community of interest with the other voters.[377] Similarly, a number of comments express the view that deferral of eligibility issues would engender confusion among the voting employees.[378] Other comments generally suggest that the deferral of eligibility issues would increase the likelihood that disputed individuals would refrain from voting in an election. For example, a number of comments express the position that employees, faced with the

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employer believes is a supervisor who is later held not to be a supervisor. This same concern exists under the current procedures as explained above. Moreover, the test the Board uses to determine who is a supervisor under the Act is not and need not be the same as the various tests used to determine if attorney communications to an individual employed by the attorney's client are privileged.

[375] See, e.g., PIA.

[376] See, e.g., Testimony of Michael Lotito on behalf of IFA II; AEM II; GAM; Constangy; NRF; Baker & McKenzie. IBEW, in contrast, states that, in its experience, employee voters are motivated primarily by whether they desire representation and not by precisely which employees will be in the unit. See also Testimony of Gina Cooper on behalf of IBEW II ("My experience is that employees are voting for union representation and the unit issue never comes into their decision.")

[377] See, e.g., Associated Oregon Industries; COSE; Seyfarth Shaw; Kuryakyn; John Deere Water.

[378] See, e.g., NGA II; Leading Age II; SHRM; ACE; AHA.

prospect of having their votes challenged, might simply refrain from voting,[379] some as a result of a concern that–particularly in smaller units–they could be easily identified as the individuals whose votes determined the outcome of the election.[380] Finally, with respect to the deferral of supervisory status questions, several comments generally express concern that employees with disputed supervisory status would not know whether they could appropriately speak in favor of or against union representation, attend union meetings, or sign authorization cards,[381] and SHRM asserts that employees would be chilled in the exercise of their Section 7 and First Amendment rights.

However, in this final rule the Board has determined not to adopt the 20-percent rule, but rather, to retain the existing discretion of regional directors to defer deciding such questions until after the election. Prior to the amendments, regional directors were free to decide individual eligibility and inclusion questions prior to the election if they wished to do so or to defer such decisions until after the election and direct that disputed individuals vote subject to challenge. The same is true under the final rule. Although the amendments permit the hearing officer, at the direction of the regional director, to exclude evidence that is not relevant to determining whether a question of representation exists—and thereby permit the hearing officer to exclude evidence regarding some eligibility and inclusion questions—the regional director is free to direct that such evidence be admitted if the director resolves to consider the eligibility questions at issue.

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[379] See, e.g., SHRM II; Pinnacle Health Systems; Arizona Hospital and Healthcare Association.

[380] See, e.g., LRI; Anchor Planning Group; Bluegrass Institute.

[381] See, e.g., Seyfarth Shaw; ACE; Sheppard Mullin II.

In any event, the Board is not persuaded by the policy argument that it should permit litigation of all individual supervisory status questions—even though such questions are ordinarily irrelevant to the statutory purpose of the hearing—on the grounds that resolution of such questions is necessary for an employer to effectively campaign against union representation.[382] Most fundamentally, while the question of whether particular individuals are supervisors as defined in the Act has generated considerable litigation, the question exists only at the margin. In the Board's experience, in virtually every case, even where there is uncertainty concerning the supervisory status of one or more individual employees, the employer nevertheless has in its employ managers and supervisors whose status is not disputed and is undisputable.[383]

The policy argument contained in these comments is also based on a set of faulty premises. First, as explained above and in the NPRM, employers have no right to a pre-election decision concerning individual eligibility under the current rules. Second, even under the current rules, a regional director cannot issue a decision on any eligibility question until well after the filing of the petition because a hearing must be noticed (no sooner than 5 business days after the notice), the hearing must be completed, and the regional director must issue a decision. Thus, even where the regional director resolves the individual eligibility issue in the decision and direction of election, the employer will

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[382] To be sure, it is not the purpose of the pre-election hearing to determine employers' spokespersons in the ongoing representation campaign.

[383] See, e.g., *McAlester General Hospital*, 233 NLRB 589, 589-90 (1977) (noting that even without considering employees whose supervisory status was in dispute, employer employed one supervisor for every eight unit employees and, if the employer filled open supervisory positions, it would employ one supervisor for every three unit employees).

not have the benefit of the decision for a substantial part of any campaign, including a substantial part of the "critical period" between the filing of the petition and the election.[384] Third, under the current rules, even if the regional director issues a decision concerning an individual eligibility question, the decision is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election. See, e.g., *Mercedes-Benz of Anaheim*, Case 21-RC-21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital*, Case 1-RC-22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.*, 250 NLRB 58, 58 n.1 (1980) (same). Fourth, the problem identified by the employer comments is even more acute for unions, which must obtain a showing of interest prior to filing a petition. If the union asks employees to help gather a showing of interest and the employees are later determined to be supervisors, the Board may find that the showing of interest is tainted and overturn election results favoring union representation on that ground. See *Harborside Healthcare Inc*., 343 NLRB 906 (2004). That problem cannot possibly be solved through any form of post-petition, pre-election hearing. Fifth, under the Act itself, even if a regional director's decision and final Board decision are issued prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be issued pre-election.

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[384] Additionally, as the AFL-CIO II points out in its reply comment, the extant period of uncertainty under the current rules is extended still further when employers begin their campaigns—as they often do—prior to a petition's filing.

See 29 U.S.C. 159(d) and 160(e); *Boire v. Greyhound Corp*., 376 U.S. 473, 476-79 (1964).[385] Thus, the uncertainty with which the comments are concerned, which affects all parties, exists under the current rules and cannot be fully eliminated.

Nor does the Board agree that the proposed amendments improperly deprive employees of the ability to make an informed choice in the election. As explained above, under the amendments, as under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of the election. Accordingly, at the time they cast their ballots, the voting employees will be fully informed (via the Notice of Election) as to the description of the unit, and will be able to assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals or groups ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that is also the case under the Board's current rules, because, as explained above, regional directors were free to defer deciding individual eligibility or inclusion questions prior to directing an election (and parties were free to agree to permit disputed employees to vote subject to challenge in the election agreement context). In addition, as pointed out by SEIU, a similar choice has confronted voters in mixed professional/non-professional units since 1947, when Congress amended the Act to provide that a majority of the professional

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[385] FMI II and INDA II, among others, express concern that if an alleged supervisor is permitted to vote subject to challenge, the results of the election might be set aside pursuant to an objection citing the presence of a supervisor in the polling area if the individual is found to be a supervisor after a post-election hearing. As explained above, this scenario can arise under the current procedures. See, e.g., *Sorenson Lighted Controls*, 286 NLRB 969, 989 (1987). The Board is not aware of any case holding such conduct *per se* objectionable under these circumstances, and the existence of the new rules would be a factor the Board would consider if such an objection arises in the future.

employees must vote separately for inclusion with a bargaining unit of non-professional employees and the results of that separate vote, which takes place simultaneously with the vote in the non-professional unit, are not known when any of the employees cast their ballots. See Section 9(b)(1); *Sonotone Corp.*, 90 NLRB at 1241-42. In that context, the Board has held: "Such a procedure * * * presents the employees with an informed choice." *Pratt & Whitney*, 327 NLRB 1213, 1218 (1999).

Many comments cite the courts of appeals' decisions in *NLRB v. Beverly Health and Rehabilitation Services*, 120 F.3d 262 (4th Cir. 1997) (unpublished per curiam opinion), and *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986). As explained in the NPRM, those two decisions represent the minority view in the courts, and the Board continues to disagree with them. The majority of the courts of appeals have upheld the Board's vote-under-challenge procedures and upheld election results even when the eligibility or inclusion of certain employees was not resolved until after the election.[386] Moreover, under the final rule, the regional director has discretion to permit litigation and to resolve eligibility and inclusion questions, and we expect regional directors to permit litigation of, and to resolve, such questions when they might significantly change the size or character of the unit, thus addressing the courts' concerns in both *Beverly* and *Parsons*. In addition, as explained in the NPRM, the courts' concern in both of those cases was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after

[386] See, e.g., *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52 (2d Cir. 1992); *Nightingale Oil Co. v. NLRB*, 905 F.2d 528, 533-34 (1st Cir. 1990); *NLRB v. Clark Distributing*, 917 F.2d 24 (6th Cir. 1990) (unpublished); *Prudential Ins. Co. of America v. NLRB*, 832 F.2d 857, 861 (4th Cir. 1987).

the election. The final rule would actually help prevent exactly that form of change in unit definition from occurring by codifying regional directors' discretion to defer deciding individual eligibility or inclusion questions until after the election and by providing in amended § 102.67(b) that where the director does defer deciding such questions, the Notice of Election will inform employees prior to the election that the individuals in question "are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge," and that their unit placement "will be resolved, if necessary, following the election." Thus, employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. The Board views this alteration to the election notice as meeting the concerns raised by the *Beverly* court and as specifically countenanced by the Second Circuit in *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992) (regional director permitted employees in one classification to vote subject to challenge and included section in notice which "detailed the special voting posture of the automotive floor sales employees and the circumstances for including their votes").[387]

[387] CDW II questions how the proposed 20-percent rule can be reconciled with such final notice language because if individual eligibility or inclusion issues need not be identified in the Statement of Position or litigated at the hearing, then the regional director will presumably be unaware of them when the final notice is prepared. As explained above, however, the Board is not adopting the proposed 20-percent rule. Accordingly, because regional directors have discretion to allow individual eligibility issues to be litigated, parties may seek to put the regional director on notice of such issues through their statement of position and at the hearing. While it is true that there may also be election-day challenges that could not have been anticipated in advance by the regional director, this is the case currently, and it is not the situation that concerned the courts in *Beverly* or *Parsons*.

PIA and Bluegrass Institute suggest that deferring resolution of individual eligibility questions until after the election threatens the secrecy of the ballot and that employees who are permitted to vote subject to challenge are less likely to vote because they fear that the parties will learn how they voted. However, the Board is not persuaded that the final rule threatens the secrecy of the ballot or voter turnout. The courts have upheld the Board's current practice of deferring individual eligibility questions under most circumstances. Moreover, the ballots cast by the employees directed to vote subject to challenge are not counted if they are not determinative.[388] Accordingly, ballot secrecy is preserved in those cases. Even if challenged ballots are determinative, the ballots are not counted if the employees who cast them are ultimately found to be ineligible after the post-election hearing. And, even if the challenged ballots are determinative and a post-election hearing results in the individuals who cast them being found eligible, the ballots are not opened and counted one-by-one, but rather the ballots of all individuals found to be eligible are "thoroughly mixed" before being opened and counted. See Casehandling Manual Section 11378. Accordingly, the Board believes that it is only in cases where there is just one determinative challenge, or where all of the potentially determinative challenged ballots are marked in the same way, that the parties will learn how the employees voted. However, that is both rare and unavoidable in any system that permits

[388] As shown above, deferral of up to 20% of eligible voters would have left the challenged ballots non-determinative in more than 70% of all representation elections conducted in FY 2013. If there were no need to defer as many as 20% of the eligible voters because not that many individual voter eligibility issues were contested, then the percentage of elections where challenged ballots would be non-determinative of the election's outcome would be greater still. For example, in FY 2013 more than 85% of elections had margins greater than 10% of the eligible voters.

challenges, including the current system. Thus, even if regional directors were prohibited from deferring individual eligibility issues, which is not the case currently, parties would still have a right to challenge voters for good cause at the polls and the commenters' concern would remain.[389]

The Board is also unaware of any evidence of significant differences between the turnout of employees whose eligibility to vote has not been disputed or has been resolved prior to the election and employees permitted to vote subject to challenge. The case law demonstrates that even in cases where only a single individual is permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, e.g., *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB v. Staiman Brothers*, 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).

Nor is the Board persuaded by SHRM II's attempt to analogize to scholarly criticism of states' voter challenge laws in political elections as evidence that the Board's challenged ballot procedure does or would lead to reduced participation in NLRB elections. The Board agrees with the AFL-CIO II (Reply) that the significant differences between the political challenge process and the NLRB challenge process undermine SHRM's attempted analogy. In particular, during political elections, voters' veracity is challenged, and they are often subject to questioning and required to swear an oath before

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[389] The Board also notes that to the extent the amendments do result in more individuals casting challenged ballots than under the current rules, the amendments may well have the effect of making it less likely that parties will be able to discover how particular individuals voted because the pool of determinative ballots would be larger.

voting; whereas during NLRB elections, voters will know in advance via the election notice that although their eligibility to vote—through no fault of their own—has not yet been determined with finality, they will be permitted to cast ballots, they will be advised as to the procedure for their voting, and they will be invited to contact a Board agent with any questions that they may have in advance of the election about the challenge process. The Board also agrees with SEIU II (Reply) that the additional structural safeguards in a Board election—including its supervision by a Board agent, the presence of observers for both sides, and the Board agent's duty to disallow argument concerning the merits of the challenge and to explain to the voter the measures that will be taken to protect the secrecy of the challenged ballot[390]—make it unlikely that challenged voters in NLRB elections would decide not to cast a ballot. Furthermore, as both the AFL-CIO and SEIU point out, SHRM cites no evidence of voter suppression in NLRB elections resulting from our longstanding challenge procedures,[391] nor does SHRM attempt to grapple with the differences between the challenge processes in political elections and NLRB elections.

Finally, balanced against any asserted employer or employee interests in pre-election litigation of individual eligibility or inclusion questions is the statutory interest in

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[390] See Casehandling Manual Section 11338.6.

[391] SHRM II also fails in its attempts to use the results of a 2014 FOIA response from the Board to show that the Board's current use of the challenge ballot procedure is "limited" by arguing that in the 1,763 elections conducted during FY 2011-13 in which ballots were challenged, there were "only 4.5 [challenged ballots] per election." Considering that the median size of bargaining units ranged from 24-28 employees over that same period of time, the statistics cited by SHRM do not appear to support the implication that the number of challenged ballots under the final rule (which does not include a mandatory 20-percent rule) would be radically different than under the Board's current practice. Indeed, in reply to SHRM, the AFL-CIO II (Reply) cites to research showing use of challenged ballots in 40% of NLRB elections conducted between 1972 and 2009.

prompt resolution of questions of representation. As explained above and in the NPRM, permitting the litigation of such matters imposes serious costs, and no comments on the NPRM convinced the Board otherwise. It plainly frustrates the statutory goal of expeditiously resolving questions of representation, and it frequently imposes unnecessary costs on the parties and the government. As explained in the NPRM, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees votes against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board. See *New York Law Publishing Co.*, 336 NLRB No. 93, slip op. at 2 (2001) ("The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition."). As the Eighth Circuit observed, "The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that "[s]uch a practice enables the Board to conduct an immediate election." *Medical Center at*

Bowling Green v. NLRB, 712 F.2d 1091, 1093 (6th Cir. 1983).

NRTWLDF argues that application of the 20-percent rule at the hearing might cast into question the regional office's earlier, administrative determination that the petition was accompanied by an adequate showing of interest. Whether or not that is the case, the final rule does not adopt the 20-percent rule. Moreover, the concern expressed in the comment could equally be expressed about the current procedures under which regional directors and the Board routinely defer ruling on eligibility questions without revisiting the adequacy of the showing of interest. Furthermore, the required showing of interest is purely an internal administrative matter, as explained in current § 101.18(a): "it being the Board's experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees." The adequacy of the showing is non-litigable, as discussed in connection with Part 101 below. *The Borden Co*., 101 NLRB 203, 203 n. 3 (1952) ("the question[] of the sufficiency of the showing of interest * * * [is a matter] for administrative determination and not subject to litigation by the parties); Casehandling Manual Section 11028.3.

In a related vein, Jonathan Fritts on behalf of CDW II raised a series of thoughtful questions concerning exactly how the proposed 20-percent rule would be implemented in the context of several possible hearing contingencies. Of course, the 20-percent rule is not being adopted. Nevertheless, given our expectation that regional directors will consider the relative percentage as a significant factor in deciding whether to decide or defer an issue, we address those questions below.

CDW's first three questions concern how the choice to take evidence would

interact with the proposed 20-percent threshold. Specifically, CDW asks:

> If, at the outset of the hearing, there are eligibility and inclusion issues that affect more than 20% of the bargaining unit, will the hearing officer take evidence on all of those issues?
>
> Or will the hearing officer take evidence on only "just enough" issues so that the remaining eligibility issues fall below 20%? If so, how will the hearing officer decide which issues to take evidence on in these situations?

As explained more thoroughly in connection with the offer of proof proposal below, the discretion to determine which issues will be deferred or decided will reside with the regional director. Recognizing that there is no mandatory 20-percent rule, if the regional director wished to defer deciding individual eligibility or inclusion questions involving 20% of the unit, the regional director would simply identify a subset of the issues which impacted 20% of the unit and defer them, and would take evidence on the rest. This exercise of discretion is analogous to what currently happens in post-election proceedings involving determinative challenges, where there is a known margin before challenged ballots are opened, and regional directors sometimes decide to resolve only a few of the challenged ballot issues and open the resolved ballots in order to see whether the new tally obviates having to resolve the remaining challenges.[392] We expect that the regional director would consider many of the same factors that the regional directors currently consider in deciding whether to rule on all determinative challenges or just a few. For example, the regional director might consider how long it would take the parties to present their evidence on the disputed individuals, and then decide to take evidence on the individuals who require the least amount of time and defer the remainder. The regional director might also instruct the hearing officer to see whether the parties can

[392] See Casehandling Manual Section 11361.3.

agree on which individuals' eligibility should be litigated in order to leave a smaller percentage to be deferred. The regional director might also consider offers of proof and decide which issues would be easiest to resolve or whether a common issue would resolve the eligibility status of multiple individuals, and take evidence accordingly. In sum, regional directors will not be mandated to follow any particular course of decision-making as to the taking of evidence on individual eligibility issues, but will instead retain discretion to use their judgment as to what evidentiary structure will result in the most efficient use of party and agency resources.

CDW next questions how 20% of the unit would be measured if the size of the unit is in dispute, asking specifically:

> If the appropriateness of the bargaining unit is in dispute, how will the 20% be measured? Will it be 20% of the petitioned-for unit?
>
> If the employer asserts that the only appropriate unit is a larger unit, will the rule be applied based on 20% of that larger unit?

If there are significant differences in the sizes of the parties' preferred bargaining units, then regional directors should evaluate the individual eligibility and inclusion issues in dispute relative to the petitioned-for unit, and any other unit in which the petitioner is willing to proceed to an election. For example, if the petitioner asserts at hearing that it would be unwilling to proceed to an election concerning an employer's alternative unit that is larger than the petitioned-for unit, then the regional director need not take into account the employer unit's size in evaluating individual eligibility or inclusion issues to be deferred, because there will either be an election in the petitioned-for unit—if found appropriate by the regional director—or no election at all. If, on the other hand, the petitioner is willing to proceed to an election in a significantly larger unit as proposed by

the employer, then the regional director will retain discretion to decide the most efficient means of structuring the litigation of potential individual eligibility issues. In such a situation, the regional director may, of course, consider the relative percentage of individual eligibility issues presented in each of the proposed units. Each such case will present its own complications, and there is no particular litigation structure mandated by the final rule.

CDW also questions whether and how unit appropriateness issues might be deferred under the final rule. The primary answer to these questions is that under the final rule, as under the Board's current regulations, the regional director must always decide on the appropriateness of the unit before directing or conducting an election. So, a regional director will not defer taking evidence or resolving individual eligibility or inclusion issues whose resolution could render inappropriate an otherwise appropriate unit.

However, under the final rule, as under the Board's current regulations, and completely apart from the 20-percent proposal in the NPRM, a hearing officer will be free to require an offer of proof concerning any unit appropriateness arguments raised by an employer.[393] If the evidence sought to be introduced would be insufficient to sustain the employer's position—for example, whether to overcome a presumptively appropriate

[393] In fact, the Board's pre-NPRM regulations permitted hearing officers, on their own volition, to allow or prevent litigation of issues based on offers of proof. But in practice, hearing officers faced with such a decision typically chose to seek guidance from the regional director and we think that this is the better practice. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II and Gabrielle Semel of behalf of CWA II (discussing current practice of hearing officers pausing to consult with regional directors when necessary).

unit or to show an overwhelming community of interest between petitioned-for classifications and excluded classifications—then the regional director would direct the hearing officer not to allow the evidence to be received.[394] This is distinct from deferring a question to the challenge process: as has always been the case under Board rules only "significant facts" can be litigated, and if a party's contentions are meritless they are never entitled to litigate them, nor can these voters be challenged without good cause. Thus, although regional directors cannot defer consideration of unit appropriateness issues under the final rule, they will continue to enjoy discretion to instruct hearing officers to deny the introduction of evidence to "protect the integrity of [the Board's] processes against unwarranted burdening of the record and unnecessary delay." *Laurel Associates d/b/a Jersey Shore Nursing and Rehabilitation Center*, 325 NLRB 603, 603 (1998).

CDW then poses a follow-up question running to whether certain classifications of employees—excluded from the petitioned-for unit by virtue of a legally insufficient offer of proof made by their employer—will nevertheless be eligible to vote in the election, subject to challenge. Generally, no, but the answer will vary from case to case. Thus, the rules do not require the casting of challenged ballots in such circumstances and the Board's policy continues to be that when a regional director has specifically ruled on

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[394] In this regard, the Board rejects the suggestion of the IBEW II that we create a mechanism to automatically defer litigation challenges to presumptively appropriate units. Rather, in the circumstances that IBEW describes, we would expect hearing officers to typically require an offer of proof from an employer arguing against the appropriateness of a unit considered presumptively appropriate under Board caselaw. If the employer's proffered evidence would be insufficient to rebut the presumption, then it would be appropriate for the regional director to foreclose receipt of the evidence without regard to the proposed 20% rule.

an employee's inclusion in or exclusion from the unit, then it would generally not be appropriate to vote that employee, even subject to challenge. However, as discussed below in connection with § 102.67, the final rule contains a procedure for requesting segregation and impoundment of ballots, and so challenged ballots concerning unit appropriateness issues may be permitted in a particular case.

Some comments criticize the 20-percent rule on the grounds that it will lead to more post-election litigation and result in more elections being set aside as a result of post-election rulings concerning the eligibility of employees.[395] Similarly, at least two comments raise the concern that because the bargaining obligation attaches at the time of the tally, employers will be required to invest time and money in bargaining with a union that has questionable representative status.[396] These comments misunderstand the proposals. As under the current rules, if decisions concerning individuals' eligibility or inclusion are deferred until after the election, the individuals will vote subject to challenge. If their votes are not potentially outcome determinative, the matter will not be litigated, thus decreasing the total amount of litigation. If their votes are potentially outcome determinative, their eligibility may be litigated and the resolution may affect the results of the election, but it will not lead to the results of the election being set aside. As under the current procedures, post-election proceedings concerning challenged ballots will proceed and conclude promptly at the regional level. As explained above and below in relation to §§ 102.62(b) and 102.69, any Board review of the disposition will be

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[395] See, e.g., Chairmen Kline and Roe II; CDW II; Leading Age II; U.S. Chamber Workforce Freedom Initiative II; Associated Oregon Industries; Bluegrass Institute.

[396] See COSE; Constangy.

expedited by the final rule.

Finally, a few comments argue that deferral of voter eligibility questions will create more issues for the parties to address during first contract negotiations.[397] AHA makes the related claim that "leaving the individuals' inclusion or exclusion from the unit to be used as a bargaining chip is unfair to employees and disrespectful of their Section 7 rights and counter to the Act's purposes of promoting labor peace[.]" As explained above, this already happens under the current rules, when the regional director or the Board defers decision on the questions and does not decide them post-election because the votes of the disputed individuals were not potentially outcome determinative. The Board does not believe addressing such questions will complicate bargaining, particularly when the parties can file a timely unit clarification petition if they are unwilling or unable to resolve the matter.[398] Neither does the Board believe that negotiations between the parties concerning employees' inclusion in or exclusion from the bargaining unit is substantively different, vis-à-vis their Section 7 rights, whether the parties are negotiating a first contract or a stipulated election agreement. Both are inherently acceptable

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[397] See, e.g., Testimony of Doreen Davis on behalf of RILA II; SHRM II; CDW II.

[398] As SEIU observes:

> If the union wins, the parties can negotiate unit inclusion issues through the collective bargaining process, when both parties have an eye towards the appropriate composition of the bargaining unit (rather than maneuvering to exclude or include particular workers to skew the election results). Indeed, in our experience, the unit placement of workers permitted to vote under challenge is almost always resolved, after certification, without the necessity of returning to the Board for clarification.

See also Testimony of Semel on behalf of CWA II.

mechanisms under the Board's extant procedures, and AHA does not suggest, for example, that the Board cease accepting party stipulations concerning the parameters of proposed bargaining units in deference to employees' Section 7 rights.[399] In any event, we would reject such a suggestion for the same reason that we reject AHA's instant comment: the fundamental design of the Act is to encourage agreement between the parties as much as possible and not to interject the Board's judgments in place of collectively-negotiated terms.[400] So long as parties negotiate terms regarding which individuals or classifications to include in a bargaining unit that do not contravene the Act's provisions or settled Board policies, then it would be inappropriate for the Board to disallow their agreements.[401] In relation to AHA's concerns about the promotion of labor peace, the Board believes that labor peace is more likely if parties are permitted to voluntarily resolve their differences.

Many comments additionally challenge the proposed amendments to 102.66 by arguing against the aggregated effects of the various proposed changes, including the mandatory 20-percent rule. For example, comments question: the hearing officer's role in administering the changed pre-election hearing; whether hearings under the proposed

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[399] Indeed, some commenters claim that petitioning unions under the current rules are compelled to modify the parameters of their preferred unit solely to avoid the delay associated with litigating the voter eligibility of certain individuals or classifications—a context that would seem no less "unfair" to employees as the post-election negotiations posited by AHA. See, e.g., Testimony of Brenda Crawford II; Testimony of Martin Hernandez on behalf of UFCW II.

[400] Cf. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970) ("the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements").

[401] See, e.g., *Micro Pacific Development, Inc. v. NLRB*, 178 F.3d 1325, 1335-36 (D.C. Cir. 1999).

amendments would result in an inadequate record for subsequent appeals; and whether the hearings under the proposed amendments would be inconsistent with Section 9(c) of the Act. We respond to each of these groups of commentary below in connection with the changes regarding joinder and offers of proof.

B. Identification of Issues in Dispute; Discretionary Offers of Proof; Preclusion

In the NPRM, the Board proposed a number of amendments to § 102.66 which were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. 79 FR 7329-32. The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, Statements of Position, and then would require the petitioner to respond to any issues raised in the Statements of Positions, thereby joining the issues. The NPRM further proposed that after the issues were properly joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact, a standard derived from Rule 56 of the Federal Rules of Civil Procedure.

The Board also proposed that a party would be precluded from raising any issue, or presenting any evidence or argument about any issue, that it failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement. However, any party would be permitted to present evidence as to the Board's statutory

jurisdiction, and the petitioner would be permitted to present evidence as to the appropriateness of the unit if the nonpetitioning parties declined to take a position on that issue. In addition, consistent with the proposed amendments' intent to defer both litigation and consideration of disputes concerning the eligibility or inclusion of individual employees until after the election, no party would be precluded from challenging the eligibility or inclusion of any voter during the election on the grounds that no party raised the issue in a Statement of Position or response thereto. 79 FR 7329-30.

The Board received a great number of comments about these proposals. As discussed at length in relation to § 102.63, the Board has decided to adopt the proposal requiring nonpetitioners to complete Statements of Position, but has revised the due date for the completion of the Statements so that the Statements can serve their intended purposes of facilitating entry into election agreements and narrowing the scope of pre-election hearings in the event the parties do not enter into such agreements. Thus, amended § 102.63(b) requires nonpetitioners to file and serve their Statements of Position such that they are received by the regional director and all parties identified in the petition by noon on the business day before the scheduled opening of the pre-election hearing.

After careful consideration of the comments, and as more fully discussed below, the Board has decided to require, in amended § 102.66(b), the other parties to respond to each issue raised in a Statement of Position. The same paragraph expressly authorizes the regional director to permit Statements of Position, as well as responses, to be amended in

a timely manner for good cause.[402] It then provides that "[t]he hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions." We believe that this amendment will help the Board maximize hearing efficiency by eliminating unnecessary litigation, expeditiously resolve questions of representation and make Board procedures more transparent and uniform across regions. As discussed in relation to § 102.63, although parties currently are asked to provide much of the information requested by the Statement of Position form, they are not required to do so, and some parties do not disclose the information even though it is needed to ensure efficient hearings and to expeditiously resolve questions of representation. Similarly, parties are not currently required to respond to positions taken by other parties on issues that need to be determined by the regional director. The required Statements of Position and responses will enable the hearing officer and the parties to ascertain at the outset of the hearing the issues in dispute and, conversely, those that are not in dispute. As to the latter, it follows as a matter of administrative efficiency and common sense that litigation would unjustifiably waste the time and resources of the Board and the parties. Thus, the amendment will prevent wasteful litigation of matters that are not in dispute.[403] It also

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[402] We have thereby adopted the Chamber's suggestion that the regulatory text explicitly provide that parties may timely amend their Statements of Position for good cause, as discussed above in relation to § 102.63(b). Accordingly, we have also explicitly provided in the regulatory text for required responses to any amendments to a Statement of Position.

[403] The sentence—providing that the hearing officer shall not receive evidence concerning any issue as to which the parties have not taken adverse positions—includes an exception that preserves the regional director's discretion to permit the introduction of evidence relating to an issue that is necessary for the director to address even if the parties have not taken adverse positions. For example, if an employer declines to complete a statement of position in a case where the petitioned-for unit is not

helps to streamline the hearing and ensure that the hearing proceeds in an orderly fashion if parties are precluded from raising issues that they did not raise in their Statements of Position or place in dispute in response to another party's Statement. Absent good cause, parties should not be permitted to raise new issues just prior to the close of the hearing.[404]

The Board declines to adopt the proposed rule's use of the term "joinder" in connection with the requirement of responses to issues raised in a Statement of Position.

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presumptively appropriate, the director must still determine whether the petitioned-for unit is appropriate in order to determine whether a question of representation exists. Accordingly, the final rule permits the director to instruct the hearing officer to take evidence on this issue. Similarly, if an employer takes no position regarding the Board's jurisdiction over it, the final rule permits the director to instruct the hearing officer to take evidence on that issue as well. In particular, the regional director must find that the Board has statutory jurisdiction over the employer before the director may conduct an election. However, under the final rule, the Board will continue its longstanding practice of presuming that an employer satisfies the Board's *discretionary* jurisdictional standards when the employer refuses to voluntarily provide information requested by the Board in order to apply those standards. See, e.g., *Seaboard Warehouse Terminals, Inc.,* 123 NLRB 378, 382–83 (1959); *Tropicana Products, Inc.,* 122 NLRB 121, 123–24 (1958).

The Board declines to adopt some provisions of a similar proviso that was contained in §§ 102.66(a)(1), (2), and (3) of the proposed rule. With respect to supplementing the record as to issues relating to the appropriateness of the unit that no party has placed in dispute, the proposed proviso called for the petitioner to supply the evidence. It also specifically provided for the use of secondary evidence, such as sworn statements or declarations. We see no need to specify the petitioner or any other party as responsible for supplementing the record in this regard; the means and manner of insuring the adequacy of the record should remain within the discretion of the regional director, or the hearing office on the director's behalf, where it currently resides. Similarly, hearing officers already enjoy discretion to receive secondary evidence in appropriate circumstances, and we see no need to limit that discretion or predetermine the form of evidence that might be appropriate for this purpose.

[404] Moreover, as previously discussed, one purpose of requiring the Statement of Position in advance of the hearing is to narrow the scope of the pre-election hearing by alerting the petitioner as to issues the nonpetitioner is seeking to litigate in the hearing on the petitioner's petition. This will avoid a situation where one party is not prepared to proceed because they did not believe that certain issues required litigation. For all the foregoing reasons, the Board rejects the notion that parties should be able to amend their Statements of Position even in the absence of good cause.

While, as explained above, the important concept of identifying the issues in dispute and precluding litigation of undisputed matters is retained in the final rule, the term "joinder" is not necessary to describe the concept and might give rise to a mistaken belief that the body of law concerning civil pleading requirements was intended to be imported and applied to our representation-case proceedings. We believe that would be inappropriate for the relatively informal administrative hearings governed by this rule. The Board has also eliminated the duplicative numbered subdivisions of § 102.66(a), consolidating their provisions, as modified, as § 102.66(b).

The Board adopts in all material respects the "Preclusion" paragraph of the proposed rule, numbered here as § 102.66(d). This complements §§ 102.63(b) and 102.66(b), and helps achieve an important objective of those provisions. As explained above, the requirements of the Statement of Position and responses, permitting identification of the issues in dispute, together with the preclusion of evidence of issues not timely raised, substantially improves the Board's procedures by saving the parties and the Board the time and expense of wasteful litigation. As also discussed here and in connection with § 102.63, hearing officers working under the prior rules often sought to obtain this result by soliciting the positions of the parties in order to narrow the issues and avoid unnecessary litigation. However, parties sometimes failed or refused to provide the necessary information, thereby frustrating those efforts. Section 102.66(d) supplies the incentive for parties to comply with the requirements of §§ 102.63(b) and 102.66(b), consistent with Board precedent discussed above, by precluding parties from litigating issues as to which they have failed to take positions required either as part of a Statement of Position or in response to a Statement of Position. Put another way, § 102.66(d)

constitutes the enforcement mechanism for §§ 102.63(b) and 102.66(b), in a way that tracks Board precedent. It includes an exception for litigation of the issue of statutory jurisdiction, and it expressly exempts from the preclusive effect of the paragraph a party's ability to challenge the eligibility of any voter during the election.

Upon reflection, the Board has decided not to adopt the proposed mandatory offer-of-proof procedure. Under the proposal, once the issues raised in a party's statement of position were properly responded to by the petitioner, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact. Thus, the proposed rule provided, in relevant part:

> (b) Offers of proof; discussion of election procedure. After identifying the issues in dispute pursuant to paragraph (a) of this section, the hearing officer shall solicit offers of proof from the parties or their counsel as to all such issues. The offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing the witness' testimony. The hearing officer shall examine the offers of proof related to each issue in dispute and shall proceed to hear testimony and accept other evidence relevant to the issue only if the offers of proof raise a genuine dispute as to any material fact. * * *

79 FR at 7358 (§ 102.66(b)). The final rule provides with respect to offers of proof (emphasis added):

> (c) Offers of proof. *The regional director shall direct the hearing officer concerning the issues to be litigated at the hearing.* The hearing officer *may solicit* offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. *If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.*

See amended § 102.66(c).

The final rule thus makes clear that hearing officers will *not* require parties to make offers of proof raising genuine disputes as to material facts before proceeding to hear testimony and accept other evidence. Instead, consistent with pre-existing practice, the Board has decided to leave it to the hearing officer's discretion whether to require parties to submit offers of proof on disputed issues. The Board has also removed the language drawn from Federal Rule of Civil Procedure 56. The substitute language makes clear that in the event the hearing officer decides to require parties to make an offer of proof, the evidence will not be received if the regional director determines that the evidence described in the offer of proof is insufficient to sustain the proponent's position.

The Board believes that codifying hearing officers' discretion to require offers of proof (and regional directors' discretion to determine that the evidence described therein is insufficient to sustain the proponent's position and thus that it will not be received) will help the Board to avoid unnecessary litigation and expeditiously resolve questions of representation in a manner that fully protects the rights of all parties. As discussed above, subject to the provisions of § 102.66, the hearing officer has a duty "to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act." Amended § 102.64(b) (which was formerly § 102.64(a)). However, as the Hearing Officer's Guide has long recognized, the hearing officer "also [has a] duty * * * to keep the record as short as is commensurate with its being complete." Hearing Officer's Guide at 1. Thus, the Board has a concomitant "duty to protect the integrity of its processes

against unwarranted burdening of the record and unnecessary delay." *Laurel Associates, Inc. d/b/a Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603, 603 (1998). See Casehandling Manual Section 11188.1 ("The hearing officer should * * * exclude irrelevant and cumulative material.").

In order to protect against unwarranted burdening of the record and unnecessary delay, the Board has long sanctioned a hearing officer's authority to require a party to submit an offer of proof summarizing and explaining its proffered evidence as well as a hearing officer's authority to rule on the offer of proof. See *Laurel Associates, Inc.*, 325 NLRB at 603; *Mariah, Inc.*, 322 NLRB 586, 586 (1996). Indeed, because offers of proof can be an effective tool for controlling and streamlining the hearing and achieving an uncluttered record free of irrelevant and cumulative material, the Hearing Officer's Guide expressly encourages the hearing officers to utilize offers of proof. Hearing Officer's Guide at 6, 38 ("the hearing officer should * * * utilize offers of proof in order to achieve an uncluttered record."). See Casehandling Manual Section 11185, 11188.1. But, we no longer believe that we need insist on a rigid formality by mandating that offers of proof be taken on every potential issue before any evidence is introduced. We think that hearing officers will continue to be capable of judging when offers of proof are likely to be helpful in safeguarding the record, and will continue to require them as appropriate, without removing their discretion to let the hearing proceed organically where pro forma offers of proof might burden, rather than streamline, the hearing record. However, given protests in the comments concerning the hearing officers' role (as discussed below), out of an abundance of caution we clarify that hearing officers must seek the regional director's determination as to whether to receive proffered evidence relating to an issue

that the regional director determined should be litigated. This ensures that discretion to foreclose litigation resides with the statutorily appropriate agent of the Board. This comports with current best practices, where hearing officers briefly adjourn hearings to communicate with regional directors to ensure that the record is developed consistent with the regional director's view of the case.[405]

In sum, amended § 102.66(c) does no more than reaffirm and codify the authority of the hearing officer to require parties to make offers of proof if the hearing officer believes it would be useful to do so. See *Laurel Associates, Inc.*, 325 NLRB at 603 & n.1 (hearing officer properly required employer to make an offer of proof in support of its claim that the presumptively appropriate petitioned-for unit was not in fact appropriate and then properly rejected it); *Mariah, Inc.*, 322 NLRB at 586 n.1, 588 (hearing officer properly permitted employer to make, and then properly rejected, an offer of proof regarding the eligibility of strikers because such matters are decided post election if necessary); *Franklin Hospital Medical Center*, 337 NLRB 826, 826-27 & n.2 (2002) (hearing officer properly rejected employer's offer of proof regarding alleged supervisor status of certain individuals); *Colgate-Palmolive Co.*, 120 NLRB 1567, 1568 & n.2 (1958) (hearing officer properly rejected proffered evidence because it was not material); *W.B. Willet*, 85 NLRB 761, 761 n.2 (1949) (hearing officer properly rejected offer of proof in support of party's contract bar claim, because it could not have constituted a bar to the proceeding).

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[405] See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II and Gabrielle Semel on behalf of CWA II (discussing current practice of hearing officers pausing to communicate with regional directors when necessary).

A number of comments criticize the role of, and the authority assigned to, the hearing officer under the proposed rule. Of those comments, several suggest that the Board's proposed procedures represent an unprecedented expansion of the hearing officer's role and vest the hearing officer with too much discretion.[406] Similarly, some comments express the view that the statute prohibits hearing officers from making decisions such as whether disputed issues relate to a material fact, or whether offers of proof are sufficient to establish the existence of a genuine dispute as to a material fact, as Section 9(c) prohibits hearing officers from even making recommendations with respect to the representation hearing.[407] In addition, several comments note that not all hearing officers are attorneys,[408] and numerous comments questioned the competency of hearing officers—particularly in the absence of guidance from the Board—to assess the parties' position statements and offers of proof and to apply the legal standards embodied in federal civil procedure to make judgments as to what constitutes a disputed issue of material fact.[409] According to several comments, the likely result of such required judgments—which may not be made in a uniform manner among hearing officers—will

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[406] See, e.g., SHRM; Bluegrass Institute; ACC; CDW II. In that regard, Baker & McKenzie asserts that the proposed rule changes the role of the hearing officer from that of fact gatherer to gatekeeper/judge, a role for which the hearing officer does not have the requisite experience or training.

[407] See, e.g., ALFA;Testimony of Roger King on behalf of SHRM II; COLLE II.

[408] See, e.g., ACE; SHRM II; Bluegrass Institute; GAM; York SHRM.

[409] See, e.g., SHRM; CNLP; AHCA; National Mining Association; ACE; Bluegrass Institute. AHA further asserts that, should the Board adopt the proposed procedures, it should engage in an open dialogue regarding the standards that the hearing officers would apply, and should invite comments on proposals that provide for more detailed and comprehensive descriptions of the process to be followed by the hearing officers.

be an increase in post-election litigation and post-certification challenges.[410]

Responsive comments express the contrary position that the proposed rules grant no greater discretion to hearing officers than that which they already exercise under current Board procedures, as hearing officers have always been responsible for controlling the hearing, assuring that there is a complete record, and excluding evidence that is not material to the case.[411] In addition, SEIU asserts that the proposed rules do not suggest that hearing officers are to weigh the proffered evidence of the parties, or to ascertain whether assertions made in position statements are accurate or reliable; rather, the hearing officer is to examine the position statements and offers of proof to ascertain whether there is conflicting evidence as to any material fact.

Many comments also focus on the use of language similar to that used in Rule 56. The AFL-CIO supports the proposal claiming that it will appropriately eliminate the ability of a party to strategically delay the election by forcing the litigation of undisputed or immaterial issues and provide the hearing officer with the authority to prevent an "empty show" hearing, while simultaneously ensuring that the parties are provided the opportunity to present their positions on all issues and to present evidence or offers of proof on all material factual issues. In addition, the AFL-CIO contends that "most major agencies in the federal system have opted to make available procedures for the summary disposition of adjudicatory matters," and that such procedures are particularly appropriate in the context of an "informal and nonadversarial" pre-election hearing. Similarly, several

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[410] See, e.g., National Mining Association; Baker & McKenzie; GAM; NAM II.

[411] See, e.g., AFL-CIO II; SEIU Reply.

comments assert that the offer-of-proof procedure is consistent with both the Board's current post-election practice and civil litigation in federal and state courts.[412]

Conversely, several comments express the position that the mandatory offer-of-proof procedure inappropriately deprives the parties of the opportunity to develop a full and complete record.[413] Other comments assert that the procedures proposed in 102.66 deny employers the due process protections to which they are entitled,[414] and that they are inconsistent with the statutory requirement that the Board provide an "appropriate hearing" prior to the election. In the latter regard, several comments argue that Section 9(c) of the Act requires a pre-election evidentiary hearing at which the parties are afforded the opportunity to present their evidence and positions, and cross-examine witnesses.[415]

Several responsive comments dispute the claims that the Board's proposed procedures are violative of due process guarantees.[416] These comments assert that there is a notable absence of support for the claim that due process requires the Board to expend resources in connection with the litigation of issues that are neither material nor in dispute, and that due process requires "something less than a full evidentiary hearing."

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[412] See, e.g., NELP; UFCW; Testimony of Peter Ford on behalf of UFCW II.

[413] See, e.g., SHRM; ACE; AHA; CDW II. Moreover, SHRM asserts that the incomplete record resulting from the hearing officer's decision regarding the offers of proof, together with the possibility that the Board might exercise its discretion to deny post-election review, will result in more frequent remands to the Board from the federal courts of appeals, as the courts will not have an adequate record for review.

[414] See, e.g., SHRM; ACE; U.S. Poultry II.

[415] See, e.g., SHRM; CNLP; AHCA II; CDW II.

[416] See, e.g., AFL-CIO Reply; SEIU Reply.

Similarly, several comments express support for the Board's preliminary view in the NPRM that the statutorily-prescribed "appropriate hearing" does not mean an evidentiary hearing when there are no issues in dispute or the parties fail to submit an offer of proof demonstrating a genuine dispute as to a material fact.[417] The comments additionally assert that, pursuant to the Supreme Court's interpretation of Section 9(c) of the Act, the Board has discretion to determine the appropriate parameters of the investigatory representation hearing.

In addition to challenging the Board's proposed limitations on the hearing as inconsistent with due process and statutory requirements, many of the comments in opposition to the proposed procedures express the view that, contrary to the Board's suggestion in the NPRM, the summary procedures are not analogous to the summary judgment framework established by Rule 56 of the Federal Rules of Civil Procedure. More specifically, a number of comments contend that a fundamental distinction between the Board's proposed procedures and Rule 56 is the fact that summary judgment under the federal rule takes place only after the parties have had the opportunity to conduct discovery.[418] According to comments from SHRM and ACE, non-petitioning parties cannot reasonably be expected to articulate and substantiate their positions through an

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[417] See, e.g., AFL-CIO Reply; SEIU Reply; UFCW; LIUNA MAROC II.

[418] See, e.g., AHA; ALFA; SHRM; NAM; ACE; National Mining Association. CNLP additionally asserts that when a summary judgment motion is filed as an answer under Rule 56, the non-moving party may request time for additional discovery to provide a response.

In response, a reply comment from the SEIU asserts that, in contrast to federal court proceedings, the employer in a representation proceeding before the Board has access to, and exclusive control over, all of the relevant information and, accordingly, does not have the same need for discovery.

informal summary judgment process in the absence of a full record or, at a minimum, access to all of the relevant evidence. SHRM, ACE, and AHA additionally contend that the Board's analogy to Rule 56 is inapt in that summary judgment procedures are utilized to resolve legal questions only after the facts have been established to the point where no material facts are in dispute; the summary judgment procedure has never been used to determine *whether* to receive and evaluate evidence.

A comment from NAM II additionally asserts that, as the Board's proposal requires the non-moving party to identify issues, submit an offer of proof, marshal arguments, and introduce evidence supporting its position, it completely reverses the burden of proof applicable under Rule 56. In addition, unlike the federal rule, the Board's procedures do not afford the parties the opportunity for oral argument.

In response to the comments criticizing the Board's reliance on Rule 56, the SEIU (Reply) counters that, under the Board's proposed rules, "employers may force hearings by producing far less than a litigant must produce under Rule 56, and may easily meet its burden without the discovery that often precedes summary judgment motions." Indeed, argues the SEIU, employers would be subjected to a much lower bar than that necessary to overcome a summary judgment motion; whereas a non-moving party under Rule 56 cannot rest on its pleadings, but must submit significant probative evidence in support of its claims, a party seeking to introduce evidence at a representation hearing need only raise an issue in its position statement and, subsequently, submit an offer of proof identifying its likely witnesses and summarizing their anticipated testimony. See F.R.C.P. 56(e).

We agree with the criticism of the proposed rule's use of Rule 56 of the Federal

Rules of Civil Procedure as a model for the procedural rules governing representation cases, based on the substantial differences between the different kinds of proceedings. The Federal Rules are designed for formal judicial actions before a federal judge or magistrate judge that may address any issue raised in connection with almost the full range of claims cognizable under federal or state statutory or common law. The Board's representation cases, by contrast, involve informal administrative proceedings that address a narrow subset of the issues arising under a single federal statute. The range of issues is even narrower in pre-election proceedings. The cases are presided over and decided by hearing officers and regional directors, respectively, some of whom are not lawyers, and it is more common than in district court for parties not to be represented by counsel. We agree that it makes little sense to burden an informal proceeding that performs a simple, narrow function with trappings of full-dress federal litigation. We therefore have declined to adopt the language of proposed § 102.66(c) that was drawn from Rule 56. Similarly, in §§ 102.64(b) and 102.66(a) we have rejected proposed language imported from Rule 56, and in § 102.66(a) we have eliminated the proposed "joinder" nomenclature in connection with the identification of disputed issues through the responses to statements of position.

It is important to recognize, however, that § 102.66 of the final rule, Rule 56, and many other rules governing adjudication of disputes are animated by a common principle of economy and common sense: a tribunal need not permit litigation of a fact that will not, as a matter of law, affect the result, or as to which the party that seeks to litigate the fact cannot identify evidence that would sustain its position. For example, suppose that a party asserts, concerning a petition for a unit including all dispatchers, that dispatchers

are supervisors, and suppose that even if all of its witnesses testify credibly as it says they will testify and all of the documents it proposes to introduce show what it says they will show, the party's testimonial and documentary evidence will not, as a matter of law, establish that dispatchers are supervisors. Under such circumstances, there is no need for an evidentiary hearing on the issue. There is no need to require the hearing officer to try the factual issue to find out whether the party's witnesses might by some chance testify to something different from what the party said they would. That would be the definition of unnecessary litigation, and the formalities of summary judgment under Rule 56 are not needed to reach the obvious conclusion that the issue should not be tried.

The Board is confident that hearing officers are fully capable of performing their role under the final rule, including asking petitioners to respond to each position taken by the nonpetitioners and administering the preclusion provision. Put simply, we believe that the amendments to § 102.66(b) codify nothing more than what hearing officers are supposed to do currently. The Hearing Officer's Guide has long provided that at the outset of the hearing, the hearing officer should have the parties clearly state their positions on each issue. Hearing Officer's Guide at 6, 13, 14, 16. Casehandling Manual Sections 11187 and 11188 likewise provided long before the NPRM that the hearing officer should guide, direct and control the hearing, seek responses to issues raised by the parties, and take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated. Similarly, hearing officers have experience precluding parties from presenting evidence relating to an issue if the parties have not taken a position on that issue. See *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994). See also Casehandling Manual Section 11217 (the hearing officer should

advise a party that refuses to state its position on an issue that it may be foreclosed from presenting evidence on that issue). Accordingly, we believe that hearing officers are capable of determining when parties are seeking to present evidence about issues they did not raise in their Statements of Position or in response thereto.[419]

Nor would the Board be persuaded by any claim that hearing officers are incapable of administering the amended offer-of-proof procedure. As discussed above, amended § 102.66(c) does not expand the hearing officer's role beyond that which existed under the Board's prior rules; rather, it merely confirms that the hearing officer—in the interests of protecting the record from being burdened by cumulative or unhelpful evidence and preventing unnecessary delay —has the discretion to require the parties to submit an offer of proof. Thus, the hearing officer's role is limited to the traditional one of "guid[ing], direct[ing], and control[ling] the hearing, excluding irrelevant and cumulative material, and not allowing the record to be cluttered with evidence submitted 'for what it's worth.'" Hearing Officer's Guide at 6, 38. See Casehandling Manual Section 11188.1. As shown, prior to the NPRM, hearing officers had discretion to require parties to submit offers of proof. Under the final rule, hearing officers continue to have discretion to require offers of proof, subject to the clarification that it is the regional director who will make the ultimate decision on the offer's sufficiency. Nothing in the amendments denies parties the ability to argue orally about whether a particular offer of proof should be rejected. In our experience, hearing officers have been fully capable of

[419] In any event, § 102.66(b) also vests authority in the regional director to permit parties' timely amendments to their Statements of Position or response thereto under a good cause standard, mooting some of the concerns parties had concerning the hearing officer's proposed role.

requesting offers of proof and seeking direction from regional directors on whether to allow evidence to be received, and there is no reason to think that the amendments will change that.[420]

There will be adequate evidence on the record to decide the relevant issues. To be sure, prior to the NPRM, the Board had construed its rules as granting parties the right to litigate individual eligibility or inclusion questions, whereas the final rule provides that disputes concerning individuals' eligibility to vote or inclusion in the unit found appropriate ordinarily need not be litigated or resolved before an election is conducted. The Board has concluded that, although this provision may operate to exclude evidence from the record concerning individuals' eligibility to vote or inclusion in the unit found appropriate, such evidence is not relevant to the existence of a question of representation. As such, it would be administratively irrational to require that parties be permitted to litigate such issues at the pre-election hearing if the regional director will not be deciding those issues prior to the election. But, under the final rule, regional directors are free to

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[420] Regional directors assign either field attorneys or field examiners to serve as hearing officers. Field attorneys must possess a J.D. degree and be an active member of a bar. Field examiners must possess a B.A. degree. The Board has traditionally provided written guidance to hearing officers as well as periodic training. Hearing officers also participate in a video training program that covers the subject of conducting a hearing as well as relevant professional development programs. There is also a lengthy publication entitled Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings, which is periodically updated and made available to hearing officers (and the public on the Board's Web site). Hearing officers are also routinely given feedback on their conduct of hearings by the staff members assigned to assist the regional director in drafting the resulting decision as well as by the regional director. The Board intends to continue to provide these types of assistance, feedback, and training. Finally, the qualifications of hearings officers are not set by statute or regulation. To the extent the regional directors or the Board find that the existing hearing officers cannot competently perform the role assigned them under the final rule, the Board will provide necessary training or alter the qualifications for service as a hearing officer.

direct that evidence regarding individuals' eligibility to vote or inclusion in the unit be admitted if the director resolves to consider the individual eligibility question at issue prior to the election.[421]

Contrary to some of the comments, the hearing officer's determination to require a party's offer of proof and seeking a ruling from the regional director on whether to receive the described evidence does not constitute a "recommendation" or decision for purposes of Section 9(c)(1) of the Act. Thus, in deciding whether to require an offer of proof, and presenting that offer to the regional director, the hearing officer is not recommending, or deciding, whether a question of representation exists or whether an election should be directed to resolve that question. See Casehandling Manual Section 11185 ("The hearing officer's role is to guide, direct, and control the presentation of evidence at the hearing [but] [t]he hearing officer does not make any recommendations or participate in any phase of the decisional process.")[422] Moreover, as discussed above, the

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[421] We also disagree with the suggestion of the IBEW II that the process would be improved if the hearing officer took control of the hearing by subpoenaing witnesses and becoming the primary questioner to develop the record. To say nothing of the hearing officer being the individual least suited to determine, as an initial matter, which witnesses would be best situated to provide the necessary evidence, we are also guided by the principal that the hearing officer is not an advocate for either side and must be impartial in developing the record. As the Casehandling Manual cogently explains, the hearing officer should avoid the appearance of providing undue assistance to one party or another and "should also exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly taking over." 11188.1. We think that the tools provided in the final rule will allow the hearing officer and the regional director to adequately control development of the record without taking steps—as suggested by IBEW—that could lead their impartiality to be called into question.

[422] Indeed, hearing officers have long been charged with passing on the admissibility of evidence, and ruling on petitions to revoke subpoenas that are filed after the hearing opens. See §§ 102.64, 102.65, 102.66, 102.68 (2009); Hearing Officer's Guide at 1, 22, 29, 33-39; Casehandling Manual Sections 11188.1, 11185, 11194; 11204, 11207, 11212.

final rule makes clear in amended § 102.66(c) that it is the regional director, not the hearing officer, who will determine the issues to be litigated and whether evidence described in an offer of proof will be admitted.

We would also find unpersuasive any claim that the amendments deprive parties of their right to an "appropriate" pre-election hearing under Section 9(c) of the Act. Section 9(c)(1) of the Act states that the Board must provide for "an appropriate hearing" if it has "reasonable cause to believe that a question of representation affecting commerce exists," and that the Board must direct an election if it finds, based on the record of that hearing, that "such a question of representation exists." Thus, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists.[423] In the absence of an election agreement, the Board's duty under Section 9(c) of the Act is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results.

Amended § 102.66 does not deprive parties of their right to "an appropriate [pre-election] hearing" under Section 9(c) of the Act. After all, as explained above, amended § 102.66(a) expressly provides that parties have the right to introduce evidence "of the significant facts that support the party's contentions and are relevant to the existence of a question of representation." Codifying hearing officers' discretion to require parties to

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[423] As noted, a question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. However, a proper petition cannot be filed under Section 9(c)(1) of the Act, and a question of representation cannot arise under the Act, unless the employees in the unit are employed by an employer covered by the Act. Thus, the regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists.

make offers of proof in § 102.66(c) likewise does not deprive parties of their right to "an appropriate [pre-election] hearing" or their right to litigate relevant issues. To the contrary, offers of proof are a recurring feature of pre-election hearings under the NLRA (and of administrative and state and federal court hearings across the land). An offer of proof is simply a tool to enable the regional director to determine whether it is appropriate to receive the evidence a party wishes to introduce. See Hearing Officer's Guide at 38. Thus, for example, if the proffered evidence is not relevant to whether a question of representation exists and the offer is rejected, parties have not been deprived of their right to a pre-election hearing, because parties have no right—under the NLRA, the APA, or the due process clause of the United States Constitution—to present evidence that is not relevant to the statutory purpose of the pre-election hearing.[424]

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[424] See *Mariah, Inc.*, 322 NLRB at 586 n.1 (hearing officer acted consistent with his role in ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing); *National Mining Ass'n v. DOL*, 292 F.3d 849, 873-74 (D.C. Cir. 2002) (the APA "empowers agencies to 'exclu[de] * * * irrelevant, immaterial, or unduly repetitive evidence' as 'a matter of policy'") (citation omitted); *U.S. v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001) (although a criminal defendant "has a wide-ranging right to present a defense, * * * this does not give him a right to present irrelevant evidence"); *U.S. v. Vazquez-Botet*, 532 F.3d 37, 51 (1st Cir. 2008) (same). Accordingly, parties have no right to present irrelevant evidence at a pre-election hearing, which is not governed by the APA's formal adjudication provisions. See 5 U.S.C. 554 (a)(6); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1252-1253 (9th Cir. 1979) (representation case proceedings exempt from APA formal adjudication requirements)*; NLRB v. Champa Linen Service Co.*, 437 F.2d 1259, 1262 (10th Cir. 1971) (same).

We also wish to reiterate that if pursuant to the regional director's direction, a hearing officer prevents receipt of evidence regarding an individual eligibility or inclusion question (on the grounds that the proffered evidence is not relevant to determining whether a question of representation exists,) the party remains free to present such evidence at a post-election hearing if that individual casts a determinative challenged ballot. Similarly, if the disputed votes are not determinative, parties can bring the issue back before the Board through a timely filed unit clarification petition if the

Indeed, as shown, hearing officers had authority under the Board's prior rules to seek responses to party positions and to require parties to make offers of proof.

Moreover, because offers of proof are part of the record as discussed below in connection with amended § 102.68, parties' rights are preserved even if the evidence is rejected in error. Thus, the offer of proof is in the record for the regional director (or the Board or a reviewing court) to review, and if the director (or the Board or a reviewing court) concludes that the evidence was rejected in error and that the error prejudiced the party making the offer, then the director (or the Board or a reviewing court) can order that the record be reopened and the evidence taken. Hearing Officer's Guide at 38.[425]

Nor will the preclusion provisions prevent development of an adequate record upon which the regional director can determine whether there is an appropriate unit in which the Board may properly conduct an election. As explained in the NPRM, hearing officers had authority under the Board's prior rules to preclude parties from presenting evidence when they refused to take positions on issues. See 79 FR 7329-30; *Bennett Industries Inc.*, 313 NLRB 1363, 1363 (1994) (hearing officer properly refused to allow employer to introduce evidence regarding supervisory status of leadpersons and quality

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union wins the election and they cannot resolve the issues through collective bargaining. Thus, the amendments do not limit any party's right to present such evidence, but merely give the regional director discretion to defer introduction of such evidence until after the election.

[425] As noted, hearing officers have long had discretion to require offers of proof at the pre-election hearing. The courts of appeals have not remanded a significant number of cases because of erroneous hearing officer rulings regarding offers of proof, and we see no reason for this to change as a result of the final rule. If anything, the requirement that regional directors determine whether evidence described in the offer of proof should be received lessens the chance of erroneous rulings.

control inspectors because employer refused to take a position regarding their status and their inclusion or exclusion from the unit); *Allen Health Care Services*, 332 NLRB 1308 (2000); Casehandling Manual Section 11217. Even if the hearing officer exercises the authority to limit an employer's presentation of evidence when the employer fails to take a position regarding the appropriateness of a petitioned-for unit, the regional director will retain the discretion to direct the receipt of evidence needed to make the required determination concerning a petitioned-for unit which is not presumptively appropriate. That evidence may include testimony adduced from the employer's owners, managers, or supervisors as witnesses, called under subpoena or otherwise, and documents obtained from the employer.

Thus, for example, amended § 102.66(b) contains an exception which explicitly provides that "this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary."[426] And amended § 102.66(a) provides that the hearing officer "shall also have the power to call, examine, and cross-examine witnesses and to introduce into the record documentary

[426] The NPRM proposed a slightly different version of this language, keyed only to the need for petitioner to adduce evidence concerning the appropriateness of the petitioned-for unit when the employer refused to take a position on the issue. See 79 FR 7357. However, the Board was persuaded in part by the comment of the AFL-CIO II that the Board's proposed language should be modified to include a reference to evidence concerning jurisdiction, and a catch all covering any issue concerning which record evidence is necessary for those circumstances in which the record might lack other necessary evidence concerning issues that are neither contested, nor stipulated. For example, a petitioner's status as a labor organization could be such an issue in certain cases.

and other evidence." The Board has concluded that employers who are unable or unwilling to take a position concerning the appropriateness of a proposed unit of their own employees are unlikely to provide assistance to the hearing officer in the development of an adequate record upon which to address that question. And we reiterate our further conclusion that not vesting hearing officers with clear authority to limit such employers' participation in the hearings under those circumstances threatens the hearing officer's ability to control the proceedings and avoid burdening the record.

In short, if the parties do not enter into an election agreement, there *will* be a pre-election hearing. But Section 9(c) does not require a full evidentiary hearing in every case. Rather, it requires "an appropriate hearing." The Board concludes that a hearing where irrelevant evidence must be introduced is an inappropriate hearing. Thus, if the parties come to the hearing and the regional director determines that there are no disputes that must be resolved prior to the election (because, for example, all parties agree on the record that the Board has jurisdiction and that the only dispute concerns the supervisory status of one individual in a 10-person unit that all parties agree on the record is appropriate), an appropriate hearing does not require introduction of further evidence. See *United States v. Storer Broadcasting*, 351 U.S. 192, 205 (1956); *accord American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624, 628 (en banc), *cert. denied*, 385 U.S. 843 (1966). On the other hand, if, as discussed above, the petitioned-for unit is not presumptively appropriate and the employer refuses to take a position on the appropriateness of the unit, then although the amendments to § 102.66 preclude the employer from presenting evidence and argument about the appropriateness of the unit, the amendments allow the petitioner to demonstrate the appropriateness of the unit at the

hearing, or adduce evidence concerning any other issue for which record evidence is necessary. See § 102.66(b). Thus, the amendments are consistent with *Allen Health Care Services*, 332 NLRB 1308, 1308-09 (2000), where the Board held that if the employer refuses to take a position on a unit that is not presumptively appropriate, the hearing officer must take evidence sufficient to allow the regional director to find that the unit is appropriate before the director may direct an election in that unit.[427] Similarly, unless the employer concedes the Board has jurisdiction, evidence must be taken on the Board's statutory jurisdiction to process the petition. Indeed, amended § 102.66(b) provides that receipt of evidence regarding the Board's jurisdiction will not be precluded even if the employer takes no position on this issue, and amended § 102.66(d) contains language that expressly provides that "no party shall be precluded from * * * presenting evidence relevant to the Board's statutory jurisdiction to process the petition."

Many comments specifically claim that the rule's preclusion provision is unfair, biased, or too severe a consequence for an employer's failure to raise an issue in its position statement, particularly in light of the abbreviated period of time permitted for its

[427] Likewise, because, as the IFA points out, current Board law holds that employees who are jointly employed by two entities cannot be included in the same bargaining unit with employees who are solely employed by one of those entities without the consent of both entities (*Oakwood Care Center*, 343 NLRB 659 (2004)), the Board may not find such a "mixed unit" to be appropriate merely on the basis that neither entity submits a Statement of Position. At the same time, it would be inappropriate to dismiss the petition simply based on the failure of the two entities to file Statements of Position, as for example, both entities could consent at the hearing. The petitioner could also amend its petition and seek to represent only the employees who are jointly employed by both employers (see *id.* at 662, 666 (a joint employer unit consisting solely of the jointly-employed employees is appropriate, even absent the employers' consent)), or the union could amend its petition and seek to represent just the employees who are solely employed by one of the two entities.

preparation;[428] one such comment (ACC) additionally questions the Board's authority to preclude litigation of significant issues based on an inadvertent omission from the position statement. In addition, a number of comments argue that the short-time frame will lead employers to file "pro forma" position statements and may cause employers to put forward every argument rather than risk preclusion.[429] We have already explained above in relation to § 102.63 why we disagree with the claim that the Statement of Position form due date and the pre-election hearing scheduling provisions render preclusion unfair. We have likewise explained above why we disagree with the notion advanced in some comments that the preclusion proposal will lengthen pre-election hearings and therefore will be counterproductive.

We also disagree with the comments that appear to challenge the very notion of preclusion itself as well as the Board's authority to preclude parties from raising issues that they did not raise in their Statements or in response to another party's Statement. Thus, the fact of the matter is that, as discussed above, prior to the NPRM, parties were required to raise contentions at specified times in the process or face preclusion. Indeed, as shown, Casehandling Manual Section 11217 provided that the hearing officer should advise parties that they may be foreclosed from presenting evidence on issues if they refuse to take a position on those issues. Prior to the NPRM, the Board had held that a hearing officer may preclude an employer from introducing evidence regarding the supervisory status of employees in certain job classifications if the employer refuses to

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[428] See, e.g., Cook-Illinois; AGC; Sheppard Mullin; ACC; NRF; Indiana Chamber.

[429] See, e.g., Bluegrass Institute; NMMA; Testimony of Curt Kirschner; GAM; Constangy.

take a position on their status and their inclusion or exclusion from the unit. *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994). Similarly, under the rules in effect prior to the NPRM, a party could "not [in a request for review of a regional director's decision and direction of election] raise any issue or allege any facts not timely presented to the regional director." 29 CFR 102.67(d) (2010). Moreover, § 102.65(e)(1) of the prior rules provided that motions for reconsideration or to reopen the record needed to be based on extraordinary circumstances, and that neither the regional director nor the Board would entertain a motion for reconsideration or to reopen the record with respect to any matter which could have been but was not raised pursuant to any other section of the Board's rules. Accordingly, even under the Board's prior rules, if a party failed to present facts or take a position before the hearing officer at a hearing which opened and closed within 7-days of the notice, it could not do so later regardless of whether the failure was inadvertent. In addition, as discussed above in connection with § 102.63 (and § 102.66), we have explicitly provided that parties may seek to amend their Statements of Position either before or during the hearing in a timely manner for good cause.

In view of the foregoing, we categorically reject those comments that contend that we lack authority to impose preclusion, and that preclusion is too severe a consequence, for a party's failure to complete the Statement of Position form. We likewise reject Professor Estreicher's suggestion that the preclusive effect of failing to take a position required by the Statement of Position form should not extend beyond the pre-election period. Put simply, the Board believes, for example, that permitting parties to raise unit appropriateness issues after the election even if they did not raise those issues before the election would be inconsistent with the Board's goal of expeditiously resolving questions

of representation, and would thwart the Board's interest in certainty and finality of election results. Moreover, as shown, the Board's prior rules already required parties to raise certain issues before the election in order to preserve their ability to raise those issues subsequent to the election.

Contrary to comments of GAM, the amendments do not operate to preclude challenges to the eligibility of an individual voter at the polls merely because the party seeking to challenge the voter at the polls failed to provide the initial lists of employees as part of its Statement of Position or failed to raise the issue of that individual's eligibility at the hearing. Amended § 102.66(d) merely provides that the employer "shall be precluded from contesting * * * the eligibility or inclusion of any individuals *at the pre-election hearing*" if it fails to furnish the lists of employees as part of its Statement of Position. (emphasis added). Similarly, amended § 102.66(d) explicitly provides that "no party shall be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election." In short, as noted above, even if an employer fails to complete a Statement of Position form, it will generally be able to challenge the eligibility of a particular individual at the polls, unless, of course, the regional director specifically ruled on that individual's eligibility prior to the election. Cf. Casehandling Manual Section 11338.7 ("Persons in job classifications specifically excluded by the Decision and Direction of the Election should be refused a ballot, even under challenge, unless there have been changed circumstances.") GAM argues that the provisions are confusing, but does not provide suggested language for clarifying the provisions. The Board does not view the language as confusing, and thus has determined that no change is necessary.

SHRM argues that the preclusive effect of the rules is unfair because it operates primarily against the employer. We disagree. The preclusion provisions do not just apply in RC cases where the employer is the nonpetitioner and must complete the Statement of Position form. Rather, under amended § 102.66(b) and (d), the preclusion provisions apply in all cases, without distinction, including RD (decertification cases) as well as RM cases, where the individual or labor organization currently representing employees, or seeking to represent employees, is the nonpetitioner and is responsible for completing a Statement of Position form. Moreover, where a labor organization is the petitioner, amended § 102.66(b) and (d) preclude it from seeking to introduce evidence concerning any issue that it did not place in dispute in response to another party's Statement of Position. We also reiterate that, contrary to SHRM's contentions that the amendments favor unions and impose one-sided burdens, if the employer refuses to take a position regarding the appropriateness of a petitioned-for unit that is not presumptively appropriate (or claims that the unit is not appropriate but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from, the petitioned-for unit to make it an appropriate unit), the petitioner cannot simply rest, but must demonstrate the appropriateness of the petitioned-for unit. Similarly, evidence must be taken as to the Board's statutory jurisdiction to process the petition if the employer refuses to concede jurisdiction and fails to provide the commerce information in its Statement of Position form. See amended § 102.66(b). This is so even though the nonpetitioner employer unquestionably has greater access to the relevant information relating to those issues, as the employer established its employees' terms and conditions of employment and knows the extent of the connection between its business

and interstate commerce.

C. Subpoenas

The final rule does not adopt the proposed amendment to § 102.66(c) specifying that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the 5 days provided in Section 11(1) of the Act. The Board had proposed to codify the existing practice noted in the Casehandling Manual, which provides that case authority "holds that the 5-day period is a maximum and not a minimum." Section 11782.4.[430] Upon reflection, however, the Board does not feel that it would be appropriate to codify the limited caselaw in this area, and instead prefers to allow the continued development of best practices among the Board's regional directors and its administrative law judges concerning motions to quash subpoenas. [431]

D. Discussion of Election Details

The NPRM proposed that prior to closing the hearing, the hearing officer would inform the parties what their obligations under these rules would be if the regional director directs an election. The NPRM also proposed that the hearing officer would solicit all parties' positions on the type, dates, times, and location of the election, and the eligibility period. However, the NPRM also made clear that although parties would be solicited to provide their positions on the election details in their statements of position and at the hearing, the resolution of these issues would remain within the discretion of the

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[430] Accord Hearing Officer's Guide at 22; NLRB Administrative Law Judge Bench Book Section 8-220 (2010) ("[T]o avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days").

[431] Because the final rule does not codify any particular practice, Klein II's complaint that the Board is reducing the time for motions to quash is no longer relevant to the final rule.

regional director, and the hearing officer would not permit them to be litigated. 79 FR at 7330, 7358.

The Board has decided to adopt these proposals in amended § 102.66(g), which provoked little comment. The Board believes that parties to a representation proceeding will be provided with useful guidance if the hearing officer advises them what their obligations will be if the director directs an election.

In addition, as noted above in relation to § 102.63, the Board believes that the solicitation of the parties' positions regarding the election details will help the Board to expeditiously resolve questions of representation. Because the parties will have fully stated their positions on the election details either in their statements of position or at the hearing, the regional director will be able to take the parties' positions on those matters into account and ordinarily will be able to specify the election details in the direction of election, instead of needing a series of unnecessary phone calls or emails with the parties to discuss election details after the decision. And, because the director ordinarily will specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election simultaneously with the direction. This will avoid unnecessary delay, because the election cannot be conducted until the details of the election are set, and the Notice of Election advises the employees of when, where, and how they may vote. And by enabling the director to let the employees vote sooner, the amendment will help the Board to more expeditiously resolve questions of representation.

As discussed above in connection with § 102.63, the Chamber claims that it is not possible for a party to state its position regarding the election details until the regional director determines the unit. We find this objection unpersuasive in this context as well.

Thus, parties are free at the hearing to present their positions on election details in the alternative if they believe that the parties' various unit positions would impact their views on the election details. Moreover, given the small size of bargaining units in representation cases in recent years, the Board anticipates that it will be the exceptional case rather than the norm where differences between the petitioned-for unit and any other unit would cause the employer to feel the need to take such alternative positions regarding the election details. Finally, a regional director has discretion to contact the parties to ascertain their positions regarding the election details if the director ultimately chooses to direct an election in a unit that is materially different from that proposed by either party at the hearing.[432]

GAM questions whether the Board intends to abandon its current practice of taking into account the parties' positions on the election details. The answer is "no." The very purpose of soliciting the parties' positions on these details in the Statement of Position and at the hearing is so the regional director can consider them in setting the election. Contrary to the comment, parties remain free under the final rule to explain the background reasons for their positions regarding the details of the election even though the issue is not litigable at the pre-election hearing. The Board points out, however, that

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[432] According to Casehandling Manual Sections 11842.3(a) and (b), the regional director should provide to both the parties and their designated representatives the election notice to be posted by the employer as well as the decision and direction of election. The final rule clarifies in § 102.66(g)(2) that the hearing officer will solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative, which will aid the regional director in complying with that practice. The final rule also clarifies in § 102.66(g)(3) that the hearing officer will inform the parties that the director will transmit the decision and direction of election to both the parties and their designated representatives.

even prior to the NPRM, the Board was not bound by the parties' preferences. See, e.g., Casehandling Manual Section 11302. Accordingly, contrary to GAM, the Board does not believe that the amendment will decrease the likelihood that parties will enter into election agreements. To the contrary, just as was the case prior to the amendments, one of the reasons why parties may want to enter into an election agreement and waive a pre-election hearing is to gain certainty over the election details.

E. Oral Argument and Briefs

The NPRM proposed amending §§ 102.67 and 102.66(h) to vest the hearing officer with discretion to control the filing, subjects, and timing of any post-hearing briefs. The final rule amends this proposal to vest the regional director with discretion to grant a request to file a post-hearing brief in amended § 102.66(h).

The NPRM explained that, given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Yet under existing §§ 102.67(a) and 101.21(b), in nearly all cases parties are afforded a right to file briefs at any time up to 7 days after the close of the hearing, with permissive extensions granted by hearing officers of up to 14 additional days.[433] By exercising that right or even by simply declining to expressly waive that right until after the running of the 7-day period, parties could potentially delay the issuance of

[433] Despite the current regulations, the Board has denied review of a direction of election when one argument made by the party requesting review was that the hearing officer had refused to permit post-hearing briefs. *Unifirst Corp*., Case 5-RC-15052 (Aug. 16, 2000). The Board reasoned that the party had showed no prejudice and was able to fully present its substantive argument in the request for review. *Id.* at n.1.

a decision and direction of election and the conduct of an election unnecessarily.

Various comments, including those of SHRM, AHA, AHA II, AHCA II and ALFA, oppose the proposed amendment on the ground that briefs are needed to sum up the evidence presented at the pre-election hearing. SHRM, ACE, and AHA point out that this cannot be done as effectively in oral argument at the close of the hearing because the full transcript is not yet available and parties need time to conduct research and formulate legal arguments. Bruce E. Buchanan argues that briefs serve to narrow the issues in dispute and identify relevant case law. The AFL-CIO points out that the current Casehandling Manual recognizes that briefs are not necessary or even of assistance in every case. Section 11242 provides, "Before the close of the hearing, the hearing officer should encourage the parties to argue orally on the record rather than to file briefs."[434]

Curt Kirschner opposed the proposed amendment on the ground that hearing officers are not authorized to control briefing under Section 9(c)(1). Testimony on behalf of AHA II. And numerous other comments argue that elimination of briefing by right denies parties due process.[435]

Having considered these comments, the Board has concluded that post-hearing briefing is not required or even helpful in every case. In this regard, it is important to note that amended § 102.66(h) does not prevent parties from filing post-hearing briefs. Rather,

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[434] A preference for oral argument in lieu of briefing was among the "best practices" identified by the Board's General Counsel in a 1997 report. See G.C. Memo. 98-1, "Report of Best Practices Committee – Representation Cases December 1997", at 10, 28 ("It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.").

[435] See GAM; INDA II; AEM II; US Poultry II.

as amended, the final rule simply vests the regional director with discretion to permit or not permit such filings and to otherwise control the content and timing of any post-hearing briefs. Vesting the regional director with the authority and discretion to decide whether post-hearing briefs are necessary in a particular case eliminates any concerns that hearing officers are not permitted to control briefing under Section 9(c)(1). In addition, where complex issues arise, parties can argue to the regional director why briefing is necessary in that particular case. In the majority of representation cases, where briefing is not necessary, the final rule will eliminate unnecessary delay. Moreover, there is no denial of due process because in every case, parties aggrieved by a decision of the regional director will have a right to file a brief in support of their request for review. Thus, in every representation case that proceeds to a pre-election hearing, a party aggrieved by a ruling of a hearing officer or decision of the regional director will have had the opportunity to file at least one and sometimes two briefs before the close of the case. Finally, in relation to the need for a transcript before parties can adequately sum up the evidence, the Board notes that the typical pre-election hearing lasts for one day or less.

It also bears mentioning that, even under the current rules, parties do not enjoy a right to file post-hearing briefs in certain kinds of representation cases. For example, the Board's current rules do not permit the filing of briefs absent "special permission" after a pre-election hearing conducted under Sections 8(b)(7) and 9 of the Act. See 29 CFR 101.23(c). Similarly, there is no right to file post-hearing briefs after a hearing on challenges or objections. See Casehandling Manual Section 11430; Hearing Officer's Guide at 167 ("In a hearing on objections/challenges, the parties do not have a right to

file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.").

Regarding the arguments that the proposal denies due process, the Board points out that the final rule does not deny any party's right to file at least one post-hearing brief with the Board before the close of the representation proceeding. Moreover, the rule permits the filing of a post-hearing brief with the regional director if such a request is granted. Combined with the right to file a pre-hearing brief or to file a hearing brief before the close of the hearing and to present closing oral argument in every case, the opportunities for the filing of post-hearing briefs provided in the final rule do not deprive any party of due process nor are they inconsistent with the statutory requirement of an "appropriate hearing." In *Morgan v. United States*, 298 U.S. 468 (1936), the Supreme Court considered the essential element of the "full hearing" required by the Packers and Stockyards Act, 7 U.S.C. 310. The Court held that the requirement of a full hearing was not met if the decision-maker was an individual "who has not considered evidence or argument." *Id.* at 481. However, the Court also made clear that the "requirements are not technical," that "[e]vidence may be taken by an examiner," and that [a]rgument may be oral or written." *Id.* See also *Abbott Laboratories v. NLRB*, 540 F.2d 662, 665 n.1 (4th Cir. 1976) ("With respect to proceedings before the hearing officer, the Board ruled that its hearing officer was not required, either by statute or the due process clause, to accept posthearing briefs since the parties had the opportunity to express their views in writing both before and after the case was referred to the hearing officer * * * We see no error of fact or law in these rulings."); *Lim v. District of Columbia Taxicab Commission*, 564 A.2d 720, 726 (D.C. App. 1989) ("there exists no due process right * * * to file a brief").

The APA and its legislative history contain evidence of Congress's intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides, in pertinent part, that in formal agency adjudication "parties are entitled to a reasonable opportunity to submit * * * proposed findings and conclusions * * * and supporting reasons for the * * * proposed findings or conclusions." But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases involving "the certification of worker representatives." The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1252-1253 (9th Cir. 1979); *NLRB v. Champa Linen Service Co*., 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board's "determinations rest so largely upon an election or the availability of an election." S. Rep. No. 752, at 202 (1945). The committee also pointed to "the simplicity of the issues, the great number of cases, and the exceptional need for expedition." Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

Congress did not revisit this decision in 1947 when Section 9 of the NLRA was amended, and the APA continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board's Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that "election case handling

would be newly freighted and greatly retarded by * * * [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law." Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, "After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent." *Id.* at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, "It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board." S. Rep. No. 1234, 89 Cong., 2d Sess. 12-13 (1966). This history demonstrates that Congress's intent in the APA was to ensure that written briefing was not required in representation cases because of the interest in expedition. Congress has steadfastly maintained this view, and has expressly rejected any written briefing requirement in representation cases whenever the matter has arisen. The change is therefore consistent with the requirements of the law and the intent of Congress.

SEIU suggests amending the proposed rule to require that any briefing be

completed within 14 days of the close of the hearing. The Board has considered this suggestion and decided that the regional director who will be writing the decision and considered the parties' request to file a post-hearing brief is in the best position to determine if briefing should be permitted, what subjects any briefing should address, and when briefs should be filed. Accordingly, we decline to set a 14-day limit on post-hearing briefing.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Appeal from Actions of the Regional Director; Statement in Opposition; Requests for Extraordinary Relief; Notice of Election; Voter List

The NPRM proposed a number of amendments to § 102.67, addressing matters such as the regional director's discretion to transfer a case to the Board before issuing a decision, the contents of the pre-election decision, the final election notice, the voter list, and the pre-election request for review procedure and the accompanying 25-day waiting period. 79 FR at 7332-33, 7358-60. As discussed below, after careful consideration, the Board has decided to adopt some of the amendments as originally proposed, to adopt modified versions of other proposals, and to reject the remainder.

A. Elimination of Transfer Procedure

In the NPRM, the Board proposed to eliminate the regional director's authority to transfer a case at any time to the Board for decision. 79 FR at 7333. This authority has rarely been used and, when it has been used, has led to extended delays in the disposition of petitions. See, e.g., *Centurion Auto Transport, Inc.*, 329 NLRB 394 (1999) (transferred December 1994, decided September 1999); *Roadway Package System, Inc.*, 326 NLRB 842 (1998) (transferred May 1995, decided August 1998); *PECO Energy Co.*, 322 NLRB 1074 (1997) (transferred October 1995, decided February 1997); *Johnson Controls, Inc.*,

322 NLRB 669 (1996) (transferred June 1994, decided December 1996). The Board did not receive any significant comments regarding this proposal, and the final rule adopts it. Accordingly, the final rule eliminates, for example, §§ 102.67 (h),(i), and (j) of the current rules which referenced the transfer procedure, and reletters various subparts of § 102.67.[436]

B. The 20-Percent Rule

As discussed above in connection with § 102.66, the Board has decided to reject the proposed 20-percent rule which in relevant part would have *required* the hearing officer to close the hearing if the only issues remaining in dispute concerned the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote. 79 FR at 7330. The Board has likewise decided to reject the portion of the proposed 20-percent rule which would have required the regional director to defer deciding individual eligibility or inclusion questions involving less than 20 percent of the unit. 79 FR at 7332. Instead, for the reasons discussed above in connection with § 102.66, the Board has decided to preserve the discretion regional directors enjoyed even before the NPRM to defer resolving disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election or to decide such disputes before the election in the decision and direction of election. However, the final rule adopts in § 102.67(b) the NPRM proposal that, in the event a

[436]Because § 102.67(j) of the current rules also addressed Board action regarding issues raised by a party's request for review (in addition to Board action regarding issues that had been referred to it by a regional director via the transfer procedure), amended § 102.67(h) clarifies (consistent with current § 102.67(j)) that upon granting a request for review, the Board may provide for oral argument or further hearing, and shall make such disposition of the request for review as it deems appropriate.

regional director defers deciding individual eligibility or inclusion questions until after the election, the Notice of Election shall explain that the individuals in question "are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge," and the procedures through which their eligibility will be resolved. 79 FR at 7332, 7359.[437] The Board concludes that this provision will ensure that employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding, if applicable, that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. The amendment thereby provides guidance to employees and the parties and renders Board procedures more transparent.

GAM asserts that the inclusion in the election notice of an explanation that individuals whose eligibility has not been determined will be permitted to vote subject to challenge precludes employees from "know[ing] the voting unit," and that this violates the Act and due process pursuant to the reasoning in the Fourth Circuit's unpublished decision in *NLRB v. Beverly Health and Rehabilitation Services*, 120 F.3d 262 (4th Cir. 1997). However, under the amendments, as under the prior rules, the regional director must determine the unit's scope and appropriateness prior to directing the election, and employees will be informed of the unit via the Notice of Election. Accordingly, as noted in connection with § 102.66, at the time they cast their ballots, the voting employees will

[437] The final rule provides for this in § 102.67(b), rather than in § 102.67(a) as proposed in the NPRM, and retitles the proposed "Final Notice to Employees of Election" as the "Notice of Election," in light of the final rule's retitling the proposed "Initial Notice to Employees of Election" as the "Notice of Petition for Election." The final rule also states in § 102.67(a), rather than in § 102.67(b), that the decision by the regional director shall set forth the director's findings, conclusions, and order or direction.

be fully informed as to the scope of the unit, and will be able to fully assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that was also the case under the Board's current rules, as explained above, because regional directors and the Board have long had the discretion to defer deciding individual eligibility or inclusion questions until after the election, and parties could agree to permit disputed employees to vote subject to challenge. Indeed, Section 11084.3 of the Casehandling Manual in effect prior to the NPRM provided that where the parties agree that certain classifications of employees should vote subject to challenge, the notice of election "should indicate the classifications that will vote subject to challenge."

Moreover, the court's concern in *Beverly* was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after the election. The final rule would actually help prevent exactly that form of change in unit definition from occurring by codifying regional directors' discretion to defer deciding individual eligibility or inclusion questions until after the election and by providing in amended § 102.67(b) that if the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, thereby advising employees prior to the election that the individuals in question "are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge," and that their unit placement "will be resolved, if necessary, following the election." As already explained, the Board views this alteration to the Notice of Election

as meeting the concerns raised by the *Beverly* court and as specifically countenanced by the Second Circuit in *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992).

C. Direction of Election with Statement of Reasons to Follow

In the NPRM, the Board proposed to grant the regional director discretion to issue a direction of election without simultaneously providing a statement of reasons so long as the director provided his findings and statement of reasons prior to tallying the ballots. The Board expressed its tentative view that granting such discretion to the regional director would avoid unnecessary delay in the conduct of elections. 79 FR at 7332.

SEIU praised the proposal, claiming it could be instrumental in facilitating a timely election. On the other hand, GAM claims that the proposed amendment would be unfair because, without knowing the basis for the direction of election, parties could not evaluate whether to request review of the regional director's direction of election. Negative comments also claimed, among other things, that the proposal would lead to poor decision-making by the regional directors (Fox, GAM); could give rise to unhelpful suspicion regarding the basis for the direction of election (Testimony of Curt Kirschner on behalf of AHA II); and could cause regional directors to set later election dates in complex cases (Fox).

Upon reflection, the Board has decided to reject the proposal. The NPRM set forth the Board's tentative view that the proposal to permit the regional director to direct an election without simultaneously providing a statement of reasons would not prejudice any party in light of another proposed amendment which would defer parties' right to request Board review of pre-election rulings until *after* the ballots cast in the election were tallied. 79 FR at 7332. In other words, no party would be prejudiced by the proposal

because the regional director would be required to furnish his statement of reasons before the ballots were tallied and because the time for filing a request for review of the direction of election would not start to run until after the tally of ballots. However, as discussed below, the Board has decided to reject that other proposal that would have deferred all parties' right to request review of the regional director's pre-election rulings until after the election. Because, under the final rule, a party may file a request for review of a direction of election *prior* to the election, the Board has likewise decided to reject the proposal that would have permitted the regional director to direct the election without simultaneously providing a statement of reasons. Rejection of this proposal will not create a new source of delay in conducting elections because the pre-NPRM rules already require regional directors to set forth their findings and conclusions in the decision and direction of election. 29 CFR 102.67(b) (2010).[438] Moreover, upon reflection, we conclude, in agreement with the testimony of Kirschner II that the time savings that would have been achieved by adopting the proposal would have been relatively modest because they would have represented only the time it would have taken for the regional director to memorialize the decision. Thus, even under the proposal, the director could not have directed an election without first concluding that a question of representation did indeed exist in the unit in which an election was being directed.

D. Specification of Election Details in Direction of Election; Scheduling of Election

In the NPRM, the Board proposed that in the event the regional director directs an election, the direction of election "shall specify" the type, date, time, and place of the

[438] As noted above, the final rule moves this requirement from § 102.67(b) to § 102.67(a).

election, and the eligibility period. 79 FR at 7359. Under prior practice, these details were resolved after the hearing and decision in sometimes lengthy phone consultations and negotiations with the various parties. As one commenter noted, "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.' * * * [The rule] eliminates one of the choke points later on in getting to an election in a timely manner * * *." Testimony of Gabrielle Semel on behalf of CWA II.

Instead of requiring the regional director to specify the election details in *every* direction of election, the Board has decided to provide in § 102.67(b) of the final rule that the direction of election "ordinarily will" specify the election details.[439] Because, as discussed above in connection with §§ 102.63 and 102.66, the parties will have stated their positions on the election details in their petitions, in their Statements of Position and at the hearing, the regional director ordinarily will not need to solicit their positions on the election details yet again after issuing the direction of election, and therefore ordinarily will be able to specify the election details in the direction of election. And, because the director ordinarily will specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election for the employer to post and distribute simultaneously with the direction, and amended § 102.67(b) so provides. These amendments will enable the regional director to let the employees vote sooner,

[439] The Board has changed the language because there may be situations where the regional director concludes that it is appropriate to consult with the parties regarding election details after issuing the direction of election, notwithstanding the prior solicitation of the parties' positions regarding those details.

because the election cannot be conducted until the details of the election are set and the Notice of Election advises the employees of when, where, and how they may vote. In sum, by enabling the regional director to conduct the election without unnecessary delay, the amendments will help the Board to more expeditiously resolve questions concerning representation.

GAM suggests that some employers might refuse to allow elections on their premises if the regional director simply sets the election details in the direction of election instead of first contacting the employer. This comment misunderstands the rule. The Board hearing officer will "contact" the employer at the hearing itself, and there is no reason to think that contact at that time would be less efficacious in obtaining employer consent than contact after the decision.[440] The change will obviate the need for a wasteful post-decision consultation process in favor of more efficient consultations during the hearing itself. Given that all parties will be present at the pre-election hearing, it seems eminently reasonable to solicit the parties' positions at that time, rather than have the Board agent attempt to solicit input individually after the direction issues. In any event, as shown, the final rule leaves the director free to consult with the parties yet again after issuing a direction of election if the director concludes that it is appropriate to do so. For example, if the regional director directs an election in a unit significantly different from the union petitioner's proposed unit and the employer's alternative unit, the regional

[440] Thus, when hearing officers solicit the parties' positions, they can tell the parties the approximate time frame in which the regional director expects to issue the decision, and parties can reference that time frame in stating their positions. This is analogous to what happens now when Board agents contact parties after the decision issues and solicit their positions concerning the details of an election which cannot be held for at least 25 days pursuant to § 101.21(d).

director should consult with the parties concerning the election details. Moreover, contrary to the suggestion in the comment, regional directors were not bound by the parties' preferences regarding the election details prior to the NPRM. See Casehandling Manual Section 11302.[441]

The final rule also adopts in § 102.67(b) the NPRM proposal that in the event the regional director directs an election, the director "shall schedule the election for the earliest date practicable consistent with these rules." 79 FR at 7332, 7359. Many comments object to the NPRM proposals, claiming (incorrectly) that the Board improperly focused on the need to expeditiously resolve questions concerning representation to the exclusion of other factors. In fact, as discussed above in connection with the need for the rule and the opportunity for free speech and debate, the Board did *not* focus exclusively on the statutory goal of expeditiously resolving questions concerning representation. The Board likewise categorically rejects the notion that the proposed language, which the final rule adopts, constitutes a sea change from the Board's practice which existed prior to the NPRM. In fact, it represents no change. Thus, the Casehandling Manual in effect prior to the NPRM already provided that "[a]n election should be held as early as is practical[,]" Casehandling Manual Section 11302.1.[442] The

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[441] GAM asks what will happen if the employer refuses to comply with the direction of election. The short answer is that, consistent with current practice, if the employer refuses to comply with the direction of election, then the Board will conduct the election by mail or offsite.

[442] And the Casehandling Manual in effect prior to the NPRM also referenced the Board's prior Statements of Procedures in determining when the election should be scheduled. Thus, it cited the 25-day waiting period provided in § 101.21(d) and stated, "When the Regional Director directs an election, the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived,

language in the final rule is virtually identical to the Casehandling Manual language which predated the NPRM, going back decades. See, e.g., Casehandling Manual Section 11302.1 (1975). The Board takes this opportunity to reassure the public that, as noted above in connection with the opportunity for free speech and debate, the regional director will continue to consider the various policies protected by the Act—as well as operational considerations and the relevant preferences of the parties—in selecting an election date. *Id.*[443] Thus, for example, the regional director should avoid scheduling the election on dates on which past experience indicates that the rate of attendance will be low. *Id.* At the same time, just as was the case prior to the NPRM, the regional director is not bound by the parties' desires concerning the election date. Casehandling Manual Section 11302.[444] The Board intends to leave the precise scheduling of elections to the discretion of the regional directors under the supervision of the General Counsel.

E. Regional Director Transmission of Direction of Election and Notice of Election; Posting and Distribution of Notice of Election

In the NPRM, the Board proposed that both the decision and direction of election and the election notice be electronically transmitted to the parties' designated

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nor later than the 30th day thereafter Sec 101.21(d), Statements of Procedure." Casehandling Manual Section 11302.1.

[443] We reject Vigilant's claim that the scheduling language will result in the Board having to conduct more mail ballot elections because "it will be nearly impossible to * * *have a Board agent conduct the election in person" under the "compressed election time frame[s]." Just as was the case prior to the NPRM, regional directors will continue to take operational considerations (including Board agent availability) into account in setting the election date. Moreover, the final rule sets no rigid timetables for conducting elections.

[444] We have previously addressed the complaints that the amendments deprive employers of an effective opportunity to campaign against union representation or otherwise interfere with employee free choice.

representatives when the parties have provided the relevant email addresses to the regional office or the documents would be transmitted by facsimile.[445] If a party provides neither an email address nor a facsimile number, the regional director would transmit the direction of election and the election notice via overnight mail. 79 FR at 7332, 7359. The final rule adopts these proposals in § 102.67(b). The final rule also provides in § 102.67(b) that those documents will also be transmitted in the same manner to the parties themselves. This is consistent with Casehandling Manual Section 11842.3, which provides that the regional director furnish both the parties and their representatives with election notices and representation case decisions. And, because, as discussed above, the director ordinarily will specify the election details in his direction of election, the final rule likewise provides that the Notice of Election will ordinarily be transmitted simultaneously with the direction of election. These amendments permit the Board to use modern methods of communication to transmit important representation case documents and to expeditiously resolve questions of representation in a more cost-efficient manner as electronic mail is cheaper and quicker than more traditional means of transmitting documents.

Section 103.20 of the Board's current rules addresses the posting of the election notices. The NPRM proposed to eliminate § 103.20, the only section of part 103 of the regulations governing procedures in representation proceedings, and to integrate its contents into part 102, as modified in proposed § 102.67. 79 FR at 7334. The final rule adopts this proposal which should make it easier for parties to comply with their

[445] As discussed above, the final rule retitles the proposed "Final Notice to Employees of Election" as the "Notice of Election."

obligations by describing the obligations in one place.

The NPRM proposed that employers be required to post copies of the election notice "in conspicuous places," but that the notice to be posted upon the filing of the petition (before an election is agreed to by the parties or directed by the regional director) be posted where notices to employees are customarily posted. 79 FR at 7354, 7359. Upon reflection, the Board has concluded that to help ensure wide dissemination of the important information contained in the Notice of Election, it should be posted "in conspicuous places, including all places where notices to employees in the unit are customarily posted," and the final rule so provides in amended § 102.67(k). This amendment parallels the final rule's amendment to § 102.63(a)(2) concerning the "Notice of Petition for Election."

The NPRM also proposed to require the employer to electronically distribute the election notice if it customarily communicates with its employees electronically. 79 FR at 7359-7360. The final rule adopts this proposal in § 102.67(k), which parallels the amendments to § 102.63(a)(2) regarding the Notice of Petition for Election. Thus, if the employer customarily communicates with employees in the unit by emailing them messages, it will need to email them the Notice of Election. Similarly, if the employer customarily communicates with its employees by posting messages on an intranet site, it will need to do that. The Board concludes that the amendment will facilitate wider dissemination of the important information in the Notice of Election, thereby providing greater guidance to the employees.

The proposal to require the employer to electronically distribute the election notice was received with little controversy in the comments. Some comments, such as

those filed by GAM and U.S. Poultry II, express concern that the requirement to distribute the election notice to employees electronically if the employer customarily communicates with its employees electronically could lead to additional grounds for filing objections to the election and subsequent litigation, particularly if some intended recipients do not receive the transmission. Unless an employer can be shown to have departed from its customary practice in electronic distribution, there will be no basis for an objection. The Board views the possibility of litigation delays, where an employer fails to comply with the final rule's electronic distribution requirement, as outweighed by the expected benefit of more effective distribution of the election details to eligible voters.

GAM also speculates that employees are likely to print and distribute the notices to each other, but it is unclear why it would be objectionable if employees merely distributed copies of the actual election notice. GAM expresses concern that employees may modify the sample ballots on the notice which will lead to objections, but just as was the case prior to the NPRM, the Notice of Election will warn employees that the notice must not be defaced by anyone, that any markings on any sample ballot or on the notice were made by someone other than the National Labor Relations Board, and that the National Labor Relations Board "does not endorse any choice in the election." Form 707. In any event, the possibility of employees marking up the sample ballot on the election notice existed under the prior rules because the employer was required to physically post the notices in "conspicuous places." See 29 CFR 103.20(a) (2010).

The NPRM also proposed to reduce the minimum time for posting of the notice of the election from 3 to 2 working days, because of the provisions for the mandatory

posting of a more detailed initial notice of election, for manual and electronic posting of the final notice by employers, and, to the extent practicable, for electronic transmission of the final notice of election to affected employees by the regional director. 79 FR at 7332. However, as discussed below, under the final rule, the regional director will not be transmitting the Notice of Election directly to the affected employees. Accordingly, the Board has decided to maintain the current 3 working-day posting requirement, rather than reduce it to 2 days. The final rule preserves in amended § 102.67(k) the relevant language about the time for posting that previously appeared in § 103.20(a) and (b).[446]

Consistent with the pre-NPRM version of § 103.20(c), and (d), the final rule also provides in § 102.76(k) that the employer's failure properly to post (or distribute) the election notices shall be grounds for setting aside the election whenever proper and timely objections are filed. However, just as was the case prior to the NPRM, the final rule also provides that a party is estopped from objecting to the nonposting if it is responsible for the nonposting, and likewise is estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

The NPRM also proposed that the regional director would electronically transmit the notice to the affected employees to the extent practicable. 79 FR at 7359. Thus, if the employer provided employee email addresses to the regional director, the regional director would transmit the notice to those employees. 79 FR at 7332.

The AFL-CIO praises this proposal as a positive contribution to information-

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[446] However, because of the potential unfairness of conclusively presuming that the employer received the notice if it does not inform the region to the contrary within 5 work days, the final rule also adopts the NPRM proposal (79 FR at 7332) to eliminate the provision creating such a conclusive presumption in § 103.20(c) of the prior rules.

sharing. Some comments, such as those filed by ALFA and GAM object on the grounds that it could cause an increase in the number of objections being filed if, for example, the Board fails to serve employees or the Board's attempts at service are blocked by the recipients' spam filter. Moreover, Ms. Kutch (relying on her background in online organizing and bulk email delivery) explained that navigating spam filters to ensure high rates of bulk email deliverability to the individuals at issue would likely be beyond the agency's technological capacity (or our foreseeable budgetary restrictions). Testimony of Jess Kutch on behalf of Coworker.org II. ALFA also implies that direct notification by the regional office is unnecessary since the NPRM would still require the employer to post paper copies of any election notice.

Upon reflection, the Board has decided to reject the proposal that the regional director transmit the election notice to employees to the extent practicable. Under the final rule, an employer must post the Notice of Election in paper form in conspicuous places, including all places where notices to employees in the unit are customarily posted for at least 3 full working days. In addition, as discussed above, if the employer customarily communicates with its employees by emailing them messages, it will need to email the Notice of Election to them as well. Similarly, if the employer customarily communicates with its employees by posting messages on an intranet site, it will need to post the notice on its intranet site as well. So any transmission by the Board in those circumstances would be largely duplicative. Moreover, given Jess Kutch's testimony that email providers can, and often do, block bulk emails (even if the intended recipients would like to receive the emails in question), it seems highly speculative that regional directors could effectively transmit the Notice of Election to unit employees

electronically. In any event, the regional director will not have the information necessary to transmit the Notice of Election to employees at work under the final rule, because the final rule does not require the employer to furnish either the work email addresses or work phone numbers to the regional director. As for personal email addresses, if the employer customarily communicates with its employees via their personal email addresses, it will be required to distribute the notices that way as well under the final rule. And because the employer must furnish the nonemployer parties to the case with the available personal email addresses of its employees, the nonemployer parties will be able to transmit the Notice of Election themselves if they care to do so (even if the employer does not customarily communicate with them via personal email addresses). Accordingly, the Board declines to adopt the proposal to require the regional director to electronically transmit the final election notice to employees.

F. Voter List

The final rule makes the same changes with respect to the content, timing, format and service of the list of eligible voters that the employer must file after a direction of election as were described above in relation to § 102.62 after entry into any form of consent or stipulated election agreement. In addition, § 102.67(l) provides that the employer shall also include in a separate section of the list the voter list information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in classifications or other groupings that will be permitted to vote subject to challenge. The Board concludes that this requirement will serve the goal of ensuring that employee votes are recorded accurately and efficiently and help the Board to expeditiously resolve questions of

representation. Thus, if the names of such disputed individuals are put in a separate section of the list, it makes it more likely that the Board agent (and the parties' observers) will realize which employees who show up to vote were directed to vote subject to challenge, and therefore makes it more likely that those employees will be instructed to put their ballots in challenged ballot envelopes before placing them in the ballot box. See Casehandling Manual Sections 11338.2(b), 11338.3.[447] This provision will reduce the chances of objections being filed on the grounds that disputed employees' ballots were comingled with other employees' ballots. This provision is also consistent with the amendments providing that in the event a regional director chooses to defer deciding individual eligibility or inclusion questions until after the election, the Notice of Election shall explain that such individuals are being permitted to vote subject to challenge and what that means.

G. Requests for Review of the Regional Director's Decision and Direction of Election

In the NPRM, the Board proposed amendments to the current pre-election request-for-review procedure. Under the current rules, the parties are required to request Board review within 14 days of a regional director's decision and direction of election or be deemed to have waived any arguments that were or could have been made concerning rulings at the pre-election hearing or in the decision and direction of election. § 102.67(b), (f); see, e.g., *A.S. Horner, Inc*., 246 NLRB 393, 394-95 (1979). But elections were scheduled no sooner than 25 days after the direction of election, and thus, as a

[447] As was the case prior to the NPRM, the Board agent must challenge anyone who has been permitted by the regional director to vote subject to challenge. Casehandling Manual Section 11338.2(b)

practical matter, parties were required to file a request for review of the direction of election prior to the election. This was the only opportunity for Board review of this decision.

The Board proposed to eliminate the pre-election request-for-review procedure in the NPRM and instead permit parties to file any such request after the election, when it could be consolidated with any request for review of the director's disposition of post-election disputes arising out of challenges or objections. The Board explained that the proposed consolidation of Board review would eliminate unnecessary litigation because many issues raised through pre-election requests for review are either rendered moot by the election results or are resolved by agreement of the parties post-election. In addition, the Board explained, permitting parties to consolidate, in a single filing, requests that the Board review pre- and post-election rulings would result in efficiencies for the parties and the Board. 79 FR at 7329, 7333.

Comments praising the proposal to eliminate the current pre-election request for review procedure point out that it would conform Board procedures with the ordinary rules in both federal and state courts, which generally disfavor interlocutory appeals as wasteful, piecemeal litigation that can cause delay and which therefore generally require parties to conclude all litigation in a case before filing an appeal or seeking review. See, e.g., AFL-CIO II; Supplemental Testimony of Thomas Meikeljohn; Testimony of Brian Petruska on behalf of LIUNA MAROC II. There is a great deal of force to this argument, which is consistent with sound judicial and administrative policy developed over

centuries, and is in the best interest of all parties to representation cases.[448]

However, Section 3(b) states that "*upon the filing of a request therefor* with the Board by any interested person, the Board may review *any action* of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director." The argument has been presented that this provision grants parties a right to request interlocutory review.[449] Although we do not agree that the statute compels this result,[450] we have concluded that the Board's objectives are better served by amending the rules in

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[448] As Justice Story stated, "causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses." *Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830). "Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken." *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan, J., concurring in part). The final judgment rule was adopted by the common law English courts from at least the 1300s, and in America was enshrined in the Judiciary Act of 1789 and retained in every subsequent revision of the judicial code. *See* C. M. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 Yale L. J. 539, 539-552 (1932); *see also* T.D. Frank, *Requiem for the Final Judgment Rule*, 45 Texas L. Rev. 292, 292-93 (1966) ("[The rule] effectuates, in general, an efficient utilization of judicial manpower and permits the initial stage of the litigation to operate in a smooth, orderly fashion without disrupting appeals.").

[449] See Dissenting Views of Members Miscimarra & Johnson to NPRM, 79 FR at 7343 & n.108 (the NPRM proposal is "directly contrary to Section 3(b) of the Act," and the proposed request-for-special-permission-to-appeal "is qualitatively different from what Section 3(b) requires."); see also, e.g., COLLE II; Chamber II; Testimony of Curt Kirschner on behalf of AHA II.

[450] The statute does not expressly state that parties are entitled to request review of a regional director's pre-election decision before the election. Moreover, Section 3(b) clearly gives the Board discretion to deny review, see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971), and, just as the Board can exercise its discretion to decide hospital units "in each case" by a single rule, see *Am. Hosp. Assn.*, 499 U.S. at 606, 610-613, it seems to us that the Board could also deny review of entire categories of cases by rule. The proposed rule would have merely delayed, rather than denied, review, and logically the greater power should include the lesser.

a manner that preserves the opportunity to request review of "any action of a regional director delegated to him under Section 3(b)" at any time, and, where necessary, to request a stay.

The final rule is intended to codify the text of the statute. Thus, the relevant portion of the final rule begins by stating, in §102.67(c):

> Upon the filling of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under Section 3(b) of the Act *except as the Board's rules provide otherwise*, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

The emphasized language is the only alteration from the text of the statute, and its purpose is primarily to clarify that parties which waive the right to Board review in an election agreement under §102.62(a) or (c), or under §102.67(g) are no longer entitled to request review under this provision.[451] The rule then goes on to state that: "The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election." Finally, a number of other changes are made to carry out and clarify the essential amendments here.

1. The Parties Will Have Greater Latitude to Choose When to File a Request for Review

The first notable change is that the due date for filing requests is relaxed. The

[451] This exception is also necessary in light of the different procedures for Board review applicable to dismissal of petitions under § 102.71, and procedures for elections which implicate Section 8(b)(7) of the Act, and other specialized circumstances addressed elsewhere in the regulations.

Board's current practice of requiring parties to seek such review of directions of election before the election—or be deemed to have waived their right to take issue with the decision and direction of election—not only encourages unnecessary litigation, but actually requires parties to conduct unnecessary litigation. Thus, in the Board's experience, many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending elections are removed from consideration. [452] For example, if the regional director rejects an employer's contention that a petitioned-for unit is inappropriate and directs an election in the unit sought by the union, rather than in the alternative unit proposed by the employer, the Board's current rules *require* the employer to request review of that decision prior to the election or be precluded from contesting the unit determination at any time thereafter. But if the union ends up losing an election, even though it was conducted in the union's desired unit, the employer's disagreement with the regional director's resolution becomes moot (because the employer will not have to deal with the union at all), eliminating the need for litigation of the issues at any time. The current rules thus impose unnecessary costs on the parties by requiring them to file pre-election requests for review in order to preserve issues.

Accordingly, the Board has decided to amend the current pre-election request for review procedure and to provide that any party may request review of a regional director decision to direct an election either before the election or after the election. Thus, the

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[452] For this reason, the Board disagrees with comments which contend that the proposed rule would not have expedited commencement of bargaining, but would simply shift review until after the election. See, e.g., Testimony of Michael Prendergast on behalf of Holland & Knight; AHA; Seyfarth Shaw.

final rule provides that the request for review of the direction of election may be filed at any time after the direction of election issues until 14 days after a final disposition of the proceedings by the regional director. Under the amendments, a party can choose to file a request for review of the regional director's decision to direct an election before the election or can choose to wait to file the request for review until after the election.[453] We conclude that this amendment, which relieves parties of the burden of requesting pre-election review in order to preserve issues that may be mooted by the election results, will further the goal of reducing unnecessary litigation because, in our view, rational parties ordinarily will wait to file their requests for review until after the election, to see whether the election results have mooted the basis for such an appeal. The amendment should also reduce the burdens on the other parties to the case and the government, by avoiding the need for the other parties to file responsive briefs and for the Board to rule on issues which could well be rendered moot by the election results.

Some comments also raise policy arguments which could apply to the final rule's provision permitting parties to file requests either before or after the election. For example, SHRM, AHA, and ACE generally commented that in cases where review would otherwise have been granted, the proposed rule would result in elections being run unnecessarily, causing both the Board and the parties to incur unnecessary expense. The comments pose the example of a regional director failing to find a bar to the conduct of an election, and thereby erroneously directing an election. But this example aptly

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[453] The final rule does not change the standard for granting requests for view. Just as was the case prior to the NPRM, the Board will grant a request for review "only where compelling reasons exist therefor."

illustrates the flaw in the argument. Even under the current rules, if a regional director finds no contract bar and directs an election, and a party files a request for review that the Board ultimately grants, the election is regularly held anyway and the ballots impounded prior to Board resolution of the issue. See, e.g., *VFL Technology Corp.*, 329 NLRB 458, 458 (1999); *Western Pipeline, Inc.*, 328 NLRB 925, 925 n.1 (1999). Thus, the same expenses may be unnecessarily incurred under current procedures. See, e.g., *Mercy General Health Partners Amicare Homecare*, 331 NLRB 783, 785-86 (2000) (Board directed that impounded ballots not be counted and that second election be held after ruling on pre-election request for review post-election). Moreover, given the small number of requests for review filed each year, and the extraordinarily small percentage of regional directors' decisions that are ultimately reversed,[454] the number of cases of the type described in these comments is likely to be very small. In any event, under the final rule, a party may still file a request for review before the election.

AHA comments that the Board's own failings in timely processing requests is not a basis for eliminating the right of parties to review. This point is no longer applicable because parties will retain the right to seek pre-election review. In addition, the Board is entitled to and must consider its own adjudicative and administrative capacities and past

[454] Out of the 6686 RC, RM, and RD elections held from FY10 to FY13, there were only 14 cases in which regional director decisions were reversed.

Relatedly, some comments argue that deferring review of issues that were previously raised in a pre-election request for review until after the election will result in the Board addressing more issues subsequent to the opening of the ballots. See, e.g., PIA; COLLE; ACE. This point is true but not significant because less overall litigation will be required, and because, as discussed, requests for review are so rarely found meritorious by the Board.

performance in evaluating its procedural rules. The elimination of the requirement that parties file pre-election requests for review should, as explained above, reduce the number of disputes reaching the Board. The Board will, therefore, be able to dispose of those disputes that do reach it more promptly.

Other comments suggest that limiting pre-election review will mean that the parties will be unsure who is a supervisor during the pre-election campaign.[455] This objection is addressed at length above in relation to § 102.66. The current pre-election review procedures do not entitle the parties to a final Board determination on such matters prior to the election and rarely result in such a determination. In addition, under current procedures, even in the very rare cases where the Board both grants review and rules on the merits prior to the election, as explained above, the ruling typically is issued only days before the election, i.e., well into the critical period between petition and election, and thus does not serve the purpose the comments suggest will be thwarted if the pre-election request for review is eliminated.

We also reject any suggestion that the final rule will increase the number of technical 8(a)(5) cases by denying parties "the palliative of Board review" of the regional director's pre-election determinations. Chamber II. Under the final rule, parties retain the right to request review of the regional director's decision to direct an election. The change is only that rather than being required to file the request for review prior to the election, parties may request such review either before or after the election, if the election results have not rendered the basis for such an appeal moot. As for parties being able to

[455] See, e.g., Testimony of Harold Weinrich on behalf of Jackson Lewis LLP; Chamber II.

seek Board review of a regional director's *post*-election determinations, that issue has been addressed above in connection with § 102.62.

2. Ballots Will No Longer Be Automatically Impounded While a Request for Review is Pending

Second, the final rule eliminates the automatic impound procedure. The amendments thereby codify the statute's approach to stays, which will not take place "unless specifically ordered by the Board." The current rules contain the following language on stays:

> The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however*, That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

In amending the rules to codify Section 3(b) as written, the amendments eliminate the segregation and impoundment proviso of the former rules, which appear nowhere in the statute. As Section 3(b) contemplates, the regional director will continue to schedule and conduct elections notwithstanding that a request for review has been filed with or granted by the Board; *however,* the voting and counting of ballots will now *also* proceed notwithstanding the request for review, unless the Board specifically orders otherwise. This is consistent with the purpose of Section 3(b) to prevent delays in the Board's processing from impacting regional Section 9 proceedings.

As discussed above, some comments argue that the proposed rule would result in unnecessarily re-running elections. Of course, impoundment, standing alone, could not

and did not prevent rerunning elections. Rather, comments argue that prior procedures for segregating ballots might permit the Board to issue a decision on review which would obviate the need for a rerun, and by postponing requests for review until after the election the proposed amendments-eliminate that possibility. However, as discussed below, the final rule contains a procedure for requesting segregation and impoundment, as well as a pre-election request for review, and so the Board will still have the option to segregate and impound where necessary in a particular case. In addition, if, as discussed above, a regional director has chosen to defer deciding an individual eligibility or inclusion question and to permit such individuals to vote subject to challenge, then those employees will indeed cast challenged ballots and their ballots will be segregated and impounded. Finally, the possibility of reruns is minimized further because the Board rarely reverses the regional director.

3. Motions for Expeditious Consideration, Stays, and Impoundment May Be Filed

Finally, in light of the references in the rules to requests for a stay, a new paragraph (j) in §102.67 is created. This paragraph states that parties may separately move the Board for expedited consideration; a stay; or impoundment and/or segregation of ballots. The paragraph also clarifies, however, that "[t]he pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion." *Id.* As discussed above, the current rules stated that stays would not be granted "unless otherwise ordered by the Board," and the final rules continue and expand this prohibition of stays "unless specifically ordered by the Board" in conformity with the statutory text. And yet, notwithstanding this implicit reference to orders by the Board on stays, the

current rules provided no specific procedural mechanism for filing a motion for such a stay. In cases where such relief was sought, parties generally cited a catchall "special permission to appeal" procedure.

The final rule makes explicit the right to request a stay, or related forms of immediate Board relief such as expeditious consideration, or segregation or impoundment of ballots. This is not intended to reflect any change in the current practice or standards for moving for or granting such relief; however, in light of the changes to the Board's existing automatic impoundment process discussed above, we recognize that this provision is likely to be of increased significance to some parties seeking interlocutory review of regional director actions.

Two additional points should be addressed. First, under current practice, these motions are very rarely granted, and we expect that this will remain true, particularly in light of the strong statutory and regulatory policy against unnecessary stays or litigation delays expressed above. The requirement of a "clear showing that it is necessary under the particular circumstances of the case" will not be routinely met.

Second, although we expect that motions under this paragraph will generally be acted upon in a timely fashion, we emphasize that, as is the case with motions more generally, "the pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion." Thus, filing a motion for a stay is not the same as having a motion granted, and the proceeding will continue unless and until any such motion is granted.

H. The 25 Day Waiting Period

The Board also proposed eliminating the 25-day waiting period because, even under the current rules, it serves little purpose in light of the vote-and-impound procedure, and its stated purpose would be eliminated by the elimination of the pre-election request for review. 79 FR at 7333.

The Board's current Statements of Procedures provide that elections "normally" are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, in order to provide the Board with an opportunity to rule on any request for review that may be filed:

> The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.

29 CFR 101.21(d) (2010).

The final rule adopts the proposal to eliminate the 25-day waiting period. 79 FR at 7333. Elimination of the 25-day waiting period eliminates an unnecessary barrier to the fair and expeditious resolution of questions concerning representation. By definition, the waiting period delays the election, which is designed to answer the question of representation. The 25-day waiting period—which effectively stays the election in *every*

contested case for 25 days—is in tension with Congress' instruction in Section 3(b) of the Act that even the grant of review of a regional director's action "shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director." Although the 25-day waiting period by its terms only applies to contested cases, the waiting period also has the effect of delaying elections in stipulated-election cases. As discussed above in connection with § 102.66, bargaining takes place in the shadow of the law, and some parties use the threat of insisting on a pre-election hearing—and the resulting 25 day waiting period—to extract concessions concerning election details, such as the date of the election and the unit itself. The 25-day waiting period also serves little purpose under the existing rules. The stated purpose of the 25-day period is merely "to permit the Board to rule on any request for review which may be filed." 29 CFR 101.21(d) (2010). However, such requests are filed in a small percentage of cases, are granted in an even smaller percentage,[456] and result in orders staying the conduct of elections in virtually no cases at all. Thus, if the Board has not yet ruled on the request at the time of the election, as is not infrequently the case, the election is held and the ballots impounded until the Board can rule. Even if the Board grants the request, the Board almost never stays the election and the same vote-and-impound procedure is

[456] A comparison of the total number of elections to the total number of grants of review (including grants of review after petitions were dismissed) during the period 2004 to 2013 reveals that review was granted in less than 1 percent of all representation cases in which an election was conducted and in approximately 15 percent of those cases in which a request was filed. See NLRB Annual Reports (Fiscal Years 2004-2009) and NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004-2012). Data for 2010-2013, after publication of the Annual Reports was discontinued, was produced from the NLRB's electronic case processing system.

used.[457] Finally, there is even less reason for the waiting period under the final rule, which should reduce the number of requests for review filed before elections by virtue of the amendment permitting parties to file such requests *after* the election.

Very few comments specifically object to the elimination of the 25-day waiting period. Indeed, there is near consensus that this period serves little purpose.[458] In support of the proposed rule, several comments observe that parties typically do not use the waiting period to request review and that a single post-election review process eliminates use of the Board's processes to achieve tactical delays.[459]

Some comments, such as the hearing testimony of Jay P. Krupin on behalf of NGA, maintain that the 25-day period serves an important purpose because the "rules of the game" are not set until the decision and direction of election, so the parties are not sure which voters they need to persuade or which employees can speak on behalf of the employer until the decision issues. However, the stated purpose of the 25-day period is not to give parties an opportunity to campaign. Section 101.21(d) states only that the 25-day waiting period is "to permit the Board to rule on any request for review which may be filed." Moreover, the concern raised in this comment is addressed at length above in §

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[457] Accordingly, the Board would adopt the proposal to eliminate the 25-day waiting period even if the Board did not make any change to the request-for-review procedure.

[458] See Testimony of Professor Samuel Estreicher; SEIU reply; Testimony of Arnold Perl on behalf of TN Chamber II ("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 or representation policies that's contained in the notice of proposed rulemaking.").

[459] See Professor Joel Cutcher-Gershenfeld; Senior Member Miller and Democratic House Members; IBEW; Thomas Meiklejohn.

102.66. Finally, the regional director retains discretion to consider any significant changes in the scope of the unit that result from the decision and direction of election in setting the election date.

A few comments observe that the waiting period serves a purpose in the small minority of cases where the Board finds that a request for review has merit. These comments suggest that a waiting period would be appropriate where a pre-election request for review is actually filed. AHCA and ALFA suggest an alternative to the proposed rule, whereby the Board would ask parties whether they intend to file a request for review. If they answer affirmatively, then and only then would the regional director wait at least 25 days to hold the election. However, their proposal would create a perverse incentive for parties to file a request for review solely to delay the election. Moreover, in many cases, the delay would still be wholly unnecessary when the issue raised in the pre-election request for review is rendered moot by the election results. Under current procedures, even where a request for review is granted and eventually found to have merit, there is little reason that the request should be filed pre-election or that the election should be delayed so that the Board can consider it, because the election almost always proceeds using the vote-and-impound procedures before the Board's decision on the merits issues.

Some comments argue that the elimination of the 25-day waiting period, combined with other proposed amendments, interferes with employers' right to free speech under Section 8(c) of the Act and the First Amendment and undermines the free discussion of the question of representation essential to employee free choice. However, the statute does not provide for a 25-day waiting period, and the 25-day waiting period

provided by the Board in the current rules was not intended to give parties an opportunity to campaign. Instead, once again, the stated purpose of the 25-day waiting period was merely to give the Board an opportunity to rule on any request for review which might be filed. The more general point is addressed at length above in connection with the opportunity for free speech and debate.

§ 102.68 Record In Pre-Election Proceeding; What Constitutes; Transmission to Board

The proposed amendments to § 102.68, which currently defines the record in a proceeding conducted pursuant to § 102.67, were quite minor as they were designed merely to conform its contents to the proposed amendments to other sections. First, the Board clarified that Statements of Position would be part of the record. While many comments objected to the requirement that parties make a binding statement of position on various issues, there were no significant comments concerning the proposal to make the Statement of Position a part of the record. Second, the proposed amendment deleted references to the transfer procedure, because the Board proposed eliminating the ability of regional directors to transfer a case to the Board before deciding it. The Board received no significant comments regarding that proposed change either. The final rule in § 102.68 adopts those portions of the proposal. The final rule also amends § 102.68 to make responses to Statements of Position part of the record. In the NPRM, the Board also proposed adding language to state that § 102.68 would define the record in proceedings conducted pursuant to § 102.69. Although no significant comments were filed concerning this proposed change, the Board has considered the matter and is now of the view that the proposed addition is unnecessary, because § 102.69(d)(1) defines the record in

proceedings conducted pursuant to § 102.69.

GAM and U.S. Poultry II complain that there is no express provision that the record also includes written offers of proof. Prior to the amendments, there was no express provision that the pre-election hearing record include written offers of proof. Yet, prior to the amendments, offers of proof, whether written or oral, could be part of the record of the pre-election hearing. Thus, if the offer of proofs were in written form, they could be received as "exhibits;" if oral, they could be part of "the stenographic report of the hearing." In response to the comment, however, the final rule explicitly provides in § 102.68 that offers of proof made at the pre-election hearing are part of the record.

Sec. 102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Regional Director Decisions on Objections and Challenges

The proposed amendments to § 102.69 dealt with a variety of matters including the filing and service of objections, the procedure to be used by the regional director when faced with election objections or determinative challenges, post-election hearing scheduling and procedure, and appeals of decisions and directions of elections and decisions on objections and challenged ballots.

A. Simultaneous Service of Objections on Parties; Simultaneous Filing of Offer of Proof with Election Objections

In the NPRM, the Board proposed to amend § 102.69 to require that a party filing objections simultaneously file a written offer of proof supporting the objections as described above in relation to § 102.66(c) and serve the objections, but not the offer of proof, on the other parties. After carefully considering the proposal in light of the commentary, the Board has decided to adopt it with one modification, which would grant

regional directors discretion to permit additional time for filing the offer of proof upon a showing of good cause. The Board has concluded that the amendments will provide the parties with the earliest possible notice of the pendency of election objections, reduce unnecessary litigation, and help the Board to more expeditiously resolve election objections, and thereby help it more expeditiously resolve questions of representation.

The Board's prior rules did not require a party filing objections to simultaneously serve a copy of its objections on the other parties, just as the Board's prior rules did not require a party filing a representation petition to simultaneously serve a copy of its petition on the parties named in the petition. Requiring a party that files election objections to simultaneously serve a copy of its objections on the other parties to the representation case provides the other parties with the earliest possible notice of the pendency of the election objections, just as amended § 102.60's new requirement—that every petitioner simultaneously serve a copy of its representation petition when it files it with the Board—gives the other parties the earliest possible notice of the pendency of the petition.

The final rule maintains the current time period (7 days after the tally) for the filing of objections to the conduct of the election or to conduct affecting the results of the election. The final rule also maintains the current requirement that a party's objections contain a short statement of the reasons therefor. However, the final rule eliminates the extra 7-day period parties currently enjoy to file evidence in support of their objections.[460]

[460] The amendments also codify existing practice permitting parties to file, but not serve, evidence in support of objections. Amended § 102.69(a) also preserves the pre-existing

Many employer comments complain that 7 days is an insufficient time both to investigate objections and provide an offer of proof.[461] The Board is not persuaded by these comments. Under the Board's prior rules, a party had only 7 days to file election objections, and those objections had to contain a short statement of the reasons therefor. 29 CFR 102.69(a) (2010). The only change concerns the time to produce the offer of proof in support of the objections. The change is based on the view that objections to a secret-ballot election should not be filed by any party lacking factual support for the objections and, therefore, a filing party should be able to describe the facts supporting its objections at the time of filing. The Board notes in this regard that objections may be filed concerning events that occurred before the election and events that occurred during the election. The Board presumes that a party that becomes aware of objectionable conduct before the election will note such misconduct and begin gathering evidence relating to the misconduct immediately. Accordingly, a party often has more than 7 days to prepare the offer of proof regarding such misconduct. As to misconduct that occurs during the election in the polling area, parties are commonly represented by an equal number of observers, and the parties typically speak with their observers immediately after the election before the tally of ballots even begins. For this reason, the Board believes that parties generally should be aware of both the misconduct and possible witnesses to it shortly after the balloting ends. Accordingly, the Board finds unpersuasive

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practice of having the regional director furnish a copy of the objections to each of the other parties to the case.

[461] See, e.g., GAM; Chamber Reply; ACE; SHRM; AHCA; Summa Health Systems (Summa); AHA II; US Poultry II.

the complaints that 7 days ordinarily will be an insufficient amount of time to produce evidence in support of objections.

Moreover, the amendment furthers the goal of expeditiously resolving questions concerning representation. For example, a question of representation cannot be answered until the election results are certified, which cannot occur until objections and determinative challenges are resolved. And a regional director cannot evaluate the objections until it receives the objecting party's supporting evidence. Because requiring the evidence in support of objections at the same time the objections are filed serves the goal of timely certifications, SEIU supports the proposed amendment even though it believes that the amendment poses a greater burden on unions than employers, who have greater access to the workforce. The amendment is also consistent with the policy articulated in Casehandling Manual Section 11360.1, that "the prompt resolution of challenges and/or objections should be given priority attention [because] certification of the employees' choice in the election is delayed by challenges and/or objections."

The AFL-CIO suggests, however, that the Board provide that a party may move for additional time to file the offer of proof in support of its objections in "unusual circumstances," such as when a union finds it difficult to locate and contact witnesses in a large unit. The Chamber (Reply) opposes the amendments reducing the period of time to file offers of proof, but argues that if an exception is to be provided, it should be for "good cause" rather than "unusual circumstances."

Upon reflection, the Board has decided to amend § 102.69(a) to provide that a regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause, as the Chamber suggests.

As noted, the Board believes that ordinarily parties should be able to file their offers of proof in support of their election objections simultaneously with the objections. Indeed, the Board concludes that the amendments to §§ 102.62(d) and 102.67(l)—requiring the employer to include the available personal phone numbers and personal email addresses, of the employees on the voter list—makes this likely. However, as noted above in connection with § 102.62, some comments claim that some employers may not maintain records of their employees' personal phone numbers and email addresses, which would require that unions use slower forms of communication to contact potential witnesses to prepare the offers of proof, which in turn could make it more difficult to submit the offer of proof simultaneously with the election objections in some cases. In addition, depending upon the severity of the alleged objectionable misconduct, it may be difficult for a union or employer to persuade employees with knowledge of the relevant facts to come forward. The Board also notes that although the current rules afford parties an additional 7 days to produce the supporting evidence after they file their objections, regional directors have discretion to grant still more time. See 29 CFR 102.69(a) (2010) ("Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish * * * the evidence * * * to support the objections."); Casehandling Manual Section 11392.6. Accordingly, the Board has concluded that a regional director should have discretion to grant additional time for filing the offer of proof when good cause is shown, and amended § 102.69(a) so provides.

In sum, requiring the objecting party to simultaneously serve a copy of its objections on the other parties and to simultaneously file an offer of proof with its election objections will provide the other parties with the earliest possible notice of the

objections and help the Board to expeditiously resolve questions of representation because the election results cannot be certified until objections and determinative challenges are resolved. The amendment will also reduce unnecessary litigation and conserve resources for the Agency and the nonobjecting party by reducing the likelihood that a party will file objections that it cannot support. At the same time, when a party has allegedly engaged in conduct which has destroyed a fair election, the alleged abuse of workers' rights should not be disregarded merely because a party justifiably needs additional time to furnish its offer of proof. Accordingly, the final rule provides a good-cause exception to the simultaneous offer-of-proof requirement.

B. Uniform Procedure for Handling Objections and Potentially Determinative Challenges and Requests for Review of Regional Director Post-Election Determinations in Stipulated and Directed Elections

The final rule adopts the NPRM proposals to (1) codify the regional director's discretion to dispose of both determinative challenges and objections through an investigation without a hearing when they raise no substantial and material factual issues, (2) establish a uniform procedure when a hearing is conducted, and (3) make Board review of regional directors' post-election dispositions discretionary in stipulated and directed elections. 79 FR at 7333-34, 7361.

The final rule codifies existing practice permitting the regional director to investigate determinative challenges and objections by examining evidence offered in support thereof to determine if a hearing is warranted.[462] The final rule also creates a

[462] At least one comment argues that the amendments improperly permit regional directors to administratively dismiss objections without a hearing, thereby denying parties the right to a hearing and the ability to create a record for subsequent review. However, regional directors may administratively dismiss objections and challenges

uniform procedure in those cases in which there are potentially outcome-determinative challenges or objections which the regional director determines raise substantial and material factual issues that require a hearing. Adopting the procedure currently contained in § 102.69(d) and (e), the final rule provides that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues.[463] Within 14 days after issuance of such a report, any party may file exceptions with the regional director and the regional director will dispose of the exceptions. If no exceptions are filed to such report, the regional director decides the matter upon the expiration of the period for filing such exceptions. Consistent with the changes described above in relation to § 102.62(b), the final rule makes Board review of regional directors' resolutions of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections, unless challenges and objections are consolidated with unfair labor

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without a hearing under the current rules where they do not raise substantial and material issues that would warrant setting aside the election. 29 CFR 102.69(d) (2011). This well-settled practice avoids wasteful litigation, is no different from a trial court granting a motion to dismiss, and has been approved by the courts of appeals. See *NLRB v. Bata Shoe Co*., 377 F.2d 821, 826 (4th Cir. 1967); *NLRB v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (5th Cir. 1964); *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F. 3d 600, 605-06 (1st Cir. 1994) ("To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless * * *."); Fenn C. Horton III, *The Requirements of Due Process in the Resolution of Objections to NLRB Representation Elections*, 10 J. Corp. L. 493, 495-509 (1985). The amendments specify in § 102.69(d) what constitutes the record in such no-hearing cases, just as they specify what constitutes the record in cases that proceed to a hearing.

[463] Matters such as the scheduling of the post-election hearing and procedure at the post-election hearing are addressed below.

practice charges for hearing before an administrative law judge.[464] The Board anticipates that this change will leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors.

Some comments question whether the Board will resolve nondeterminative challenges post-election. The final rule maintains the status quo in this regard: the Board will not address nondeterminative challenge ballots at a post-election hearing, though parties may bring the matter to the Board by filing a timely unit clarification petition if they are unable to resolve the resulting question of whether particular employees are in the bargaining unit ("unit placement" questions) by agreement. See, e.g., *Orson E. Coe Pontiac-GMC Truck, Inc*., 328 NLRB 688, 688 n.1 (1999):

> Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. Casehandling Manual Section 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add the car prep/finisher

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[464] The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, (1) the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision; and (2) a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due. The final rule also clarifies that if the election was conducted pursuant to a consent or full consent agreement, and the objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing, as is done currently.

The final rule uses the single term, "decision," to describe the regional director's disposition of challenges and/or objections in place of the two terms, "report" and "decision," used in the current rules.

> technician to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. *See Kirkhill Rubber Co.*, 306 NLRB 559 (1992); *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 496-497, 500 fn. 7 (5th Cir. 1992).

AHA argues that permitting parties to resolve such issues in bargaining is "disrespectful" of employee Section 7 rights because it makes eligibility a "bargaining chip." This contention has been addressed above in relation to § 102.66.

Many comments criticize the proposal to make Board review of regional directors' post-election determinations discretionary in cases involving directed elections. These comments are fully addressed above in relation to § 102.62, which also addresses discretionary Board review of the regional director's post-election determinations in stipulated election cases.

Bluegrass Institute suggests, however, that the 20-percent rule renders discretionary Board review of the regional directors' post-election determinations inappropriate. It argues that the Board's current rules guarantee parties Board review of eligibility questions deferred in the pre-election decision, and therefore the provision making Board review of the director's post-election determinations discretionary constitutes a material change. However, the final rule does not adopt the proposed 20-percent proposal. To the extent the commenter would raise the same objections to the final rule, the Board would find them unpersuasive. Under the final rule, if eligibility disputes are deferred using the vote-and-challenge procedures, the hearing officer's recommendations on determinative challenges will in all cases be subject to exceptions to the director, and a party may thereafter file a request for review with the Board. This parallels how such matters are handled under the current rules when a hearing officer's

recommendations go to the director. Thus, Section 11366.2 of the Board's Casehandling Manual provides with respect to challenges to voters in the context of a directed election, "If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her * * *. The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board."[465] Moreover, under the current rules, if a regional director resolves eligibility questions on the merits in his or her decision and direction of election, the parties are able to challenge the decision only by filing a request for review with the Board. The comment does not explain why a party should have a greater right to Board review if the regional director decides eligibility questions after the election than if the regional director decides them prior to the election, and the final rule corrects this anomaly.

Citing Member Hayes' dissent to the original NPRM, PIA and others argue that the deferral of litigation from the pre-election phase to the post-election phase is likely to lengthen the period between the election and final certification, which will lengthen the period during which the employer is uncertain whether it can unilaterally change its employees' working conditions. See *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). As shown, however, the Board believes that the final rule will not simply shift litigation from before the election to after the election. Rather, the Board believes that the

[465] It is only when regional directors direct that hearing officer reports go to the Board that parties currently have the right to Board review. See Casehandling Manual Section 11366.2.

amendments will significantly reduce the total amount of litigation, because the current rules require parties to litigate issues that are often rendered moot by the election results. Moreover, the Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes, i.e., when a party's request raises no compelling grounds for granting such review, will eliminate the most significant source of administrative delay in the finality of election results. The Board anticipates that the final rule will thus reduce the period of time between the tally of votes and certification of the results and thus the period during which employers are uncertain about their duty to bargain.

A number of other amendments to this section conform its provisions to the remainder of the amendments. For example, the NPRM proposed to address the procedure for requesting review of the direction of election in § 102.69(b) in line with the proposed amendment deferring all parties' rights to request review of the decision and direction of election until after the election. 79 FR at 7333, 7360. However, as discussed above in connection with § 102.67, the Board has decided to reject that proposal and instead to permit parties to request review of the direction of election prior to the election if they choose to do so. Accordingly, the procedure for filing such requests appears in § 102.67 of the final rule, rather than in § 102.69(b) as proposed in the NPRM. And because parties will not be filing requests for review of the regional director decisions and directions of elections pursuant to proposed § 102.69(b), there is no need for this final rule to provide (as the December 22, 2011 final rule provided (76 FR at 80174, 80188)) in § 102.69(e)(1)(ii)) that the decision and direction of election and the record previously made as defined in § 102.68 will also be part of the record in a proceeding

pursuant to § 102.69 in which no hearing is held. In other words, just as was the case prior to the NPRM, under the final rule, the record in a proceeding pursuant to § 102.69 in which no hearing is held will not include the decision and direction of election and the record previously made as defined in § 102.68.

Similarly, prior to the NPRM, § 102.69(b) provided, "If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed." The final rule rejects the NPRM proposal to restyle this paragraph "§ 102.69(c) and to include a reference to no request for review being filed (proposals which the December 22, 2011 final rule adopted). 79 FR at 7360-7361; 76 FR at 80187.[466] In cases where the election is conducted pursuant to one of the three types of election agreements, there is, by definition, no decision and direction of election about which a party can possibly seek review.[467] And where there are no objections, determinative challenges, or

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[466] The NPRM had proposed to restyle paragraph (b) as (c) because, as discussed above, the NPRM had also proposed adding a new § 102.69(b) to address requests for reviews of regional director decisions and directions of elections. Because the final rule does not add that new paragraph (b) to § 102.69, the Board has decided to leave the text in question in § 102.69(b) of this final rule.

[467]Thus, when the election is conducted pursuant to a consent election agreement or a stipulated election agreement, the regional director does not issue any pre-election decision at all. See §§ 102.62(a) and (b). Although the regional director does issue a pre-election decision when the parties enter into a full consent election agreement, the parties waive their right to request review of that decision in their agreement. See § 102.62(c).

runoffs, the regional director should issue to the parties a certification of the results of the election, including certification of representative where appropriate, notwithstanding the possibility that a party may still file a request for review of any decision and direction of election previously issued. This is not unlike what happened under the prior rules in directed election cases. Casehandling Manual Section 11472.3 (In directed election cases, the regional director's supplemental decision based on an administrative investigation, a hearing or both, "should include the certification; issuance of the certification should not be delayed until after the expiration of the time for filing a request for review [of that decision].") Similarly, certifications are issued under the current rules, notwithstanding parties may challenge the validity of the representation case decisions in a technical 8(a)(5) proceeding in the courts of appeals. However, the final rule makes one small change to the text of pre-existing § 102.69(b) by deleting the reference to the closure of proceedings. Because under the final rule a party may choose to wait to file its request for review of the decision and direction of election until after the election, a proceeding cannot necessarily be considered closed in the absence of the election objections, determinative challenges or a runoff election.

C. Post-Election Hearing Scheduling

The NPRM proposed that any post-election hearing on objections and challenged ballots would open within 14 days of the tally of ballots or as soon thereafter as practicable. 79 FR at 7333.

The Board received a number of comments about the proposed scheduling of the post-election hearing. The AFL-CIO supports the hearing-scheduling amendment, noting that Casehandling Manual Sections 11365.3 and 11395.4 already provide that "[s]ince

postelection matters are to be resolved with the utmost dispatch, * * * the hearing should be scheduled at the earliest practical date." SEIU likewise supports the amendment outside the context of decertification elections because timely post-election hearings are necessary for timely certifications, which in turn are necessary for labor relations stability. Professor Cutcher-Gershenfeld also supports the amendment, noting that the proposal "minimizes the risk of process delays being used by either side for tactical advantage," and that establishment of consistent timing across regions comports with good administrative practice.

However, many employer comments complain about the time frame for post-election hearings, claiming the proposed schedule provides insufficient preparation time for both the party that filed the election objections and the nonobjecting party.[468] For example, some comments, such as those filed by ACC and AHCA II, complain that 14 days is not sufficient time for the aggrieved party to prepare for a hearing on its objections because it must also prepare its request for review of the decision and direction of election during this same time period. According to these comments, the proposed post-election procedure simply requires "too much, too soon." Other comments, such as those filed by SHRM, complain that 14 days is insufficient time to prepare for the post-election hearing because, in addition to having to prepare to present evidence regarding the objections, parties may also be required to present evidence regarding the eligibility of employees who were permitted to cast challenged ballots pursuant to the proposed 20 percent rule. Buchanan complains that the proposed post-election hearing schedule raises

[468] See, e.g., GAM; ACE; SHRM; AHA; Summa; Buchanan; ACC; AHCA II.

due process issues because the nonobjecting party will have such a short time to prepare for the objections hearing. Buchanan also claims, along with the AHA, that the amendment will be counterproductive because it will leave regional directors with insufficient time to weed out frivolous objections. Thus, Buchanan posits that instead of eliminating wasteful litigation, the amendments will have precisely the opposite effect.

After careful consideration of the comments, the Board has decided to modify its proposal regarding the scheduling of the post-election hearing to provide (in amended § 102.69(c)(1)(ii)) that, unless the parties agree to an earlier date, the post-election hearing on objections and determinative challenges should open 21 days—rather than 14 days—from the tally of ballots or as soon as practicable thereafter, thereby affording all parties an additional 7 days between the due date for the filing of election objections and the opening of the post-election hearing. We believe that providing an additional week's time is appropriate. If a party took the full 7 days to which it is entitled to file its objections under § 102.69(a), the nonobjecting party would receive at most 7 days notice of the hearing if the hearing opened 14 days from the tally of ballots as proposed in the NPRM. Moreover, if a party filed its election objections at the close of business on the 7th day following the tally, the regional director might not be able to issue a notice of hearing until the 8th day following the tally. If the hearing in such a case opened on the 14th day following the tally as provided in the proposal, that would mean that the nonobjecting party received less than 7 days notice of the hearing. Accordingly, we believe that providing an additional week's time is responsive to the concerns raised in some of the comments about parties needing more than 14 days from the tally of ballots (and 7 days

from the filing of objections) to prepare for the post-election hearing. [469]

Providing that the post-election hearing open 21 days from the tally (and 14 days from the filing of the objections) is also responsive to the criticism that the proposal might not provide enough time for the regional directors to weed out frivolous objections. By providing that the post-election hearing should open 21 days from the tally of ballots or as soon as practicable thereafter, we provide the regional directors with additional time to evaluate the objections and accompanying offers of proof—particularly in cases where they are not filed until the close of the 7th day following the tally, where the objections are voluminous, or where the regional director grants parties more time to file their supporting offers of proof—but still well within a time frame when the directors can issue notices of hearing in compliance with Board practice. And, just as was true under the Board's prior rules, directors may cancel previously scheduled hearings if subsequent developments render the hearing unnecessary.

In sum, we conclude that the revised 21-day post-election hearing schedule takes into account the critical comments in a manner that serves the goals of eliminating unnecessary litigation and expeditiously resolving questions of representation. In

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[469] Admittedly, our decision to require that post-election hearings be scheduled to open 21 days from the tally (and 14 days from the filing of objections) depends, in part, on the implementation of the new requirement that parties filing objections simultaneously file their offers of proof supporting those objections with the regional director. Ordinarily, the regional director cannot evaluate whether a hearing is necessary until the director receives the objecting party's offer of proof, which the pre-NPRM version of § 102.69(a) gave parties an extra 7 days to provide. Accordingly, without the amendment requiring the simultaneous filing of offers of proof with the objections, the offer of proof would not be due until 14 days from the tally, in which case a regional director could have no choice but to give parties less than 7 days notice of the post-election hearing in order to meet the 21-day post-election hearing scheduling goal. And that would give rise to the same concerns which our revised post-election timetable seeks to allay.

addition, the amendments should help make the scheduling of post-election hearings more uniform across regions and provide transparency to the parties.

To the extent that the authors of those critical comments would object that setting the post-election hearing to open 21 days from the tally of ballots (and 14 days from the filing of the objections) is still unfair to the nonobjecting party, the Board would find them to be unpersuasive. In cases where the objections allege that the election should be set aside because of employer misconduct, the union has to prove that the employer was responsible for the misconduct. Under the revised schedule, even if the notice of hearing issues 1 or more days after the objections are filed, the nonobjecting party should still have close to 2 weeks to investigate the objections and prepare its response unless, of course, the parties agree to an earlier hearing date. Thus, under the amendments, as under the prior rules and case law that the amendments leave undisturbed, the party seeking to overturn the election must file its objections within 7 days of the tally, and the objections must contain a specific, nonconclusory statement of the reasons therefor so as to provide notice of the alleged objectionable conduct. The nonobjecting party will promptly learn of the filing of objections, because the objecting party will now be required to simultaneously serve a copy of its objections on all parties when it files its objections with the regional director (and the regional director will continue the practice of furnishing a copy as well). § 102.69(a); Casehandling Manual Sections 11392.5 and 11392.9.

Accordingly, the nonobjecting party need not wait until the notice of the post-election hearing actually issues to begin investigating the objections and preparing its response, but instead can do so as soon as it is served with a copy of the objections,

which will be at least 14 days before the opening of the post-election hearing, unless the parties agree to an earlier date. In most cases, given the relatively small median bargaining unit size in recent years, there is likely to be only a relatively limited number of potential witnesses with knowledge of the relevant facts. The employer should have ready access to its supervisors, managers, and agents. And even prior to the amendments, nonobjecting parties were sometimes requested to produce their evidence opposing the objections just 7 days after the objections were filed and, along with the objecting parties, were sometimes advised that the post-election hearing could open 14 days from the filing of objections (i.e. 21 days from the tally of ballots).[470] It also bears mentioning that because the hearing on objections only occurs *after* the election, parties desiring a labor attorney or consultant to represent them in connection with the post-election objections hearing in all likelihood will have retained the attorney or consultant before the objections will have even been filed, in contrast to the pre-election scenario painted by some comments of unrepresented employers being taken by surprise by the filing of a representation petition and having to scramble to retain an attorney or consultant.[471]

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[470] For example, the December 1997 Report of the Best Practices Committee indicates that some regions requested that all parties (both objecting parties and nonobjecting parties) submit their evidence within 7 days of the filing of objections. G.C. Memo. 98–1,‘‘Report of Best Practices Committee—Representation Cases December 1997’’ at 22. And a sample letter attached to the Best Practices Committee Report provided for the objections hearing to open 5-to-7 days after the due date for filing evidence in support of objections, which, under the rules then in effect, was 7 days from the filing of the objections. See Attachment J 1-3 (objections filed August 16; evidence in support of (and in opposition to) objections due not later than August 23; objections hearing tentatively scheduled for the period August 28, 29, or 30”).

[471] In our experience, those parties who use attorneys or consultants to represent them in connection with *post*-election hearings frequently use the same attorneys or consultants that they retained to represent them in connection with the *pre*-election hearings or the

To the extent that ACC and AHCA would claim that a 21-day post-election hearing schedule is still unfair to the objecting party because the objecting party has to prepare its request for review of the direction of election at the same time it must prepare for the objections hearing, the Board would find such claims unpersuasive. In the Board's view, such claims would reflect a misunderstanding of the amendments. Amended § 102.67(c) makes clear that the request for review of the direction of election is not due until *after* the regional director disposes of election objections and determinative challenges. Accordingly, parties preparing for a post-election hearing on objections and or challenged ballots will not need to simultaneously prepare their requests for review of the decision and direction of election. Moreover, even if no objections are filed, a party seeking to file a request for review of the decision and direction of election will have more time to do so under the final rule than it has under the current rules.

The Board also finds unpersuasive the claim that the revised 21-day post-election hearing schedule is unfair because, in addition to having to prepare to present evidence regarding the objections, parties may also be required to present evidence regarding the eligibility of employees who were permitted to cast challenged ballots pursuant to the 20 percent rule. First of all, the Board has not adopted the 20 percent rule. Thus, the final rule grants the regional director discretion to instruct hearing officers to permit litigation of individual eligibility issues if the director resolves to consider them prior to the election. Accordingly, parties are free under the final rule to request that they be permitted to litigate individual eligibility issues at the pre-election hearing. By definition,

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negotiation of the election agreements.

if a party requests at the pre-election hearing that it be permitted to litigate an individual's eligibility or inclusion, that means that the party has prepared to litigate it at the pre-election hearing. The comments do not explain just why a party that has prepared to litigate an issue at the *pre*-election hearing should need substantial additional time to prepare to litigate the identical issue at a *post*-election hearing. And if in the direction of election, the regional director directs that particular individuals be permitted to vote subject to challenge, the parties are on notice that the status of such individuals is unresolved, and so they may begin to investigate the facts surrounding the individuals' eligibility at that time even before the election occurs.

Even in cases where election-day challenges take one of the parties by surprise, all parties can begin preparing their cases with respect to the determinative challenges immediately after the tally of ballots, because the parties know who cast challenged ballots no later than the tally of ballots.[472] Indeed, informing all parties at the election that they must present their evidence regarding determinative challenges by the date objections are due was labeled a best practice in 1997. See G.C. Memo. 98–1, ''Report of Best Practices Committee— Representation Cases December 1997,'' at 23. And, as was noted in connection with the scheduling of the *pre*-election hearing, the facts surrounding individual eligibility or inclusion questions are peculiarly within the employer's knowledge and control, because the employer established its employees' terms and

[472] Thus, parties typically are represented by an equal number of observers at the polls; the parties' observers are the ones who either challenge the voters or who observe one of the other parties or the Board agent challenge the voters; and the parties, who usually attend the count, discuss any challenges that were made before the ballots are counted in an attempt to resolve them. See Casehandling Manual Sections 11338.2, 11338.3, 11340.2, 11340.3, 11340.9(a).

conditions of employment. Accordingly, we would firmly reject any suggestion that 21 days is generally an insufficient amount of time to prepare for a hearing on objections, simply because the employer might also have to prepare to present evidence regarding challenges. We also note that the amendments grant the regional director discretion to open the hearing at a later date in an appropriate case.[473]

Finally, it bears emphasis that even prior to the NPRM, the post-election hearing could involve both objections and challenge issues. Thus, the regional director has long had discretion to defer deciding eligibility issues until after an election, and parties could always challenge voters for cause at the election.

Retired Field Examiner Michael Pearson suggests (Pearson Supplemental Statement) that the Board should require that post-election hearings on objections and challenged ballots, like pre-election hearings, continue on consecutive days until completed in order to avoid situations where multi-day hearings turn into multi-week affairs. The NPRM proposed to do just that, albeit not explicitly. Thus, proposed § 102.69(d)(1)(iii) provided that the post-election hearing be conducted in accordance with § 102.64 insofar as applicable, and proposed § 102.64(c) provided that the hearing should continue from day to day until completed absent extraordinary circumstances. However, to avoid any possible confusion, the final rule provides in amended § 102.69(c)(1)(iii) that the hearing on objections or on challenged ballots or on both shall continue from day to day until completed unless the regional director concludes that extraordinary

[473] Thus, the amendments to § 102.69(c)(1)(ii) do not require that the hearing open 21 days from the tally (and 14 days from the filing of objections) in all cases. Instead, the amendments merely require the director to set the hearing for 21 days from the tally "or as soon as practicable thereafter."

circumstances warrant otherwise.[474] This amendment is consistent with the policy set forth in Casehandling Manual Sections 11365.3 and 11395.4, which provide that hearings on determinative challenges and objections "should be held on consecutive days until completed." Conducting post-election hearings on consecutive days until completed serves the goal of expeditiously resolving questions concerning representation because in cases involving post-election hearings, the question concerning representation cannot be resolved until the hearing is completed. The amendment also renders Board procedures more transparent and uniform across regions.

D. Procedure at the Post-Election Hearing on Objections and Challenged Ballots

The NPRM proposed that the post-election hearing would open with the parties stating their positions on any challenges and objections, followed by mandatory offers of proof as described in proposed § 102.66. 79 FR at 7333-34. SHRM complains that such an offer-of proof procedure would deprive parties of their right to a meaningful post-election hearing.

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[474] As discussed above in connection with § 102.64, we found unpersuasive the Chamber's objection to the proposal that *pre*-election hearings continue on consecutive days until completed. We find equally unpersuasive any opposition to the amendment providing that *post*-election hearings will continue day to day until completed absent extraordinary circumstances. Indeed, we believe that a party and its attorney or consultant will have more lead time to rearrange their schedules, if necessary, to attend a multiday post-election hearing than they have with respect to the pre-election hearing, because under the amendments we are adopting the post-election hearing is supposed to open 21 days after the tally of ballots and 14 days after the filing of objections. And, as noted previously, because the hearing on objections and determinative challenges only occurs after the election, many of the parties desiring labor attorneys or consultants to represent them in connection with the post-election hearings in all likelihood will have retained the attorneys and consultants before the objections will have been filed, in contrast to the pre-election scenario painted by some comments of unrepresented employers being taken by surprise by the filing of the representation petition and having to scramble to retain an attorney or consultant.

However, as discussed above in relation to § 102.66, the Board has decided not to adopt the proposed mandatory offer-of-proof procedure at the pre-election hearing. The Board has likewise decided not to adopt the proposed mandatory offer-of-proof procedure at the post-election hearing. Instead, we have decided to codify hearing officers' discretion to require parties to make offers of proof and to permit hearing officers to rule on such offers.

To the extent that SHRM would argue that such a discretionary offer-of proof procedure deprives parties of their right to a meaningful post-election hearing, we would find it unpersuasive. While parties have a right to a *pre*-election hearing under the NLRA, they have no right to a *post*-election hearing under the NLRA. See *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 332 (5th Cir. 1991); *NLRB. v. Metro-Truck Body, Inc.*, 613 F.2d 746, 751 (9th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). As discussed above even prior to the NPRM, regional directors could evaluate a party's objections and challenges and overrule them (without a hearing) if they did not raise substantial material issues. See also 29 CFR 102.69(d) (2009); Casehandling Manual Sections 11394.3, 11395.1. Moreover, hearing officers had discretion prior to the NPRM to require parties to make offers of proof before admitting evidence and to rule on the offers. See Casehandling Manual Section 11424.3(b); Hearing Officer's Guide at 38, 158 ("Offers of proof can be an effective tool for controlling and streamlining a hearing.") As shown, an offer of proof is simply a tool to enable the hearing officer to determine whether it is appropriate to receive the evidence a party wishes to introduce. Thus, a party has no cause to complain if the hearing officer rejects proffered evidence that is not relevant to or probative of the matters to be determined at the post-election hearing.

Consistent with its complaints about the proposed offer-of-proof procedure to be used at the *pre*-election hearing, SHRM also complains that it is inappropriate for hearing officers, who may not even be attorneys, to administer a mandatory offer-of-proof procedure at the *post*-election hearing as well. Assuming that SHRM would argue that it is likewise inappropriate for hearing officers to administer the discretionary offer of proof procedure, we would find it unpersuasive. Indeed, the persuasive force of this contention is even weaker in this context than it was in the context of the pre-election hearing, because the statutory language regarding pre-election hearings is not controlling with respect to post-election hearings. While Section 9(c)(1) of the NLRA gives parties a right to a pre-election hearing and provides that the hearing officer who presides at the pre-election hearing shall make no recommendations with respect to the question the pre-election hearing is designed to answer, the NLRA contains no similar provisions regarding post-election hearings. Thus, prior to the amendments, hearing officers—whether field attorneys or nonattorney field examiners—could, and did, resolve credibility issues at the post-election hearing and could, and did, make recommendations regarding the ultimate disposition of the objections and determinative challenges. See 29 CFR 102.69(e) (2010) ("[U]pon the close of such a hearing, the hearing officer shall * * * prepare and caused to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues."). And prior to the amendments, the courts regularly deferred to the hearing officer's evaluation of the evidence. See *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562-63, 1564-65 (D.C. Cir. 1984) ("The Hearing Officer was uniquely well-placed to draw conclusions about credibility when testimony

was in conflict[.]"). Accordingly, if, as was also true prior to the NPRM, the hearing officer is permitted to make findings of fact and to recommend the ultimate disposition of all issues in the case based on the record of the post-election hearing, we fail to see how it is inappropriate for a hearing officer to require, and rule on, offers of proof at the post-election hearing.[475]

The amendment fully protects the rights of the parties. Offers of proof made at the post-election hearing are part of the record. See amended § 102.69(d)(1)(i). Parties have a right to file exceptions to the hearing officer's decision with the regional director, and

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[475] As noted, the NPRM proposed that the post-election hearing would be conducted in accordance with §§ 102.64, 102.65, and 102.66, insofar as applicable. 79 FR at 7361. The final rule clarifies in amended § 102.69(c)(1)(iii) that any party at the post-election hearing shall have the right to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. In contrast to amended § 102.66(c), amended 102.69(c)(1)(iii) also makes clear that the hearing officer presiding over a post-election hearing may rule on offers of proof without consulting with the regional director. Prior to the NPRM, hearing officers presiding over post-election hearings were not required to consult with regional directors before ruling on offers of proof. Moreover, as discussed above, hearing officers presiding over post-election hearings have greater authority than hearing officers presiding over pre-election hearings, because the former, unlike the latter have long been charged with making factual findings, credibility resolutions, and recommendations as to the ultimate disposition of the case. See, e.g., Casehandling Manual Section 11424.3(b). Furthermore, it will be clear to all parties prior to the opening of the post-election hearing which if any individual eligibility or inclusion questions will in fact be litigated at the post-election hearing. Thus, the post-election hearing, by definition, does not occur until after there are determinative challenges or objections, and the regional director sets the parameters for the post-election hearing on determinative challenges and objections prior to the opening of the post-election hearing. See, e.g., Casehandling Manual Section 11428.1 ("The frame of reference for the hearing on objections/challenges is the notice of hearing and order directing the hearing; the hearing officer must limit the hearing to the matters that the Regional Director has set for hearing."). Similarly, amended §102.69(c)(1)(iii) makes clear that briefs following the close of the post-election hearing shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. This is consistent with the pre-NPRM practice. See Hearing Officer's Guide at 167.

thereafter (in stipulated or directed election cases) to file a request for review with the Board. § 102.69(c)(1)(iii),(2). Thus, if the regional director, or the Board, concludes that the hearing officer erred, the director or the Board is free to remand to case to the hearing officer to take additional evidence.

Sec. 102.71 Dismissal of Petition; Refusal to Proceed with Petition; Requests for Review by the Board of Action of the Regional Director

The amendments to this section eliminate the now-outdated reference to carbon copies and clarify that extra copies of electronically-filed papers need not be filed.

Subparts D & E, §§ 102.73 Through 102.88, Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act and Procedure for Referendum Under Section 9(e) of the Act

The amendments in these two subparts merely conform their provisions to amendments in Subpart C described above.[476]

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[476] The final rule's amendments to these two subparts differ in some respects from the amendments made to these subparts by the December 22, 2011 final rule. In some instances, this is because the 2011 final rule deferred for further consideration some of the proposed amendments that the Board has now decided to adopt. For example, because the 2011 final rule deferred for further consideration the proposal to eliminate the transfer procedure (76 FR at 80171), the 2011 final rule did not delete the references to the transfer procedure in §§ 102.77(b) and 102.86. 76 FR at 80188-80189. Now that the Board has decided to eliminate the transfer procedure, the final rule deletes the references to the transfer procedure in §§ 102.77(b) and 102.86. Similarly, the 2011 final rule deferred the proposals (79 FR at 7362-7363) to amend §§ 102.83 and 102.84 to permit electronic filing of petitions and to require the simultaneous filing of the showing of interest with the petition. Now that the Board has decided to permit electronic filing of petitions and to require the simultaneous filing of the showing of interest, the final rule amends those sections to so provide. In other instances, the Board has concluded that certain amendments were not necessary. Because as discussed above in connection with § 102.69, the Board has decided to reject the NPRM proposal (79 FR at 7360), which the 2011 final rule adopted (76 FR at 80187), to add a new paragraph (b) to § 102.69 addressing requests for review of regional director directions of elections, the final rule for example does not adopt the NPRM proposal (79 FR at 7363), which the 2011 final rule adopted (76 FR at 80189), to amend § 102.86 to provide that in cases arising under Subpart E, posthearing procedure would be governed, insofar as applicable, by §§ 102.63

Subpart I—Service and Filing of Papers

Sec. 102.112 Date of Service; Date of Filing

In the NPRM, the Board proposed to correct an omission concerning the effective date of service by electronic mail. The final rule provides that where service is made by electronic mail, the date of service shall be the date on which the message is sent. The Board did not receive any significant comments regarding this provision.

Sec. 102.113 Methods of Service of Process and Papers by the Agency; Proof of Service

The final rule adds electronic mail as an approved method of service of Board papers other than complaints, compliance specifications, final decisions and orders in unfair labor practice cases, and subpoenas. The existing rules include regular mail, private delivery service and facsimile transmission (with consent), along with personal service and certified and registered mail. Related § 102.114 has provided for service of parties' papers by electronic mail since 2009. The amendment thus updates the Board's representation case procedures to reflect modern electronic communications technology.

In general, there is little objection to adding electronic mail as an approved method of service. Of the few comments addressing these changes at all, PIA explicitly

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through 102.69. Accordingly, just as was the case prior to the NPRM, the method of conducting the hearing and the procedure following the hearing in cases arising under Subpart E of part 102 will be governed, insofar as applicable, by §§ 102.63 through 102.68. Because the Board has decided to reject the proposal to eliminate Subpart D of Part 101, it is not necessary to, and the final rule rejects the NPRM proposal (79 FR at 7362) to, amend § 102.77(b) to incorporate language from preexisting § 101.23(e) to the effect that if a petition has been filed which does not meet the requirements for processing under Subpart D's expedited procedures, the regional director may process it under the procedures set forth in Subpart C. Under the final rule, that language remains in § 101.23(e).

favors the service of Board documents by electronic mail,[477] and the Chamber raises no general objection to electronic service of representation case documents, with the exception of the voter list.[478]

AGC opposes electronic service because it might be defeated by spam filters and similar tools that are used to protect computer data and equipment. AGC surmises that this could lead to an increase in litigation surrounding the election process if parties fail to receive electronically-served documents, which could slow down the Board process. These concerns are, at best, speculative. Electronic service is very common, spam filters notwithstanding. The Board has yet to experience any dramatic increase in litigation due to spam filters intercepting parties' current electronic service of their papers in either representation or unfair labor practice proceedings. Moreover, the Board has received no significant complaints regarding spam filters in connection with its ongoing pilot program to electronically serve published Board and Division of Judges' decisions where parties have registered for such service. Thus, the Board has little reason to believe that spam filter problems will suddenly become pronounced when the Board itself begins serving representation case documents electronically.

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[477] PIA relatedly contends, however, that because electronic service of documents will speed the election process, there is no need to further speed the process by making other changes. The Board does not agree that just because electronic service will be an improvement, the other changes adopted in the final rule are unnecessary. Indeed, two improvements in efficiency are generally better than one. As discussed at greater length above, one of the goals of the final rule is to remove unnecessary barriers to the expeditious processing of representation cases. Permitting electronic service by itself plainly does not fully accomplish that goal.

[478] The Chamber's prediction of an electronic voter list inviting abuse is discussed in relation to § 102.62.

Indeed, parties will have provided their email addresses and fascimile numbers to the regional director when they filed their petitions and Statements of Positions and participated in a hearing pursuant to amended §§ 102.61(a)(9), (b)(1), (c)(4), (d)(10), (e)(7); 102.63 (b)(1-3)(ii); and 102.66(g)(2). At the time parties are providing this information, they may customize their email settings to ensure that the system does not inadvertently flag official documents as spam when they are sent by regional personnel from ".gov" domains.[479] Furthermore, as already discussed in relation to § 102.60, any concerns about spam filters intercepting service of a petition will be mitigated by the practice of the regional offices to have a Board agent contact parties as soon as possible after the filing of a petition in order to facilitate the election process. See Casehandling Manual Section 11010. Upon implementation of this rule, the Board expects regional offices to additionally place follow up phone calls to all parties as soon as a decision and direction of election is sent by email or facsimile, to provide an added safeguard against delivery failures.

In sum, the Board is not persuaded that spam filter interception will be such a significant problem that the agency should continue to use slower and more expensive means to transmit its documents to parties.

Sec. 102.114 Filing and Service of Papers by Parties; Form of Papers; Manner and Proof of Filing or Service; Electronic Filings

The amendments to this section merely conform its provisions to certain amendments in Subpart C described above.

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[479] In addition, the testimony of Jess Kutch on behalf of Coworker.org II concerning potential spam filter problems discussed in connection with § 102.62 above would not implicate these types of service, which would not be attempted via bulk emails.

Sec. 103.20 Election Procedures and Blocking Charges; Filing of Blocking Charges; Simultaneous Filing of Offer of Proof; Prompt Furnishing of Witnesses.

Under the Board's prior rules, § 103.20 was entitled "Posting of election notices." As discussed above in connection with § 102.67, the final rule adopts the proposal to integrate its contents as modified into § 102.67 of part 102.[480] However, the NPRM also requested comment regarding the Board's blocking charge policy. 79 FR 7334-35. As discussed below, the Board has decided to codify certain revisions to that policy here in § 103.20. Accordingly, the final rule retitles § 103.20 "Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses."

The NPRM specifically asked for comments on various proposed revisions of the Board's blocking charge policy. As explained in the NPRM, the blocking charge policy is not codified in the current regulations. Rather, it is the product of adjudication and is described in the non-binding Casehandling Manual. See Casehandling Manual Sections 11730 to 11734.

As explained in Section 11730 of the Casehandling Manual, "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that would interfere with employee free choice in an election, were one to be conducted." This policy is designed to ensure that violations of the Act which interfere with employees' right to vote are remedied before any election is conducted. In other

[480] As noted in § 102.62, the election notice changes also apply in cases where the parties agree to an election.

words, it "blocks" the election process until such time as a fair and free election can be held. Charges alleging conduct that is inherently inconsistent with the petition itself may also result in a petition being held in abeyance. See *id.* at Section 11730.3. However, there are significant exceptions to the general policy of having a charge "block" a petition. See *id.* at Section 11731. Accordingly, the filing of an unfair labor practice charge does not automatically cause a petition to be held in abeyance. Furthermore, "the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." *Id.* at Section 11730.

Some comments urge that the policy be maintained in order to ensure a free and uncoerced choice in selecting representatives for purposes of collective bargaining.[481] In the view of these commenters, simply holding a rerun election will not fully and completely remedy the employer's unfair labor practices. As the AFL-CIO explains, this is so because there is a substantial risk that the tainted election will compound the effects of the unfair labor practices: an employee who voted against union representation under the influence of the employer's unlawful conduct is unlikely to reconsider the issue and change his or her vote in the rerun election. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-78 (1973).[482] Moreover, according to the AFL-CIO, "opening the ballots cast in a

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[481] See SEIU; AFL-CIO (Reply); UFCW; Testimony of Melinda Hensel on behalf of IUOE Local 150 II.

[482] SEIU (Reply) supports this observation by pointing out that it is grounded not only on its own long organizing experience, but also on social psychologists' research into the cognitive dissonance theory. According to SEIU, "These experts have found that people will try to bring their attitudes in line with their actions, in order to reduce the dissonance in their minds." As Leon Festinger, the father of cognitive dissonance theory, explained, a classic example is when a person is forced to do something she may not support; ultimately, researchers have found that her attitude towards that issue becomes more

tainted election would only compound the effects of the unfair labor practices in the event that a majority votes against representation because it would create the misimpression that the tally reflects the uncoerced choice of the voters." SEIU also asserts that holding a tainted election is an inherently coercive event separate and apart from the unfair labor practice giving rise to the taint, because it drills into the unit employees' minds the lesson that engaging in the election process is futile.

Other comments suggest changes in the blocking charge policy, including its elimination.[483] Professor Samuel Estreicher suggests that application of the blocking charge policy be restricted to "unusual circumstances," because it is generally desirable to hold the election and defer consideration of contested matters to the post-election stage. Other comments assert that the policy should be eliminated because it creates

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positive than it otherwise would have been. See generally Leon Festinger, *A Theory of Cognitive Dissonance* (1957); Leon Festinger and James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, Journal of Abnormal Psychology, Vol. 58, 203-210 (1959).

[483] Curiously, the IFA II claims a hindrance in being able to adequately respond to the solicitation for comments on the Board's blocking charge policy because the Board does not publish statistics including "the number of blocking charges filed per year." Yet, the Board provided information to the IFA concerning elections held during the last 3 fiscal years that had previously been blocked for some period of time as part of a joint FOIA request during the comment period, along with the average and median number of days between petitions and election in cases in which blocking charges were filed. (We also provided similar information in response to a FOIA request from commenters in 2011, and additionally provided blocking charge information made publicly available by Professor Estreicher in his 2009 law review article referenced below.) We are thus not sympathetic to IFA's suggestion that lack of additional blocking charge statistics—statistics not included in their FOIA request—should cause the Board to extend the period of time to comment on potential changes to the blocking charge doctrine. In any event, IFA's initial position—that blocking charges delay elections—is unassailable based on the statistics provided to them, those analyzed by Professor Estreicher 5 years ago, and simple logic. We discuss below IFA's policy suggestions flowing therefrom.

opportunities for needless delay of elections—particularly decertification elections.[484] SHRM also points out that blocking charges can result in elections being delayed for many months, and asserts that blocking charges cause much of the significant election delays in representation cases.[485] Some comments assert, specifically with respect to decertification elections, that experience shows that when unions have determined that they are likely to lose the upcoming election they will file unfair labor practice charges in order to block the election and frustrate the employees' efforts to end union representation.[486]

After careful consideration, the Board has decided to continue applying the blocking charge policy and to block elections in circumstances where unfair labor practice charges allege conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and no special circumstances are present that would warrant further processing the petition in the face of the charges. The Board is duty bound to ensure that employees can express their choice of representative free of unlawful coercion, and regional directors will therefore not generally process a petition through to an election in the face of a pending charge if they believe employee free choice is likely to be impaired. Furthermore, we agree that holding a tainted election results in damage beyond that caused by the employer's unfair labor

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[484] See, e.g., AHA II; COLLE; CDW; CNLP; PIA; NRMCA II.

[485] SHRM references a study conducted by Professor Estreicher of data pertaining to blocking charges filed in 2008, in which Professor Estreicher determined that the filing of blocking charges in a case increased the time to an election, on average, by 100 days. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 ABA J. LAB. & EMP. L. 1, 9-10 (2009).

[486] See, e.g., NRTWLDF; Chamber II; COLLE.

practices, which damage cannot be fully remedied simply by conducting a rerun election. As the Fifth Circuit noted in *Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974), the salutary purposes for imposing the blocking charge policy, a policy the Board has followed since 1937, "do not long elude comprehension."

Nevertheless, the Board is sensitive to the allegation that at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections.[487] To that end, the Board notes that the General Counsel already has in place procedures requiring the expedited investigation of blocking charges in an effort to ensure that non-meritorious charges do not delay elections. Under the agency's Impact Analysis system for prioritizing the processing of cases, blocking charge cases are designated as Category III (Exceptional) cases, which have the highest priority and the shortest time goals for disposition. See Casehandling Manual Section 11740.

The Board has also decided to codify several new practices to protect against abuse of the blocking charge policy by those who would use the unfair labor practice procedures to unnecessarily delay the conduct of elections. Parallel to the amendments to § 102.61(a)(7), (b)(8) and (c)(8) providing for the simultaneous filing of the showing of interest with election petitions, and § 102.69(a) providing for the simultaneous filing of offers of proof together with election objections, the Board's amendments to § 103.20 will require any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition to simultaneously file a written offer of proof. The offer of proof must provide the names of

[487] See, e.g., NRTWLDF; Chamber.

the witnesses who will testify in support of the charge, and a summary of their anticipated testimony. If the regional director determines that the party's offer of proof does not describe evidence of conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances,[488] the regional director will continue to process the petition and conduct the election where appropriate. The party seeking to block the processing of the petition must also promptly[489] make the witnesses identified in its offer of proof available to the regional director so that the director can promptly investigate the charge, as required by Section 11740.1 of the Casehandling Manual.[490] These practices will serve to provide the

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[488] Our use of the term "special circumstances" is merely intended to recognize the longstanding reality that regional directors have discretion to continue to process petitions notwithstanding the pendency of charges that would otherwise result in a petition being held in abeyance. In this way, regional directors will continue to have discretion to engage in a balancing of relative hardships concerning the blocking of an election as requested by comments such as IFA II. See Section 11731.2 of the Casehandling Manual.

[489] Although the NPRM had used the descriptor "immediately" in describing when the filer of a blocking charge must make the witnesses identified in its offer of proof available to the regional director, the final rule uses the descriptor "promptly" to avoid the connotation that the filer must physically bring the witnesses along with them in order to file a blocking charge in one of the Board's regional offices. We think that the requirement of prompt witness availability will be adequate to ensure an avoidance of unnecessary delay in the investigation of blocking charges.

[490] Similarly, the final rule provides in amended § 103.20 that if a party files a petition after filing an unfair labor practice charge and then subsequently requests that its previously filed unfair labor practice charge block further processing of the petition, the party must likewise simultaneously file an offer of proof and also promptly make available to the regional director the witnesses identified in its offer of proof. The final rule likewise provides that even if a party requests that its previously filed unfair labor practice charge block further processing of the petition, the regional director should continue to process the petition and conduct the election where appropriate if the regional

regional director with the information necessary to assess whether the unfair labor practice charges have sufficient support and involve the kind of violations that warrant blocking an election, or whether the charges are filed simply for purposes of delay. This information will also be provided within a time frame that will assist the regional director in making a more expeditious decision on whether to hold the petition in abeyance. Of course, even after the initial decision to hold a petition in abeyance, if it is determined that a charge lacks merit, the regional director will resume processing the petition.

Implementation of these new practices is supported by comments representing employer, employee and labor organization interests who agree that requiring simultaneous offers of proof and prompt witness availability will expedite the investigation of blocking charges.[491] And expediting such investigations will necessarily remove an unnecessary barrier to the fair and expeditious resolution of questions concerning representation.

The only significant opposition to either the offer of proof requirement or the production of witnesses requirement was submitted by SEIU, which opposes the offer of proof requirement on the basis that parties are already obligated to cooperate with Board agents, and it is unclear whether SEIU's objection is simply that the requirement is redundant. The Casehandling Manual does generally require petitioners to cooperate with

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director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself.

[491] See AHA II; NRTWLDF; AFL-CIO; NNU.

Board agents in processing petitions,[492] and requires charging parties to cooperate with Board agents investigating unfair labor practice charges.[493] We view, however, the addition of both the offer of proof requirement and the production of witnesses requirement to the Rules and Regulations as important explications of the duty to cooperate and not mere redundancies.

We decline to adopt the AFL-CIO's suggestion that the Board proclaim it presumptively appropriate to seek preliminary injunctive relief under 29 U.S.C. 160(j) to remedy an unfair labor practice charge that has blocked an election. Under the express language of Section 10(j) of the Act, the issuance of a complaint is a necessary predicate to any decision to seek injunctive relief in the federal district courts, and the General Counsel's discretion to issue complaints—and to accept pre-complaint settlements and post-complaint but pre-hearing informal settlements—is unreviewable by the Board. See *NLRB v. UFCW, Local 23*, 484 U.S. 112, 118-33 (1987).[494] In addition, injunction litigation obviously involves the expenditure of significant resources by the agency, and obtaining a 10(j) injunction from a district court requires the court to engage in a case-

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[492] Casehandling Manual (Part Two) Representation Proceedings Section 11012.1.

[493] Casehandling Manual (Part One) Unfair Labor Practice Proceedings Section 10054.1.

[494] In contrast, under the Board's existing regulations, parties have long enjoyed an opportunity to request Board review of a decision to hold a petition in abeyance under the blocking charge policy. See § 102.71(b) ("Where the regional director * * *directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the regional director, upon request, has so notified the parties in writing, any party may obtain a review of the regional director's action by filing a request therefor with the Board in Washington, DC. . .").

specific inquiry.[495] To be sure, since the 1950s, with limited exceptions, the Board has reserved to itself the privilege of approving any plans by the General Counsel to pursue Section 10(j) injunction proceedings,[496] but no prior Board has sought to exercise greater control over the General Counsels' discretion, even in the face of widely varying use of the preliminary injunction as an enforcement tool.[497] Thus, we decline the invitation to cabin the General Counsel's prosecutorial discretion in making the initial determination whether a particular complaint warrants the agency pursuing Section 10(j) injunctive relief. By declining, however, we do not mean to suggest that it would be inappropriate in a particular case for the General Counsel to seek injunctive relief to remedy unfair labor practices that have blocked an election.

We further decline to adopt AHA II's preferred change to the blocking charge policy, that "unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition." 79 FR 7334. SEIU argues that implementing this change would improperly shift the presumption away from the one described in the Casehandling Manual, where a charge

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[495] See *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 93-94 (3d Cir. 2011) (cataloguing the varying standards employed by the circuit courts in deciding whether the facts of a particular unfair labor practice case warrant injunctive relief).

[496] See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1352 (9th Cir. 2011).

[497] See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2030 tbl. 1 (2009) (demonstrating the range of 10(j) injunctions filed per year over the last several decades from a high of 78 in 1995 to a low of 10 in 2004); see also NLRB Performance Accountability Report, 5, 38 (Fiscal Year 2013) (reporting that 10(j) injunctions were authorized in 41 cases out of the 1,272 total complaints issued that year).

can serve to block the processing of a representation case unless the regional director finds that employees' exercise of free choice is possible notwithstanding the charge, to one where the petition is processed unless and until the regional director makes a further determination concerning the likelihood of a complaint issuing and the seriousness of the unfair labor practice involved. As described above, we believe that regional directors should generally continue to process petitions if the directors determine that the charging party's offer of proof does not describe sufficient evidence to warrant blocking an election. On the other hand, in situations where parties have raised sufficient offers of proof, we believe that the presumption should run in favor of holding in abeyance the processing of the petition absent special circumstances. In short, we cannot agree that reversing the presumption to one where the election proceeds in the face of a charge of unlawful conduct unless the regional director makes an additional probable cause determination would be a further improvement. Rather, such a standard could cause a regional director to conduct an election in circumstances where conduct has occurred that has a tendency to interfere with employee free choice, simply because the director was not yet able to make the requisite additional determination.[498]

Part 101, Subpart C -- Representation Cases Under Sec. 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

In the NPRM, the Board proposed to eliminate redundant sections of its regulations contained in Subpart C of Part 101 describing representation case procedures.

[498] For the same reason we reject IFA II's suggestion that the Board should require a "charging party to establish a likelihood of success on the merits" before a representation petition would be blocked.

The relevant sections of Subpart C of Part 101 currently include an essentially complete restatement of the representation case procedure established in Subpart C of Part 102. As the Board noted in the NPRM, "Describing the same representation procedures in two separate parts of the regulations may create confusion." 79 FR at 7325.

The final rule eliminates Subpart C of Part 101. A few, non-redundant portions are moved into Part 102. For example, the description of the pre-election conference is moved to § 102.69(a).

The Board received no significant comments opposing this proposal. Comments from a variety of viewpoints supported the Board's effort to eliminate redundant regulations.

As noted in the NPRM, § 101.1 states that the purpose of Part 101 is to provide the public with a statement of "the general course and method by which the Board's functions are channeled and determined."[499] The purpose of a separate statement of the general course "is to assist the public in dealing with administrative agencies," but should not be "carried to so logical an extreme as to inconvenience the public."[500] The NPRM stated that codifying this statement in the Code of Federal Regulations risked confusing the public. Instead, the Board proposed to publish the statement in the Federal Register without codification. This accords with general administrative practice.[501] The NPRM

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[499] See 5 U.S.C. 552(a)(1)(B). The original language of this provision stated that the section would "amplify and supplement the[] rules of procedure." 12 FR 5651 (August 22, 1947).

[500] Tom C. Clark, Attorney General's Manual on the Administrative Procedure Act, 17, 19 (August 27, 1947).

[501] See, e.g., 26 CFR 601.702(a)(1)(ii) ("[T[he Commissioner publishes in the Federal

contained an uncodified statement of the general course, 79 FR at 7324-7325, and proposed that any final rule that might issue would also include an uncodified statement of the general course. A Statement of the General Course of Proceedings Under Section 9(c) of the Act is provided below.[502]

Prior § 101.18 provided, "The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees." ALFA submits that revised § 102.61 should explicitly state that a proper showing of interest must include authorization cards or signatures from 30 percent of the employees in an appropriate unit. The Board declines to adopt this proposal. The Board's current Rules and Regulations set forth in Part 102 do not specify a precise threshold for the administratively required showing of interest. As explained in former § 101.18, the purpose of the showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is merely to determine whether there is sufficient employee interest in selecting, changing or decertifying a representative to warrant the expenditure of the agency's time, effort, and resources in conducting an election. See also

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Register from time to time a statement, which is not codified in this chapter, on the organization and functions of the IRS.").

[502] The Board will also continue to publish, update, and make available on its Web site the detailed statement of representation case procedures set forth in its Casehandling Manual.

Casehandling Manual Section 11020. As such, the purpose of the showing of interest is purely an administrative one; the size of the showing of interest in support of certification and decertification petitions that the Board currently requires is not compelled by the Act. As an administrative matter it is not litigable. *The Borden Co*., 101 NLRB 203, 203 n.3 (1952); Casehandling Manual Section 11028.3. However, at this time, the Board has no intention of changing the size of the required showing of interest and the uncodified statement of the general course that follows states that the required showing remains 30 percent.[503]

Part 101, Subparts D and E-- Unfair Labor Practice and Representation Cases Under Secs. 8(b)(7) and 9(c) of the Act and Referendum Cases Under Sec. 9(e)(1) and (2) of the Act

In the NPRM, the Board also proposed to eliminate its statement of procedures contained in Subparts D and E of part 101. The Board received no significant comments regarding the proposal. Upon reflection, however, a unanimous Board has decided to reject the proposal to eliminate Subparts D and E of part 101. Unlike prior Subpart C of part 101, Subpart D of part 101 does not merely address representation case procedures. Rather, it also addresses unfair labor practice charges and procedures. Thus, Subpart D is entitled "*Unfair Labor Practice* and Representation Cases *Under Sections 8(b)(7)* and 9(c) of the Act." (Emphasis added.) Although Subpart D of part 102 likewise discusses procedures for unfair labor practice and representation cases under Sections 8(b)(7) and

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[503] The Board's form petition, Form NLRB 502 also states, and will continue to state, that the required showing of interest is 30 percent (see Form section 6(b)).

In response to comments that erroneously suggest that 30 percent is the threshold for resolving a question of representation, the Board reiterates here that if a question of representation exists, it is resolved by a majority of valid votes cast in an election.

9(c) of the Act, the NPRM did not propose eliminating other subparts of part 101 setting forth statements of procedures for unfair labor practice cases, even though certain other subparts of part 102 address the same matters.[504] Thus, the NPRM proposed amendments dealing with, and invited comment about, representation case procedures. The Board concludes that it would be more appropriate to consider eliminating Subpart D of part 101 at such time as the Board may consider eliminating any redundancies in those other subparts of part 101 and part 102 that address unfair labor practice matters. Accordingly, the Board has concluded that it should not eliminate Subpart D of part 101 at this time.

The Board has likewise unanimously decided not to eliminate Subpart E of part 101. Subpart C of part 101 chiefly deals with the Board procedures that govern the filing and processing of petitions to determine whether employees wish to become or remain represented for purposes of collective bargaining with their employer. Unlike Subpart C of part 101, Subpart E deals with a highly specialized type of case—arising under Section 9(e)(1) and (2) of the Act—addressing the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization that requires membership in the labor organization as a condition of employment, desire that such authority be rescinded. Regardless of the outcome of the election conducted pursuant to Subpart E, the unit employees remain represented vis-à-vis their employer. During fiscal years 2010-2013, parties filed fewer than 80 petitions per year of the type addressed in Subpart E of

[504] For example, while Subpart B of part 101 describes procedures for unfair labor practice cases under Section 10(a) to (i) of the Act, Subpart B of part 102 also addresses procedures under Section 10(a) to (i) of the Act for the prevention of unfair labor practices.

Part 101 and 102. Although Subpart E of part 102 likewise discusses procedures for referendum under Section 9(e) of the Act, the NPRM did not propose eliminating other subparts of part 101 setting forth statements of procedures for other specialized sets of cases that do not deal with ordinary representation case issues, even though other subparts of part 102 address the same matters.[505] The Board has concluded that it would be more appropriate to consider eliminating Subpart E of part 101 at such time as the Board may consider eliminating other redundancies in those other subparts of parts 101 and 102 that address highly specialized sets of cases. Accordingly, the Board has concluded that it should not eliminate Subpart E of part 101 at this time.

The final rule conforms representation and referendum procedures in these two subparts as described therein to amendments set forth below.[506]

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[505] For example, the NPRM did not propose to eliminate Subpart F, which sets forth statements of procedures for jurisdictional dispute cases under Section 10(k) of the Act, even though Subpart F of part 102 also addresses procedures to hear and determine disputes under Section 10(k) of the Act.

[506] The final rule's amendments to these two subparts differ in some respects from the amendments made by the December 22, 2011 final rule. In some instances, this is because the 2011 final rule deferred other proposals which the final rule now adopts. For example, the 2011 final rule deferred the proposal to eliminate the transfer procedure. Accordingly, the 2011 final rule did not amend § 101.30(c) to delete the references to the transfer procedure. 76 FR 80182. Now that the Board has decided to eliminate the transfer procedure, the final rule deletes the references to the transfer procedure in § 101.30(c). In other instances, the Board has concluded that certain amendments to Subpart D were not necessary. For example, the 2011 final rule amended § 101.23(b) to provide that if the regional director directed an election without first conducting a hearing, an aggrieved party should file a request for review of that action after the election. 76 FR 80181. However, the NPRM did not propose to amend, and the 2011 final rule did not amend, § 102.80(c), which provides that if the regional director directs an election without first conducting a hearing in a proceeding arising under Subpart D, a party may file a request for special permission to appeal. Accordingly, the final rule preserves the "special permission to appeal" language in § 101.23(b) from the pre-NPRM version of that section. The final rule also preserves the pre-existing language to the

VI. Response to the Dissent

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

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

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

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

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

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

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[507] Section 102.67(b).

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

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

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

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

473, 476-480 (1964).

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

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

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

A. Building on a Sound Foundation

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

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

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election context as well.

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

B. Protecting Free Speech and Debate

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Hearing Date

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

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

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

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

2. The Statement of Position

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

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

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

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after the 15th day.

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Issues *Decided* Before the Election

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Issues *Litigated* Before the Election

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

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here.

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

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

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

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

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

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

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

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

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

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

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

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

5. Post-hearing Briefing

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

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

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

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

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

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

D. Post-election Board Review

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

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

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

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

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

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

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

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

E. Voter List

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

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

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

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

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

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

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

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

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

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

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

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

F. Blocking Charges

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

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

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

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

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

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

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

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

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

G. Changes from the NPRM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule, which in turn was nearly identical to what the Board originally proposed in 2011.[535] There are minor changes, but the Rule's primary purpose and effect remain the same: initial union representation elections must occur as soon as possible. The Rule's defects also remain the same, uncured by the majority's lengthy discussion, which reflects an awareness of criticisms that are far too often summarily rejected.

- *Election Now, Hearing Later*. The Rule would impermissibly conduct expedited representation elections before any hearing addresses fundamental questions like who is eligible to vote, thereby resulting in an "election now, hearing later." This "election now, hearing later" approach was twice rejected by Congress, in amending the National Labor Relations Act (NLRA or Act) in 1947 and 1959, and is contrary to the statute's requirement – twice affirmed by Congress – mandating an "appropriate hearing" prior to any representation election.

- *Vote Now, Understand Later*. The Rule improperly shortens the time needed for employees to understand relevant issues, compelling them to "vote now, understand later." Regarding these issues, the Rule takes self-contradictory positions that are contrary to common sense, contrary to the Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of

[535] In these dissenting views, we refer to the current Final Rule as "Final Rule" or "Rule," to the February 2014 Proposed Rule as the "Proposed Rule" or "NPRM," to the nearly identical June 2011 proposed rule as the 2011 Proposed Rule, and to the more limited December 2011 final rule adopting elements of the 2011 Proposed Rule as the 2011 Final Rule. The 2011 Final Rule was invalidated by the United States District Court for the District of Columbia, *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 21, 25, 30 (D.D.C. 2012), appeal dismissed 2013 WL 6801164 (D.C. Cir. 2013), and was subsequently vacated by the Board.

which focus on guaranteeing *enough* time for making important decisions. The Rule operates in reverse, making the available time as short as possible.

- *Infringing on Protected Speech*. By requiring elections to occur as quickly as possible, the Rule curtails the right of employers, unions and employees to engage in protected speech. We believe this infringement on protected speech is impermissible, but even if it is within the Board's authority, it is ill-advised and poorly serves the Act's purposes and policies.

- *Lack of Need for the Rule*. The Rule leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary. Objective evidence demonstrates that the overwhelming majority of existing elections occur without *any* unreasonable delay (substantially more than 90 percent of elections occur within 56 days after petition-filing). Although a small number of elections involve more time, this is not a rational basis for rewriting the procedures governing all elections. The Final Rule does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays.

- *Due Process*. The Rule greatly accelerates all deadlines associated with representation elections; it selectively imposes on employers the duty to submit a comprehensive written position statement 7 days after notice of a petition-filing by a union; it permits post-submission "amendments" only in narrow circumstances; the new "pleading" requirements, while facially neutral, will in practice weigh far more heavily on employers than on unions attempting to organize nonunion employees; the Rule directs the exclusion of evidence regarding important election issues; and it directs hearing officers in most instances not to permit post-hearing briefs (which, currently,

adds a mere 7 days to the pre-election timetable); and it codifies and places increased reliance on private consultation and decisionmaking between hearing officers and regional directors, conducted off the record (and thus precluding review by the Board, especially regarding matters that are deferred or excluded from the hearing). In our view, these changes are fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues.

- *Improperly Diminishing the Board's Role*. The majority not only rewrites nearly all procedures governing elections, it eliminates any mandatory role for Board members in resolving post-election questions that arise from the Rule (relegating this to regional directors and to the courts, with only discretionary and post-election review by the Board). The Final Rule articulates no necessity for a "hands-off" policy of Board non-involvement in post-election cases, which we believe is irreconcilable with the statute's requirement that the Board "*in each case* * * * assure to employees the *fullest freedom* in exercising the rights guaranteed by this Act."[536]

- *Disclosures and Employee Privacy*. The Rule imposes new mandatory disclosure requirements obligating employers to disclose personal contact information of unit employees, including all personal email addresses and cell phone numbers in the employer's possession. However, the Final Rule's justification for these expanded disclosure requirements (the importance of personal email and cell phones to protected concerted activity in the workplace, given the "prevalence" at "work" of "cell phones,"

[536] Section 9(b) (emphasis added).

which have become "the preferred mode of communication for many young people") is irreconcilable with *Purple Communications*, 361 NLRB No. 126 (2014), where the Board majority insists that "social media, texting, and personal email accounts" are not even "germane" because they "simply do *not* serve to facilitate communication among members of a particular workforce" (emphasis added). Moreover, the Final Rule adopts the expanded disclosure requirements without any employee "opt-out" right regarding such information. The Rule even rejects privacy-enhancement measures as simple as requiring an "unsubscribe" link in election-related texts and emails, notwithstanding the current widespread use of such measures in other third-party communications.

- *The Consensus Path Not Taken*. Most disappointing is the Rule's failure to incorporate reforms that could have had unanimous Board member support, and substantial support among practitioners, scholars, and advocates for employees, unions and employers. We favor (i) making representation procedures more effective; (ii) having most representation elections occur at least within 30 to 35 days after petition-filing; (iii) changing the Board's internal procedures so virtually all elections – disputed or not – would occur within 60 days after petition-filing; and (iv) adopting stricter, more expansive remedies for unlawful election conduct.

As made clear in our dissent to the Proposed Rule,[537] we believe the Board should do everything within its power to ensure that representation elections give effect to

[537] This dissent incorporates passages, often verbatim, from our NPRM dissent, because the Final Rule to a substantial degree reflects the wholesale adoption of many provisions in the Proposed Rule, without regard to our earlier views. Many of our earlier views, therefore, apply with equal force to the Final Rule. We note that the majority likewise repeats many passages from the prior NPRMs and the vacated 2011 Final Rule. Where still appropriate, we also quote from the dissenting opinion of former Member Hayes to

employee free choice consistent with the Act. We are not irrevocably committed to the status quo, nor do we criticize our colleagues for their desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We share the same desire and remain committed to work as a full Board to further our responsibilities to everyone covered by the Act.

Although we might have agreed with certain changes in a different, more limited and focused rulemaking process, we unfortunately must dissent from the Final Rule including all its parts. Its unwholesome ingredients are too numerous and inseparable from the whole, in our view, for any slice to be fit for consumption.

A. The Final Rule's Procedures Contradict Requirements in the Act and Are Otherwise Impermissibly Arbitrary.

1. Background: What the Final Rule Would Change. It is difficult to summarize the changes reflected in the Final Rule because they are so numerous and implicate so many disparate aspects of the Board's longstanding election procedures. However, the principal thrust of the proposed changes is to greatly reduce the time between a representation petition's filing and the election in all cases. Indeed, the prime objective of the Final Rule is to conduct elections "sooner" than under current practices. How much sooner is not disclosed. There is no minimum time period for the pre-election campaign. Regional directors are to schedule the election "at the earliest date practicable."

Several features of the Final Rule manifest a relentless zeal for slashing time from every stage of current pre-election procedure in fulfillment of the requirement that an

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the vacated rule. Again, the fact that we do so reflects the circumstance that although the Final Rule varies in certain respects from the NPRM first published in June 2011 and republished in February of this year, far too much remains the same.

election be scheduled "at the earliest date practicable,"[538] but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues. The Final Rule would relegate these issues to a post-election hearing, or later.

Ironically, this "election now, hearing later" approach involves the deferral of questions about voter eligibility and unit inclusion. Yes, this means the election would take place first, and only later, if at all, would there be a hearing regarding issues as fundamental as (i) who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would not even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (i.e., representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

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[538] Each of these amendments is designed to abbreviate the pre-election time period: (i) petitioners will now be required to provide the requisite showing of interest with the petition, rather than within 48 hours after filing the petition; (ii) any pre-election hearing must now generally be scheduled to open 8 days from the region's notice of petition; (iii) the right to file a post-hearing brief within 7 days of the close of hearing has been eliminated; (iv) regional directors must ordinarily schedule the election in a decision directing one, rather than leaving the date of the election and other details for further consultation with the parties; (v) the 25-day automatic waiting period after a regional director's decision and direction of election has been eliminated; and (vi) employers have only 2 days after the decision and direction, rather than the current 7 days, to produce the expanded list of employees and contact information.

These are indisputably important issues. Not only are they relevant to the election campaign, they can profoundly affect what type of bargaining relationship would exist after the election if the union prevails, and the inclusion or exclusion of certain groups may positively or negatively affect employee bargaining leverage. For employees, the "election now, hearing later" approach would create a new norm where essential issues do not even receive potential pre-election *consideration* by a regional director, much less by the Board. This is in addition to the Final Rule's shortening of the period between petition-filing and election, which creates a situation where employees will be forced to "vote now, understand later."

The Final Rule makes other equally dramatic changes in other election procedures. It incorporates in our Rules and significantly expands *Excelsior* list disclosure requirements with more severe time limitations and without adequate protection of legitimate privacy concerns, eliminates the overwhelmingly favored practice of permitting stipulation agreements providing for the automatic right of Board review of post-election issues, and incorporates into our Rules without meaningful change the current blocking charge policy, which impedes the expeditious resolution of questions concerning representation more than any of the processes substantially altered by the Final Rule.

2. The NLRA's Requirements. In contrast to the complicated array of changes in the Final Rule, the Act is straightforward: its fundamental purpose is to guarantee employee free choice when employees vote in elections regarding union representation. Sections 1 and 7 refer to "the exercise by workers of *full freedom* of association" encompassing the right of employees to have "representatives *of their own*

choosing."[539] Section 7 protects the right of employees to "*engage* in" protected activities and "to *refrain* from any or all of such activities."[540] Sections 8(a) and 8(b) prohibit actions by employers and unions that "restrain" or "coerce" employees in the exercise of protected rights.[541] Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers and unions, consistent with similar guarantees against state-action infringement of free speech afforded by the First Amendment.[542] Section 9(a)

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[539] NLRA Sec. 1, 7, 29 U.S.C. 151, 157 (emphasis added).

[540] *Id*. Sec. 7, 29 U.S.C. 157 (emphasis added).

[541] 29 U.S.C. 158(a)(1), 158(b)(1)(A).

[542] Section 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Although Section 8(c) does not directly address representation elections, it has long been recognized by the Board and the courts as protecting speech generally, consistent with the First Amendment. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board."); see also *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.") (internal quotation omitted); *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present."); *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) ("[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)."). Section 7 of the Act has been interpreted as broadly protecting the right of employees to engage in speech regarding election issues. *Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974) ("The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations.'").

The First Amendment is clearly implicated in Board regulations that impermissibly curtail free speech guarantees since federal regulation constitutes quintessential state action for purposes of the United States Constitution. See *Chamber of*

provides for unions to represent employees in an appropriate unit to the extent they are "*designated* or *selected* * * * by the majority of the employees in [the] unit."[543] And Section 9(b) – specifically pertaining to elections – refers to the Board's obligation "in each case" to "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[544]

Significantly, *nowhere does the Act contain an express statement that elections should be held at the earliest date practicable*. Rather, when it comes to preserving the "fullest freedom" of employees to exercise their protected rights in an NLRB-conducted election, the Act makes other considerations more important than speed:

(a) *Neutrality*. Congress has mandated that the Board remain neutral while preserving employee choice, which is consistent with the Act's protection of employee rights to "engage in" concerted activities and to "refrain from any or all of such activities."[545]

Commerce v. Brown, *supra* at 68 (noting that the Court recognized "the First Amendment right of employers to engage in noncoercive speech about unionization" even before Section 8(c) was enacted).

[543] *Id*. Sec. 159(a) (emphasis added).

[544] *Id*. Sec. 159(b) (emphasis added).

[545] NLRA Sec. 7, 29 U.S.C. 157. The Board must be as neutral in its procedures as in its case adjudications. Concern that the Board's procedures detracted from the agency's neutrality was among the reasons Congress adopted the Taft-Hartley amendments in 1947. See S. Rep. 80-105, 80th Cong., at 3, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (hereinafter "LMRA Hist."), at 407 (Senate report stating that "as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee seeks to overcome, by insisting on certain procedural reforms"). The "procedural reforms" insisted upon by Congress in 1947, and reaffirmed in 1959, included a repudiation of precisely the type of arrangement incorporated into the Final Rule.

(b) *Knowledge of Representation, Bargaining and NLRA Rights*. In 2011, the Board stated that the great majority of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[546] It found that "*nonunion* employees are *especially* unlikely to be aware of their NLRA rights"[547] and acknowledged that "to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is *even more of a factor today*."[548] The Board has also found that many *employers* – and even some *union* officials – lack familiarity with important

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[546] The Board based this finding on "several factors," including "the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights." 76 FR 54006, 54014-15 (2011). As a result, the Board has attempted to expand its outreach efforts, including distribution of a mobile app regarding the NLRB and the Act, which we fully support. See "National Labor Relations Board Launches Mobile App," Aug. 30, 2013 (http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app). 76 FR at 54014-15. In fact, we favor having Agency resources directed to a higher profile public relations campaign regarding the NLRB mobile app and other outreach efforts.

In 2011, the Board attempted to increase familiarity with the Act's requirements by adopting a rule requiring employers to post notices advising employees about the Act (*id.*), but this rule has been permanently suspended after appellate courts ruled that it exceeded the Board's authority. *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

[547] 76 FR at 54016 (emphasis added).

[548] *Id*. (emphasis added).

NLRA principles and many complex principles that govern union representation and collective bargaining.[549]

(c) *Free Speech*. Finally, employers and unions have protected rights to engage in protected speech prior to an election. As noted, the Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.'"[550]

3. The Legal Standards for Administrative Agency Action. Our colleagues state that their views will be given deference to a degree that must result in the Final Rule's approval.[551] We respectfully disagree. "Reviewing courts are not obliged to stand aside

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[549] *Id*. at 54017 (emphasis added). In the words of a union official cited by the Board with approval in 2011: "Having been active in labor relations for 30 years I can assure you that *both employees and employers are confused about their respective rights under the NLRA*. Even *union officers* often do not understand their rights. *Members and non-members rarely understand their rights*. Often labor management disputes arise because one or *both sides are misinformed about their rights*." *Id*. at 54017 n.88 (emphasis added).

[550] *Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008) (quoting *Letter Carriers v. Austin,* 418 U.S. 264, 272–73 (1974)). See also *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right * * * to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940) ("[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

[551] The court's ruling clearly indicated that it was deferring any consideration of the rule's other potential infirmities. *Chamber of Commerce of the United States v. NLRB*, supra, 879 F. Supp. 2d at 18, 21, 25, 30 ("Regardless of *whether* the final rule otherwise complies with the Constitution and the governing statute—let alone whether the amendments it contains are desirable from a policy perspective—the Board lacked the

and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[552]

The standard for review of agency rulemaking is principally governed by the Supreme Court's *Chevron* decision[553] and by the Administrative Procedures Act (APA).[554] In *Chevron*, the Court articulated a two-step analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[555]

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authority to issue it, and, therefore, it cannot stand. * * * Because the final rule was promulgated without the requisite quorum, the Court must set it aside on that ground *and does not reach Plaintiffs' remaining arguments*. * * * The Court *does not reach—and expresses no opinion on—Plaintiffs' other procedural and substantive challenges to the rule*.") (emphasis added).

[552] *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

[553] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[554] 5 U.S.C. 551 *et seq.*

[555] *Chevron* at 842-43 (footnotes omitted). In determining whether an agency rule is invalid under step one of the *Chevron* test, the Court indicated that reviewing courts should use "traditional tools of statutory construction." *Id.* at 843 n.9. "For most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history." Section of Administrative Law and Regulatory Practice, American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 ADMN. L. REV. 1, 44 (2002).

Step two of the *Chevron* test of an agency's statutory construction somewhat overlaps with the APA, which generally governs the quasi-legislative rulemaking function of administrative agencies and related judicial review. The APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[556] Under this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency * * * ." *Id.* Courts enforce this "hard look" principle with regularity when they set aside agency regulations that, though well within the agencies' scope of rulemaking authority, are not supported by the reasons that the agencies adduce.[557]

In our view, the Final Rule's primary purpose and consequence – shortening the time from the filing of a petition to the conduct of an election – is contrary to clear

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[556] 5 U.S.C. 706 (2)(A).

[557] The Supreme Court has applied the *State Farm* articulation of the APA's "arbitrary and capricious" standard to judicial review of both Board adjudicatory and rulemaking proceedings. See *Allentown Mack Sales* and *Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (adjudicatory), and *American Hosp. Assn. v. NLRB,* 499 U.S.606, 618-20 (rulemaking).

Congressional intent, which renders it invalid under *Chevron* step one. Moreover, even if one were to find that Congress has not directly addressed issues in a manner contrary to the Final Rule's electoral revisions, we believe the Final Rule is "arbitrary or capricious," which means it does not warrant deference under the APA.[558] Our colleagues have demonstrated a remarkable indifference to the lack of relevant data in support of the Final Rule's extensive revisions. They have failed to address important aspects of the real problems of unacceptable delay in the Board's election process. And, in our view, they have not articulated a rational connection between the facts found and the choices they have made.

4. General Problems and Deficiencies in the Final Rule.

(a) *The Final Rule does not articulate a rational reason for substantially rewriting all representation election procedures.* We still do not understand the reason for embarking on the path our colleagues have taken. As described in our Proposed Rule dissent, the Board has a very successful track record of conducting timely elections. See 79 FR at 7320. Casehandling statistics since 2011 indicate no significant variation from

[558] As the D.C. Circuit has observed, inquiry at the second step of *Chevron*, i.e., whether an agency has made a permissible statutory interpretation, overlaps with the APA's "arbitrary and capricious standard." See *Shays v. FEC,* 414 F.3d 76, 96-97 (D.C. Cir. 2005), and cases cited there. However, the same court has explained that meaningful differences exist between the two standards. *Chevron II* looks to whether the agency has made a reasonable interpretation of an ambiguous provision of its governing statute. The APA "arbitrary and capricious" standard looks to whether the agency's exercise of rulemaking authority delegated to it in that statute by Congress is invalid because it is "arbitrary and capricious." See e.g., *Continental Airlines, Inc. v Department of Transportation*, 843 F.2d 1444, 1452 (D.C. Cir. 1988). Thus, most of the Final Rule's provisions will be reviewed and found wanting under the APA standard.

those described in the 2011 proposed election rule. See 76 FR at 36813-14. In 1960, the median time from petition to a direction of election was 82 days, with more time obviously elapsing before the elections occurred (*id.* at 36814 n.16). By 1975, only 20.1 percent of all elections occurred more than 60 days after the filing of a petition, and this percentage decreased to 16.5 percent by 1985 (*id.* at 36814 n.19). Since at least 2001, the Board has applied a well-known target to have elections conducted within a median of 42 days after the petition-filing.[559] Over the past decade, elections have actually occurred within a median of approximately 38 days after the filing of a petition, and in fiscal 2010, the average time from petition to an election was 31 days.[560] Another significant Board target is to hold 90% of all elections within 56 days of the filing of the petition. The Board has consistently done better than that standard.[561] In fact, in 2013, 94.3% of elections were held within that 56-day period.[562] Thus, it is fair to conclude that in 2013, by the Board's own measures, less than 6% of elections were unduly "delayed." Some

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[559] NLRB's 2004 Performance and Accountability Report: Protecting Workplace Democracy, 15-17 and 67 (undated), *www.nlrb.gov/reports-guidance/reports/performance-and-accountability*. In the early 1990s, the Agency's articulated goal was to hold elections within a median of 50 days after the filing of the petition. See General Counsel's Memorandum, GC 93-16, "Major Accomplishments of the Office of the General Counsel for Fiscal Years (1990-1993)," 3 (Nov. 24, 1993), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

[560] General Counsel's Memorandum, GC-11-09, "Report on Midwinter ABA PP Committee," 19 (March 16, 2011), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

[561] NLRB Summaries of Operations, fiscal years 2007-2012, and Performance Accountability Reports, 2004-2013, *www.nlrb.gov/reports-guidance/reports*. See GC-11-09, *supra* note 25, at 18-19.

[562] NLRB Performance Accountability Report, fiscal year 2013, www.nlrb.gov/reports-guidance/reports.

elections take too long to resolve, but in recent years these cases have been few in number.

The Final Rule's focus on limiting the use of pre-election hearings by substantially narrowing their scope, limiting the evidence accepted, and eliminating the rights of parties to submit written legal arguments is predicated on the false assumption that providing parties with an opportunity to be heard and to develop a full factual record at the pre-election hearing is an impediment to efficient, prompt election case processing. This presumption is directly contrary to the foregoing facts showing that all but a very small percentage of Board cases are not unduly delayed.

The facts further show that the pre-election hearing itself accounts for very little of the overall time it takes to process representation cases. When hearings are required, regions hold pre-election hearings promptly, the hearing rarely lasts more than 1 day, and regional directors thereafter issue decisions with impressive celerity, perhaps facilitated by, but certainly not shown to be impeded by, the filing of post-hearing briefs. In FY 2013, regional directors issued 159 pre-election decisions in contested cases in a median of 32 days following the filing of the petition,[563] well below their target of 45 days. Similarly, in FY 2012, regional directors issued 169 pre-election decisions in contested representation cases after hearing in a median of 34 days, and in FY 2011 regional directors issued 203 pre-election decisions in a median time of 33 days.[564]

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[563] Reported by NLRB Division of Operations Management, August 8, 2014.

[564] FY 2012 Summary of Operations, General Counsel's Memo 13-01 (January 11, 2013), at http://www.nlrb.gov/reports-guidance/general-counsel-memos.

These figures show that regional directors consistently issue decisions in contested cases with great efficiency. Contrary to the extended explanation offered by our colleagues – in the interest of justifying severe limits on the timing and scope of pre-election hearings, increased evidentiary and procedural burdens on employers, and extremely limited, discretionary Board review of regional directors' decisions – the facts show that pre-election hearings and regional directors' decisions are simply *not* a cause of significant administrative delay or other identifiable deficiencies.

We do not suggest the Board's work here is necessarily done. However, the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures.

The majority also continues to dismiss the utility of agency time targets and performance standards as measures of case processing efficiency, claiming that those standards evolve and only present a measure of what can be accomplished under the existing procedural regime. Yet, they do not even offer an alternative standard, under the Final Rule, regarding what *should* be accomplished *within what period of time*. Our colleagues find it sufficient to brand certain current practices as primary sources of delay. They are because the majority says they are, and the elimination or amendment of these practices will eradicate delay. The objective facts refute this ipse dixit justification.

Further, there are several important rational inconsistencies in the Final Rule's justification for expediting the conduct of elections: (i) a need ostensibly exists for elections to occur more quickly, yet other Board doctrines delay or defer elections for up

to several years;[565] (ii) the Final Rule makes elections occur more quickly – by eliminating time for reasonable preparation, by adopting new, accelerated pleading requirements applicable only to employers, by dispensing with post-hearing briefs, and by deferring until following the election evidence regarding issues as fundamental as who can vote, for example – but our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections; (iii) most importantly, the Act's purposes and objectives are vitally affected by the amount of time between petition-filing and any election (indeed, this is the near-exclusive justification offered for rewriting nearly all election procedures), but our colleagues affirmatively *disclaim* any need to indicate how much time should or will elapse under the Final Rule between petition-filing and election; and (iv) our colleagues adamantly refuse to acknowledge what has been universally understood by Congress when evaluating the NLRA and virtually every other context when parties make important decisions: some reasonable minimum time is necessary for protected speech and so parties can be familiar with relevant issues. In all of these respects, among others, we believe the reasoning underlying the Final Rule is insufficient to establish a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, *supra*, 371 U.S. at 168.

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[565] For example, as we discuss later in this opinion, the current blocking charge policy, which the Final Rule incorporates without meaningful change, is an identified cause of substantial delay in representation cases. In addition, recent Board decisions also routinely impose delays of 6 months to a year in successorship situations, and as much as 4 years in initial card-based voluntary recognition situations, before a change in employee sentiment regarding union representation may be tested in an election. See *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011) (successorship), and *Lamons Gasket Co.*, 355 NLRB 763 (2010) (voluntary recognition).

(b) *The Final Rule improperly places speed over all other considerations.* We agree that it is desirable to eliminate systemic inefficiency and protracted delays in the election process. However, as discussed below, the Act's detailed provisions *require* Board proceedings and the consideration of evidence regarding important issues. Indeed, in addition to at least twice rejecting the "election now, hearing later" and "vote now, understand later" approaches reflected in the Final Rule, Congress enacted other amendments requiring the Board to abandon procedures – ostensibly justified by administrative efficiency – because Congress placed primary importance on having issues resolved without administrative shortcuts, so that Board members would do the "deciding" to ensure that *all* decisions would reflect "the considered opinions of the Board members."[566]

Our colleagues declare that "speed is not the sole or principal purpose" of the Final Rule, but that their amendments address "efficiency, fair and accurate voting,

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[566] H.R. Rep. No. 80-245, at 25 (1947), reprinted in 1 LMRA Hist. 316; S. Rep. 80-105, 80th Cong., at 8-9, 1 LMRA Hist. 415. After the Wagner Act's adoption, the Board created a "Review Section" of attorneys to review transcripts and draft decisions, which a Senate report characterized as disposing of cases "in an institutional fashion." *Id*. Congress amended the Act to prohibit the Board even from employing attorneys for the purpose of reviewing transcripts, apart from each Board member's own legal assistants. *Id*. Thus, NLRA Section 4, 29 U.S.C. 154, added to the Act in 1947, states: "The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." Congress also amended Section 9(c)(1) by adding language prohibiting hearing officers from even formulating "recommendations." See note 622 *infra*, and accompanying text. In 1959, Congress permitted the Board to delegate responsibility to regional directors regarding representation-election issues, but the Act explicitly conditioned this delegation on each party's right to have the Board review "any action" by regional directors. *Id*. This delegation did not expand or modify the authority of hearing officers.

transparency, uniformity, and adapting to new technology." We do not dispute that these other factors can be legitimate considerations in rulemaking. However, speed is the obvious dominant justification for most of the Final Rule's changes, and the Final Rule accelerates virtually every deadline applicable even when doing so is not required by these other factors.[567] The majority states that "eliminating unnecessary delay is therefore unquestionably a valid reason to amend these regulations." One can hardly argue against eliminating unnecessary "delay" in the abstract. As noted below, we advocate aggressive measures by the Board to identify and eliminate those cases (involving less than ten percent of elections) where more than 60 days passes between petition-filing and the election. Yet, here again, there must be a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, *supra*, 371 U.S. at 168. The majority invokes the language of "eliminating delay" as if cases involving undue delays are caused by widespread "dilatory tactics" (which is contrary to the available evidence).[568]

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[567] For example, the Final Rule argues that "uniformity" favors having all pre-election hearings take place 8 days after petition-filing, but this aspect of the Final Rule contrasts with some Regions that currently allow up to 14 days before conducting the pre-election hearing. The Final Rule invokes "technology" to expand the disclosure requirements applicable to the voter eligibility (*Excelsior*) list – thereby requiring employers to disclose available personal employee email addresses and phone numbers, for example – while requiring the submission of the *Excelsior* list *2* business days after the regional director directs an election, which contrasts with the current *7* days.

[568] We disagree with our colleagues' interpretation of a statement by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473, 478 (1964), and a comment by Senator Taft during debates on the 1947 Taft-Hartley amendments adopted as part of the Labor Management Relations Act (LMRA). According to our colleagues, the Supreme Court noted that "*the policy in favor of speedy representation procedures* 'was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration.'" (Final Rule, *supra* (emphasis added), quoting *Boire*, 376 U.S. at 478). The Supreme Court in *Boire* addressed the limited question of whether a federal court injunction could be obtained, in order to block a Board-scheduled election, based on a challenge to an

Moreover, in our view, too many of the Final Rule's changes contradict "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co*., 329 U.S. 324, 330 (1946). The Act imposes statutory *requirements* on the Board, including an "appropriate" pre-election hearing (Section 9(c) of the Act), and the Board is charged with assuring employees the "fullest freedom" in their exercise of protected rights in Board-conducted elections (Section 9(b) of the Act). This plain statutory language, and its legislative history, preclude any suggestion that Congress intended for the Board to emphasize "speedy representation procedures" over election-related requirements that the statute expressly imposes on the Board.

Understandably, Board and court cases speak favorably about having "employees' votes * * * recorded accurately, efficiently and speedily." *Id.*; see also *AFL v. NLRB*, 308 U.S. 401, 409 (1940) (the Wagner Act was designed in part to avoid "long delays in the

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election-related ruling by the NLRB (in *Boire*, the party seeking the court injunction claimed that the Board erroneously found that it was a joint employer). *Id.* at 476-77. Solely addressing whether Board-ordered elections could be enjoined by a pre-election federal court proceeding, the Supreme Court stated "Congressional determination *to restrict judicial review in such situations* was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration, when a conference committee rejected a House amendment which would have permitted any interested person to obtain review immediately after a certification because, as Senator Taft noted, '*such provision* would permit dilatory tactics in representation proceedings.'" *Id.* at 478-79 (emphasis added; footnotes omitted). Nothing in *Boire* states that Congress in 1947 reaffirmed a generalized "policy in favor of speedy representation procedures." Further, it is even more apparent that Senator Taft did not support a generalized "policy in favor of speedy representation procedures." To the contrary, as noted elsewhere in the text, the amendments sponsored by Senator Taft – which were adopted as part of the LMRA – reaffirmed and expanded the "appropriate hearing" requirement, contrary to the Board's pre-1947 practice and contrary to the changes adopted in the Final Rule. See text accompanying notes 572-581, *infra*.

procedure * * * for review of orders for elections"); *Northeastern Univ.*, 261 NLRB 1001, 1002 (1982) (referring to "expeditiously resolving questions concerning representation"); *Tropicana Prods., Inc.*, 122 NLRB 121, 123 (1958) ("[T]ime is of the essence if Board processes are to be effective."). Yet, nothing in these cases suggests speed or efficiency should be pursued at the expense of the Act's *express* principal purpose, which is to safeguard the "fullest freedom" of employees to vote in elections that determine whether or not they will be union-represented. NLRA Sec. 9(b), 29 U.S.C. 159(b). Indeed, the Court's statement in *A.J. Tower* that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" is entirely consistent with this statutory directive. 329 U.S. at 330.

Further, regarding the timing of elections, the Supreme Court precedent cited in the Final Rule deals with entirely different causes of delay than the processes that are amended or eliminated here. *A.J. Tower* was limited to endorsing the Board policy of not permitting post-election challenges to ballots, which would obviously and inevitably delay finality and accuracy in the ballot count. As indicated previously (see note 568, *supra*), the Supreme Court decision in *Boire v. Greyhound* involved an employer's attempt to enjoin election proceedings and gain immediate judicial review of a Board determination that it was an employer under the Act. The Court's rejection of pre-election court review had nothing whatsoever to do with delays attributable to the Board's handling of pre-election issues. To the contrary, as further discussed below, there is extensive legislative history demonstrating that Congress *opposed* "quickie elections,"

which was a central focus when Congress adopted the Taft-Hartley and Landrum-Griffin amendments in 1947 and 1959, respectively.

The Final Rule's emphasis on speed stands in marked contrast to all of the other contexts in which Congress, courts, and federal agencies have emphasized the need to guarantee *more* time, not less, when individuals are expected to exercise free choice about representation and other significant matters in a group setting. A substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line.[569] All of these have one thing in common: They require more time, not less. Against the backdrop of these examples, we have difficulty believing that federal labor law works in reverse. The thrust of the Final Rule—unintended or not—is that employees make better choices when they vote first, and understand later. Congress and other state and federal regulators have rejected such reasoning. Given that the Board's primary

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[569] Examples include 60 days required when employees are affected by mass layoffs or plant closings that trigger notice requirements under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.* (WARN); the 45 days required when a group of employees are offered benefits in exchange for signing a waiver of age discrimination claims, based on the Older Workers Benefit Protection Act (''OWBPA''), 104 Stat. 978 (1990), which added Section 7(f) to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(f); the recommended period of 60-90 days, with a minimum of 30 days, when plaintiffs decide whether to opt-out of a Rule 23 class action, see Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide,* 4 (2010), *http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf*; and the 4-6 week period between the nomination of candidates to be local union officials and subsequent elections. See Office of Labor-Management Standards, *Conducting Local Union Officer Elections: A Guide for Election Officials,* 4 (2010), *http://www.dol.gov/olms/regs/compliance/localelec/ localelec.pdf.* See generally our dissenting views in the 2014 NPRM, 79 FR 7344-7345 (Feb. 6, 2014) (dissenting views of Members Miscimarra and Johnson).

responsibility is to safeguard employee free choice, especially in elections, the Final Rule in this fundamental respect is deficient.

Finally, it is important to note that the Final Rule reflects a preoccupation with speed between petition-filing and the election, while improperly disregarding the increased delays it may cause in the Board's *overall* representation process: the period between petition-filing and the exhaustion of post-election proceedings and appeals. Postponing many employee eligibility and unit placement issues until the post-election period is likely to require *more* time from petition-filing to the final certification of election results, particularly since the Final Rule provides that parties will not even have a right to obtain any Board member decision regarding pre- and post-election determinations. This means the only guaranteed review of regional director decisions will occur if employers refuse to comply with post-election Board certification, which then provides the opportunity for court review. In this regard, limitations imposed on the creation of a full evidentiary record are likely to cause even more substantial delays because the majority directs the exclusion of evidence that is likely to be indispensable to any meaningful review by regional directors, the Board and the courts of appeals. The Final Rule's changes, which create a greatly accelerated pre-election timetable, impose inflexible new "pleading" requirements applicable primarily to the employer, largely eliminate post-hearing briefing, and truncate the record, are likely to produce an entirely new class of procedural and due process challenges – with many more remands from courts of appeals to the Board or from the Board to regional directors (in those relatively rare cases where the Board chooses to exercise its discretion to review a particular case). Only in the second stage of Board litigation will parties have the opportunity to present

and respond to evidence, arguments and briefing that could not fully and fairly be litigated earlier. This will result in greater delays between petition-filing and any bargaining between employers and unions, which is the most important end result of representation elections in which the union prevails.

(c) *The Final Rule's limits on pre-election litigation – creating an "election now, hearing later" and "vote now, understand later" election process – contravene clear Congressional intent.* The Final Rule defines the Board's statutory obligation to conduct an "appropriate" pre-election hearing as limited to the presentation of evidence necessary to determine whether a question concerning representation exists. This eliminates the parties' right to present evidence concerning properly contested individual eligibility and inclusion issues.[570] As previously stated, this restrictive definition, and the conferral of

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[570] It is true that the Final Rule does not completely eliminate the pre-election hearing, nor does the Final Rule totally preclude the possibility that a particular hearing officer might permit the introduction of evidence regarding voter eligibility or supervisory status, for example. However, the Final Rule expressly states that it dramatically narrows the scope and duration of pre-election hearings, and it relegates all but the most basic issues to post-election proceedings. Therefore the Final Rule clearly will not result in pre-election hearings where voter eligibility and inclusion issues are regularly addressed. The Final Rule explicitly states otherwise. Further, the inclusion or exclusion of such evidence would be determined by hearing officers, who, under Sec. 9(c)(1), are not even permitted to make ''recommendations'' about relevant issues.

We also recognize that, under existing Board procedures, elections may take place while some questions remain unresolved, and some employees may cast votes that, if challenged, are ruled upon in post-election proceedings. In all such cases, however, the Act gives parties the right to *present evidence* regarding these issues at a pre-election hearing. And based upon such evidence, the Act requires that the regional director and the Board consider requests to stay the election until such issues are resolved. See text accompanying note 627, *infra*. In addition to dramatically shortening the time period between petition-filing and the election, the Final Rule would impermissibly curtail the right to present any evidence at the pre-election hearing regarding many fundamental issues, which in turn would prevent the regional director and the Board even from considering whether the resolution of such issues is important enough to warrant staying

authority on regional directors and hearing officers to limit the presentation of evidence on these issues, is a keystone device in the Final Rule's acceleration of the pre-election timeline.[571]

This leads inevitably to a conclusion – relevant when conducting an inquiry under *Chevron* step one – that the Final Rule's exclusion of eligibility and unit-inclusion issues from the "appropriate hearing" requirement of Section 9(c)(1) of the Act directly and substantially contravenes Congress's clearly expressed intent in enacting and reenacting that requirement.[572]

Section 9(c)(1) states that, whenever a representation petition is filed, the Board "shall investigate" and, if there is "reasonable cause" to believe there is a "question of representation," the Board "shall provide for an appropriate hearing upon due notice." Section 9(c)(1) further states that the hearing "may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto," and if the Board finds "based on the record of such hearing" that a question of representation exists, the Board "shall direct an election by secret ballot and shall certify the results thereof."

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the election. *Id.*

[571] Other amendments in the Final Rule that impermissibly implement this definition by limiting the presentation of evidence in a pre-election hearing–-including the new preclusion standard, permitting offers of proof to substitute for testimonial evidence, and the discretionary 20 percent standard for the exclusion of evidence relating to eligibility and inclusion issues–-are discussed in a subsequent section of this opinion.

[572] See also former Member Hayes' discussion of this point in his dissent to the vacated December 2011 rule at 77 FR 25560.

Contrary to our colleagues' discussion of this issue, Congress has directly addressed the scope of the requisite "appropriate hearing," and has at least twice rejected the "election now, hearing later" and "vote now, understand later" approaches reflected in the Final Rule. In particular, Congress has clearly repudiated the notion that the Board may conduct so-called "quickie elections" *before* important issues such as eligibility and inclusion are the subject of an "appropriate hearing."

Based on the original Wagner Act (which did not require elections but provided for an "appropriate hearing" *if* an election was conducted), the Supreme Court decided in 1945 that the "appropriate hearing" requirement could be satisfied by a *post*-election hearing. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). For about 19 months thereafter, the Board conducted a number of prehearing elections and relegated important election-related issues to a post-election hearing. In 1947, Congress explicitly prohibited this practice by adding the aforementioned language in Sections 9(c)(1) and (4) of the Act requiring the Board to conduct an "appropriate hearing" *before* any election, and permitting "the waiving of hearings" *only* "by stipulation" of all parties.[573] Thus, when the Taft-Hartley amendments explicitly prohibited elections without an

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[573] 29 U.S.C. 159(c)(1), (4); 61 Stat. 136 (1947), 29 U.S.C. 141 *et seq.*, reprinted in 1 LMRA Hist. 1 *et seq.* (1974); *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 429-30 (3d Cir. 1950); H.R. Rep. 86-741, at 24 (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act * * * a form of prehearing election was used by the NLRB."); S. Rep. 86-187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

"appropriate hearing" *before* the election, this not only repudiated a practice that had been adopted by the Board, it repudiated the Supreme Court's *Inland Empire* decision.[574]

In 1959, the resurrected concept of having expedited elections *followed* by the consideration of important issues in post-election hearings was part of President Eisenhower's original "20-point program" that prompted Congress to adopt the Landrum-Griffin Act. See S. Rep. 86-10, at 3 (1959), reprinted in 1 LMRDA Hist. 82 ("In order to speed up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made."). Not only was this "election first, hearing later" concept considered throughout the 1959 legislative debates, it was *adopted* in the Senate version of the Landrum-Griffin amendments.[575] Significantly, though authorizing the Board to conduct elections on an expedited basis while deferring important issues to a post-election hearing, the Senate-passed bill explicitly prohibited elections from occurring fewer than 30 days after the filing of a petition. Then-Senator John F. Kennedy – who chaired the Conference Committee and was a proponent of the pre-hearing election concept – repeatedly stated that at least 30 days were required between the

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[574] In light of this and other clear expressions of Congress's intent on the precise question of the scope of the statutory term "appropriate hearing" *after* the Court's *Inland Empire* decision, we accord less weight to the Court's interpretation of that term in *Inland Empire* than do our colleagues.

[575] See S. 1555, 86th Cong. Section 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581.

petition's filing and the election to "safeguard *against rushing employees into an election where they are unfamiliar with the issues*."[576]

Ultimately, Congress still refused to adopt the Senate-passed arrangement because *elections would take place too quickly*. Congress instead reaffirmed the requirement that the Board conduct an "appropriate hearing" before any contested election, and it precluded the Board from deferring litigation of voter eligibility and other issues to post-election hearings. Representative Graham Barden, when describing the Senate-passed bill's abandonment, explained that pre-election "hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification."[577]

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[576] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (emphasis added). To the same effect, Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints." 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86-741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections"). To repeat, Senator Kennedy was a principal proponent of pre-hearing elections. Contrary to our colleagues, we find that his remarks as to what would be required if pre-hearing elections were permitted are germane to the analysis of whether the changes they make to shorten the time from petition to election in all representation cases are rational or arbitrary.

[577] 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714. Cf. H.R. Rep. 86-741, at 76 (1959), reprinted in 1 LMRDA Hist. 834 (indicating that Representative Barden was Chairman of the House Committee on Education and Labor); H.R. Rep. 86-1147, at 42 (1959), reprinted in 1 LMRDA Hist. 946 (indicating that Representative Barden was the ranking House Conference Committee Manager). See also 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (opposing "pre-hearing or so-called quickie election" and affirming that the "right to a hearing is a sacred right"); H.R.

As is obvious from the legislative record, the core concepts underlying the current Rule ("election now, hearing later" and "vote now, understand later") were not simply matters of peripheral concern when Congress – in 1947 and again in 1959 – rejected the notion of having expedited elections without a hearing regarding fundamental election issues like voter eligibility and supervisory status. Thus, from 1947 until today, the Board's long-established practice has been to conduct a full evidentiary hearing on contested issues prior to conducting an election and to permit the introduction of evidence on unit eligibility and inclusion issues in those hearings *as a matter of statutory right.* This is consistent with Congressional intent in the Taft-Hartley amendments in 1947. It is also consistent with the ultimate knowing determination by Congress not to alter that practice when enacting the Landrum-Griffin amendments in 1959. As to the latter legislative event, the Supreme Court has stated that in reviewing the Board's interpretation of the Act, "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation in 1959 is strongly supportive of our view that the longstanding interpretation is the one intended by Congress."[578] By this standard, it could not be clearer that the Final Rule's interpretation of "appropriate hearing" contravenes Congressional intent.[579]

Rep. 86-741, at 24-25 (1959), reprinted in 1 LMRDA Hist. 782-83 (mandatory period between petition-filing and election "guards against 'quickie' elections"); 105 Cong. Rec. A8522 (1959), reprinted in 2 LMRDA Hist. 1856 (referencing opposition to pre-hearing election proposal).

[578] *NLRB v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 274-75

Furthermore, not only is the Final Rule's interpretation of the scope of an "appropriate hearing" clearly contrary to Congress' expressed intent, it is especially objectionable from a policy standpoint to exclude from pre-election hearings evidence regarding *who is eligible to vote*.[580] To state the obvious, when people participate in an

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(1974).

[579] Congress's failure to pass electoral initiatives in the Labor Law Reform Act of 1977-78 represented yet another rejection of the "vote now, understand later" approach. See Cong. Res. Serv., Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501-02 (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; failure of four cloture motions in Senate from June 13-22, 1978; closest votes 58-41 on June 14 and 58-39 on June 15).

[580] Regarding the Final Rule's provisions for Board-conducted elections without even permitting a pre-election hearing about who is eligible to vote, the Rule is on the wrong side of history and common sense. See NLRA Sec. 9(c)(1), (4) (requiring an "appropriate hearing upon due notice" before an election, unless there is a "waiver * * * for the purpose of a consent election"). Addressing the Taft-Hartley Act's rejection of the "election first, hearing later" concept, Senator Taft – cosponsor of the legislation – stated, "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*." 93 Cong. Rec. 7002 (1947), reprinted in 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added). Addressing the Landrum-Griffin amendments adopted in 1959, Representative Graham Barden – Chairman of the House Committee on Education and Labor, and the ranking House conferee – stated that "[t]he right to a *formal hearing before an election can be directed* is preserved *without limitation or qualification.*" 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714 (emphasis added), describing H.R. Rep. 86-1147, at 1 (1959), reprinted in 1 LMRDA Hist. 934 (conference report). Chairman Barden stated: "The right to a hearing *is a sacred right*." 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (emphasis added). Consistent with these requirements, the Board itself has repeatedly held that Section 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and questions regarding supervisory status, among other things. See, e.g., *Barre-National, Inc*., 316 NLRB 877 (1995) (finding that hearing officer's refusal to permit evidence regarding supervisory status "did not meet the requirements of the Act" even though the hearing officer – like the Final Rule – would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status). Because, contrary to our colleagues' position, this requirement stems from the Act and not from our decisions, it cannot be evaded by overruling *Barre-National* and related cases. See also *Angelica*

election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them.[581] In this respect, the Final Rule's approach would be intolerable in every other voting context, whether it involved a national political election or high school class president. Thus, for

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Healthcare Services Group, 315 NLRB 1320 (1995); *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999); *Avon Prods., Inc.*, 262 NLRB 46, 48-49 (1982).

[581] An array of problems and incongruities stem from the broad exclusion of eligibility and inclusion issues from pre-election hearings. Because the Final Rule directs the exclusion of evidence regarding such issues, there will be more situations where many employees cast votes in NLRB-conducted elections where, based on the post-election resolution of eligibility issues, the employees learn their votes were not even counted and, even if the union prevailed, the ineligible employees are excluded from any bargaining. Without a pre-election hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters – with whom they may have discussed many issues – will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions – though not directed by the employer – could later become grounds for overturning the election. Also, employees ultimately included in the bargaining unit will not know – at the time they voted – whether they will have the support of other employees who, after the election, end up being excluded from the bargaining unit. Congress clearly intended that parties would have the right to present evidence regarding such issues in the "appropriate hearing" required before any non-stipulated election.

As indicated previously (see note 570, *supra*), the point here is not that such issues require *resolution* before every election; the Final Rule adopts the broad-based position that *evidence as to these issues* should be excluded and in many instances will be excluded from the pre-election hearing. This is all the more perplexing given that Congress repeatedly reaffirmed the need for a pre-election hearing to permit evidence regarding such important issues and, in every case, potential pre-election Board review of "any action" by regional directors. NLRA Sec. 3(b), 29 U.S.C. 153(b). This deficiency in the Final Rule is not cured by the possibility that hearing officers may, as a discretionary matter, permit evidence regarding some voter eligibility issues in isolated cases. The Final Rule redefines the limited purpose of the pre-election hearing to a determination of whether a "question of representation" exists, thereby providing for the deferral of voter eligibility issues until after the election. One cannot reasonably presume that hearing officers and regional directors will exercise "discretion" to act at variance with what the Final Rule requires.

good reason, the "appropriate hearing" requirement has consistently been deemed to require that pre-election hearings encompass evidence regarding voter eligibility and inclusion issues. The Board's recent decisions have highlighted the importance of determining what employees may be excluded from petitioned-for bargaining units, which prompted a Board majority in *Specialty Healthcare* to change the legal standard governing such determinations.[582]

(d) *The Final Rule curtails protected speech during representation election campaigns.* Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. The Supreme Court has long recognized an employer's right to engage in free speech in the labor relations context. See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477-79 (1941) (nothing in the Act prohibits employers from expressing their views about unions). The Court has also characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.'"[583] Employers and unions have protected rights to engage in protected speech prior to an election. This right only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation. Employees should

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[582] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 83 (2011), *affd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[583] *Chamber of Commerce v. Brown*, 554 U.S. at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)).

have enough time to listen to both sides of the debate about unionization, to inform their colleagues of their views on the subject, and to consider their options before voting on an issue that could impact their working lives for years to come.

The Final Rule is intended to, and inevitably will, substantially shorten the time in all initial organizing representation elections from the filing of a petition, when support for unionization is often at its peak, to the day of the election.[584] The Final Rule will therefore necessarily curtail the ability of parties to exercise their rights to engage in protected speech during the critical pre-election campaign period. Particularly because the consequences of an election can be long-lasting – regardless of whether employees vote for or against union representation – the Final Rule limits the right of *all* parties to engage in protected speech at precisely the time when their free speech rights are most important. Thus, in most cases, parties and employees will have *less time* to share their respective views and engage in robust, lawful debate regarding the positive and negative aspects of union representation. This consequence alone is a matter of constitutional concern. That concern is magnified by the mandate that regional directors schedule an election "at the earliest date practicable," which creates an unacceptably heightened risk parties and employees will have *too little time* at least in some cases, as measured by any reasonable standard, to engage in protected debate.

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[584] The majority argues that the Final Rule does not necessarily shorten the time between the petition and the election because it does not set any rigid timelines for the conduct of the election. If that were the case, then there is no point at all to the pre-election elements of the rule that abbreviate the timetable for conducting an election. Further, we have little doubt how regional directors—members of the career Senior Executive Service whose eligibility for annual performance awards depends in substantial part on how their regional office meets time targets—will construe the overriding imperative in the Final Rule that elections be scheduled "at the earliest date practicable."

The majority makes much of the statement, in our dissent to the Proposed Rule, that we did not know the precise point in time when shortening the election timetable would impermissibly deny employers, unions, and employees the right to engage in speech protected by the Act and the First Amendment. The Final Rule dispels any question about this: it *does* effectively and impermissibly curtail the protected speech rights guaranteed to employers, unions and employees under the Act and the First Amendment. The Final Rule substantially abbreviates the time from petition to election in *all* representation cases; as previously stated,[585] the Board has determined that most unrepresented employees – and many employers and union officials – lack familiarity with important NLRA principles and the many complex principles that govern union representation and collective bargaining; the Final Rule explicitly adopts the requirement that elections take place as quickly as "practicable"; the Rule squarely rejects any reasonable minimum time between petition-filing and election; and our colleagues explicitly disclaim responsibility even to identify an appropriate target time frame that should – or will – result from the Rule.

In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as "practicable" after a petition is filed).[586] Second, the

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[585] See discussion in text and accompanying footnotes in Sec. A.2, *supra*.

[586] To the extent that the majority relates its First Amendment argument to its claim that "as soon as practicable" is the Board's historical standard, we counter that the Rule radically revises what the Board has historically viewed as practicable and, by doing so, greatly increases the risk of free speech infringement.

Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: to limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties – and the Board – regard pre-election campaigns as vitally important.

The substantial body of judicial precedent that governs campaigning in political elections is also relevant here.[587] Numerous courts have ruled that all but the most narrowly drawn durational limitations on political electioneering are impermissible government restrictions of free speech.[588] Further, the Supreme Court has declared: "It is simply not the function of government to select which issues are worth discussing or

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[587] The majority rejects the analogy between Board elections and political elections. Their view cannot be reconciled with judicial precedent that has long recognized this analogy as apt. See *Wirtz v. Hotel, Motel & Club Emp. Union, Local 6*, 391 U.S. 492, 504 (1968) (when creating representation elections, "Congress' model of democratic elections was political elections in this country"); *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985) ("Congress intended representation elections to follow the model of elections for political office."). See also *NLRB v. A.J. Tower Co.*, *supra* at 332 (rationale for opposing post-election challenges in political elections also applies to representation elections). Therefore, the courts' regulation of conduct in political elections may be particularly instructive in the Board's regulation of representation elections and provide support for the assertion that individual free choice in representation elections requires more time and information, not less.

[588] See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D.N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-455 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election).

debating in the course of a political campaign."[589] Neither should it be the Board's function to curtail opportunities for the identification and discussion of issues in a representation election.

Our colleagues assert that the Final Rule is permissible because it does not completely eliminate the opportunity for employees, employers and unions to communicate about unionization. They argue, for example, that some nonunion employers learn about union organizing *before* representation petitions are filed.[590] However, our colleagues' reliance on possible union-related discussions *before* petition-filing is misdirected because, first, the Final Rule's deleterious impact on speech obviously occurs *after* petition-filing (by dramatically shortening the window between petition-filing and the election), and second, the filing of the petition initiates what the

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[589] *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002) (citing *Brown v. Hartlage*, 456 U.S. 46, 60 (1982)).

[590] The Final Rule relies in large part on written comments and testimony submitted by Professor Kate Bronfenbrenner that purport to show that employers generally have knowledge of organizing campaigns before a petition is filed. However, the reliance on this research would be misplaced even if the research were objectively accurate. As the Final Rule emphasizes, "[m]ost elections involve a small number of employees," with a quarter of elections held in units with 10 or fewer employees, half of elections held in units smaller than 25, and three-quarters of all Board elections held in units of 60 or fewer employees. However, the Bronfenbrenner study is based on a specialized sample of cases involving only *large* bargaining units containing at least 50 employees. If for no other reason than that the study is based on a population of statistical outliers, this study cannot legitimately support the Final Rule's claim that "employers are very often aware of the organizing campaign before the petition is filed." See August 22, 2011 correspondence from Bronfenbrenner and Warren to the Board, enclosing *Empirical Case for Streamlining the NLRB Certification Process*. In addition, as has been noted elsewhere, there are far too many flaws in the current and past Bronfenbrenner studies to justify the Board's reliance on them for any purpose related to this rulemaking. See, e.g., *Chamber of Commerce, Responding to Union Rhetoric: The Reality of the American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity (*U.S. Chamber of Commerce White Paper 2009).

Board and the courts consider the "*critical period*" prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.[591] Indeed, our colleagues' argument reflects the hallmark characteristic associated with *every* infringement on free speech: the government simply determines the speech is not necessary. Rather than saving the Rule, this constitutes the most objectionable aspect of the Rule as it relates to protected speech.

It is not enough that employers and employees may communicate general observations regarding unions before the filing of an election petition, any more than it would be deemed permissible to limit political campaigning to generalized statements about a particular political party before actual candidates are selected. Again, the Board and the courts (for more than 50 years) have recognized that election petitions mark the commencement of a new "critical" phase in representation campaigns.[592] Only the filing of a petition means "the Board's processes have been invoked," resulting in an election that can be "anticipated pursuant to [the Board's] procedures."[593] Objectionable activity by employers or unions after petition-filing, *because* it occurs during this "critical

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[591] The Board held in *Ideal Electric & Mfg. Co.,* 134 NLRB 1275, 1277-78 (1961), that "the date of filing of the petition * * * should be the cutoff time in considering alleged objectionable conduct," because that marks the time "when the Board's processses have been invoked" and an election "may be anticipated pursuant to present procedures." This period between petition-filing and the election – during which objectionable conduct is deemed sufficient to invalidate the election – is called the "critical period." *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Electric, Inc.,* 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005).

[592] *Supra* note 591.

[593] See *Ideal Electric & Mfg. Co.*, 134 NLRB at 1278.

period," is deemed sufficient to invalidate the results of the election.[594] This belies the Final Rule's premise that eliminating post-petition opportunities for speech has no material adverse impact on elections and must be considered inconsequential.

Regarding the Final Rule's curtailment of opportunities for speech, the majority specifically disclaims being motivated by a desire to counter what they view as an employer's undue influence during representation campaigns. However, numerous union-side commenters rely on this justification in advocating the Rule's adoption. They contend that, under current representation procedures, employers have the upper hand in campaign communications. Further, as noted previously, our colleagues or commenters have observed that some employers may be well informed about union election procedures before a petition is filed; all employers have unlimited access to employees during the workday and can hold unlimited captive audience speeches in the workplace until 24 hours before the election; and they may still thereafter have the "last word" on election day in individual conversation with employees.

In our view, reliance on these factors is fundamentally flawed. First, it reflects a view that the Rule only adversely affects protected speech undertaken by employers. To the contrary, the Act and the First Amendment afford employees and unions, as well as employers, rights to engage in protected speech that the Rule impermissibly restricts or threatens.

Second, some of these factors (for example, the fact that employers have unique access to employees) are part and parcel of *every* employment relationship, and other

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[594] *Supra* note 591.

factors (for example, limits on union access to the employer's property) arise from well-established prior decisions by the Board, the courts of appeals, and the Supreme Court, which impose different types of limitations on unions and employers, respectively.[595] But none of these factors and prior decisions authorizes the Board to disregard or adopt rules that impose undue restrictions on protected speech.

Third, although our colleagues disclaim the *intent* to redress an unfair balance of power between unions and employers by limiting employer speech, the Rule's provisions predictably and inescapably will have that *effect*. It is therefore contrary to the Supreme Court's holding that the Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965).

Finally, even if not intended, the Final Rule essentially embraces an "anti-distortion" theory – justifying speech restrictions to prevent an "unfair advantage" in campaigning based on "resources" that are too favorable to one side. This theory has been squarely rejected by the Supreme Court in the political election context,[596] and the

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[595] See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (addressing limitations on union access rights to private property).

[596] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). See also 77 FR 25574 (Member Hayes, dissenting). In *Citizens United*, the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and rejected the *Austin* "anti-distortion theory," pursuant to which limitations on speech were ostensibly justified as preventing "an unfair advantage in the political marketplace" based on "resources amassed in the economic marketplace." *Citizens United,* 130 S. Ct. at 904 (citations omitted). In *Citizens United*, the Court held that *Austin* "interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* at 907 (citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). And the Court concluded that "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the*

Final Rule has the same impermissible "anti-distortion" effect applied to the "uninhibited, robust and wide-open debate in labor disputes" that is fundamental to federal labor policy.[597] By reducing the time for employer speech, the Rule enhances the relative voice of a union and its advocates. This restriction of speech far exceeds the "narrow zone" deemed permissible by the *Brown* Court.[598]

Our colleagues have made a policy choice to abbreviate the "critical period" deemed most important by the Board to the exercise of employee free choice.[599] The unavoidable consequence of this choice is the limiting of opportunities for speech and debate during that period. It is apparent from the statements of numerous commenters supporting the Rule that in this respect the Final Rule will specifically disadvantage anti-union speech more than pro-union speech, and will correspondingly enhance a petitioning union's chances of electoral success. This does not concern the majority. In the context of union speech, however, the Board has taken great care to avoid interpreting and applying the Act in a manner that raises serious constitutional concerns regarding free speech infringement. See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010) (canon of constitutional avoidance requires Board to construe the

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First Amendment.'" *Id.* at 904 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

[597] See *Chamber of Commerce v. Brown*, *supra* at 68. See 77 FR 25574 (Member Hayes, dissenting).

[598] "The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U.S.C. 159. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech * * * ." *Chamber of Commerce v. Brown*, *supra* at 74.

[599] *Supra* note 591.

Act's provisions in order to avoid serious constitutional questions arising from an otherwise acceptable construction of the statute, if an alternative interpretation is possible and not contrary to the intent of Congress). The Board has the same interpretive obligation here. In our view, the Final Rule fails the test. It poses an unacceptable risk of infringing free speech rights guaranteed by Section 8(c) of the Act and the First Amendment.

(e) *Summary: the Final Rule's General Problems*. These general overarching problems with the Final Rule are reason enough to find that overall it contradicts the clear intent of Congress as to the Act's purpose, is "arbitrary and capricious" in failing to rationally relate to the Board's experience in administration of the Act and to facts adduced in rulemaking, and infringes or poses an impermissible risk of infringing free speech rights.[600] Inasmuch as these problems infect the Final Rule as a whole and all its parts, we do not approve of any aspect of the Rule, even if we fail to discuss some specific changes in these dissenting views. As we state at the outset, a fundamental problem with this rulemaking is its immense scope and highly technical nature. The majority has consciously adopted all of these changes simultaneously with the intention that they would function in conjunction with one another, which makes it unreasonable to suggest that any piece can be viewed in isolation. The manifold problems that we have identified throughout this dissent, in turn, mean the *entirety* of the new election process is

[600] Many commenters opposing the NPRM have contended that its provisions violate procedural due process rights. Necessarily, those Final Rule amendments that contravene Congressional guarantees of pre-election process or constitutional and Congressional guarantees of free speech rights are also invalid because they deprive affected persons of protected liberty interests without providing the mandatory due process.

beset with fatal infirmity. Our colleagues are therefore mistaken in suggesting that there exists a Board consensus on *any* specific provisions.

5. The Final Rule's Additional Specific Problems and Deficiencies.

Even putting aside the above deficiencies, significant other detailed -- and, in some respects, highly technical – provisions in the Final Rule are equally problematic, as fully discussed below.[601]

(a) Accelerating Elections While Imposing New Inflexible "Pleading" Requirements – The Final Rule impermissibly shortens the time from petition to hearing while simultaneously imposing substantial new mandatory notice and pleading obligations. Under current longstanding practice, an employer has no mandatory pre-hearing procedural obligations, although regions routinely request the voluntary submission of a written commerce questionnaire and oral communication of unit information to facilitate the negotiation of election agreements or to define issues to be

[601] We note that the Final Rule does not include a provision permitting petitioning parties to use electronic signatures in support of a showing of interest. Although certain federal statutes, including the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504 (note), Pub. L. No. 105-277, Div. C, Title XVII, 112 Stat. 2681 (1998), and the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. 7001 *et seq*. "evidence Congress's intent that federal agencies, including the Board, accept and use electronic forms and signatures, *when practicable*," the General Counsel – as suggested by our colleagues – should perform an analysis similar to that outlined in the Office of Management and Budget's guidance for implementing the GPEA, OMB Procedures and Guidance; Implementation of the Government Paperwork Elimination Act, 65 FR 25508 (May 2, 2000), which describes a specific, detailed framework for agencies to follow "for deciding *whether* to use electronic signature technology for a particular application." *Id.* at 25514 (emphasis added). Absent the results of such an analysis, we cannot share our colleagues' confidence that a practicable way exists for the Board to accept electronic signatures to support a showing of interest while adequately safeguarding the important public interests involved. Inasmuch as the Final Rule itself contains no provision relating to electronic signatures, we do not further address the matter here.

contested at a hearing. In addition, if a hearing is necessary, regional directors possess and have exercised discretion in scheduling its starting date, generally scheduling hearings to begin from 7 to 12 days from notice of the petition, with postponements granted upon a showing of good cause.

Although the Final Rule delays the consideration of many fundamental eligibility and inclusion issues until after the election, it imposes significant new mandatory prehearing requirements. Specifically, the Final Rule now mandates that, in the absence of an election agreement, a non-petitioning party, usually the employer, must within 7 days of the Board's notice of petition file with the Region a written Statement of Position that must (1) include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, a separate list of the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit; (2) address any matter it wishes to litigate before the election; (3) state preferences as to the details of conducting the election; and (4) indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Furthermore, a hearing must be scheduled to start the day after the statement's filing, 8 days from Board service of the notice of petition, absent undefined special or exceptional circumstances justifying extensions amounting to no more than 4 additional days.

As discussed hereafter, the new requirement to produce this written information prior to the hearing is unfairly placed only on non-petitioning parties, usually the

employer, and the preclusive effect given to the statements is too broad. As an initial matter, we question the rational basis for imposing a uniform shorter timeline from petition to hearing date while at the same time demanding much more information from the employer.[602] The majority claims in the Final Rule that it merely codifies a best practice here. (Actually, the claim is that 7 days would be the best practice, but they are willing to extend the time period to 8 days.)

Assuming that there is any basis other than the need for speed for declaring 8 days to be a best practice or to limit a party's opportunity adequately to prepare for a hearing, that rationale would seem to apply only to a timeline in which employers had no more than the primarily informal, voluntary, and verbal pre-hearing tasks to attend to under the Board's longstanding prehearing practice.[603] In sharp contrast, under the Final Rule, employers now must post and distribute an initial election notice, more often than not obtain counsel,[604] interview managers and others,[605] fill out a new mandatory Statement

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[602] The requirement also applies to non-petitioning unions in RM and RD elections, but the range of potential contested issues in those elections is much narrower. In any event, the RC election petition is by far the petition filed most frequently. Thus, it is not accurate to state that in practice the burden imposed by the Final Rule's new Statement of Position requirements will fall equally on all non-petitioning parties.

[603] *Croft Metals, Inc.*, 337 NLRB 688 (2002), does not support the Final Rule's requirement that a hearing be held 8 days after the notice of petition. In *Croft*, the Board held that a party must receive at least 5 working days' notice of hearing. The hearing in *Croft* was, in fact, scheduled 10 days after the petition filing, but the employer did not receive the required notice until just 3 days before that hearing date. The Board was not required to consider and did not consider how soon a hearing should be scheduled after a petition is filed. Moreover, for reasons we state here, we believe *Croft*'s minimum notice of hearing requirement would have to be adjusted to provide a reasonable minimum time for an employer to meet the additional pre-hearing burden imposed by the Final Rule.

[604] As many comments to the Final Rule state, for small employers without experienced labor counsel in house or on retainer, these time periods make it difficult to find

of Position form within 7 days, prepare for a hearing on issues that it may still contest, and negotiate the possibility of a stipulated election agreement. This timing might work out in some instances, but it is predictable that employers in other circumstances--not falling within the Final Rule's ambiguous category of "special" or "exceptional"--will legitimately require more time. For example, concepts of appropriate unit or statutory supervisory status are not readily understood by laypersons and in any event may require significant factual investigation before the required position can be taken. In such situations, the majority is wrong to assert that employers "already know[] all those things." So even if an 8-day deadline would be a best practice for uniform application under current pre-hearing procedures, there is no basis for declaring it in advance to be a best practice under the amended procedures.

An even greater shortcoming of the Final Rule in this respect, however, is its failure to recognize that the practice of regional flexibility is the best practice, far preferable to a uniform restrictive standard in the timing of a hearing. There is no evidence in the considerable record before us that the Board's extremely competent regional personnel are manipulated and conned by employers into postponing hearings for unsound reasons. Regions currently have the flexibility to vary the starting time of a hearing on a case-by-case basis for good cause shown and often in pursuit of the desired

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competent counsel. See, e.g., SHRM; Chamber II; AHA II; COLLE II.

[605] Preparation of the mandatory written Statement of Position obviously does not relieve an employer of the need to prepare witnesses to testify on issues that it seeks to contest at a hearing. Indeed, in light of the Final Rule's encouragement of offers of proof preliminary to or as a substitute for testimony, an employer may have to take the further substantial pre-hearing step of taking sworn witness affidavits for submission in support of potential offers relative to any unit eligibility and inclusion issues that it can anticipate.

outcome of concluding an election agreement before parties and witnesses are required to go through the expense and time of attending a hearing. Parties and witnesses will almost invariably have to do so under the Final Rule, unless such an agreement can be reached in 8 days. Inasmuch as the Final Rule relies so heavily in other respects on the expertise of regional personnel, it is inconsistent and arbitrary that the same confidence is not accorded to regions in the setting of hearing dates and the corollary adjustment of the date for submission of the Statement of Position.

(b) *Further Limitations on the Litigation of Pre-Election Issues – The Final Rule exacerbates inappropriate limitations on the scope of pre-election hearings by precluding the introduction of evidence on issues not initially raised in a Statement of Position, by permitting the exclusion of evidence pertaining to as much as 20 percent of a bargaining unit, and by encouraging the substitution of offers of proof for testimony*. As noted above, we believe the Final Rule contravenes the clear intent of Congress by eliminating the statutory requirement of an evidentiary hearing regarding contested voter eligibility and inclusion issues, among other things. These problems are compounded by the Final Rule's arbitrary limit on the introduction of testimony on those eligibility and inclusion issues as well as its imposition of formalistic barriers to the litigation even of those issues which the Final Rule recognizes as mandatory subjects for pre-election hearing.

- Statements of Position. The Rule requires all non-petitioning parties to arrange for preparation and submission of a comprehensive written Statement of Position no later than *7 days* after the notice of petition absent ill-defined "special circumstances." While this requirement applies to all representation-case proceedings, the problems it presents arise most frequently in the context of *initial* representation (RC) elections, where only

the employer (as the non-petitioning party) bears the burden to identify issues it wishes to contest in a written statement of position.[606]

Thus, the Final Rule states that, when "the petition is filed by a labor organization in an initial organizing context," the "employer's Statement of Position" must address all of the following items, among other things: (a) "whether the employer agrees that the Board has jurisdiction over it" (and "commerce information" must be provided); (b) "whether the employer agrees that the proposed unit is appropriate," and "if the employer does not so agree," what is "the basis for its contention that the proposed unit is inappropriate"; (c) "the classifications, locations, or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit"; (d) "any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention"; (e) "any election bar" (referring to complex Board doctrines that preclude the processing of representation petitions in various circumstances); (f) "the eligibility period" (referring to the time frame in which bargaining unit members may be employed in order to be eligible voters); (g) "the type, dates, times, and location of the election"; (h) "an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals *in* the proposed unit"

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[606] It is true that, under the Final Rule, the Statement of Position requirement will apply to unions in those cases when an employer files an RM election petition or when an individual employee files a petition seeking to decertify an incumbent union. The primary impact of the Final Rule, however, relates to initial representation elections where the union is the petitioning party, and in such cases, absent another union's intervention, the employer is the only party required to submit a comprehensive pre-election Statement of Position, and the employer is foreclosed from later raising any contentions or introducing evidence regarding mandatory pre-election issues not identified in the Statement of Position.

(emphasis added); (i) "an alphabetized list" of the "full names, work locations, shifts, and job classifications" for "all individuals that the employer contends must be *added to* the proposed unit to make it an appropriate unit" (if the employer contends the proposed unit is not appropriate) (emphasis added); (j) "those individuals, if any, whom it believes must be *excluded from* the proposed unit to make it an appropriate unit" (emphasis added); and "any other issues it intends to raise at hearing." Final Rule, Part VI B, *supra*.

It is worth pausing to appreciate just what the foregoing means in practice. Under the Final Rule, the employer Statement of Position *must address* all questions of statutory and discretionary jurisdiction, labor organization status,[607] contract bar and other election bars, appropriate unit, multi-facility and multi-employer unit scope, the statutory employee status of individuals constituting more than 20 percent of the petitioned-for unit, the use of eligibility standards other than the normal standard, whether the employer's business is about to close or whether it is expanding and does not yet have a substantial and representative employee complement, whether the employer is a seasonal operation, and whether there are any professional employees in the unit who must be accorded their statutory electoral option.[608] The Final Rule also requires an employer to include in the Statement of Position its position on eligibility and inclusion issues it wishes to contest at the pre-election stage, the newly required initial employees lists, and its preferences on election details. An employer's failure to timely file a statement will preclude it from litigating any issue that must be contested at the pre-election stage. Even

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[607] This would include Section 9(b)(3) guard/nonguard labor organization issues.

[608] See *Sonotone Corp.*, 90 NLRB 1236 (1950).

if a statement properly raising some litigable issues is timely filed, an employer cannot raise any additional issue in the hearing unless permitted to do so by the regional director for good cause.

By contrast, the Final Rule requires only that a petitioner provide some minimal information in the initial election petition and make an oral response at the hearing to the issues properly raised in a written Statement of Position from non-petitioning parties. The petitioner would be precluded from introducing evidence by failing to make a response to an issue, but it need not respond in writing or in advance of the hearing. The Final Rule also permits a petitioner to sua sponte amend its petition during the hearing.

We recognize that the information required by the Final Rule has routinely been sought in conversations between regional personnel and parties after a petition has been filed, and that the exchange of information has the salutary purpose of encouraging election agreements in lieu of a hearing or to refine and limit the areas of dispute to be explored in a hearing. However, parties have not previously been *required* to raise issues prior to the beginning of a hearing, there has been no forfeiture of the right to litigate based on the failure to do so, and the extremely onerous pleading-type standard governing amendments – applied only to the employer, and permitting amendments only for good cause – is completely foreign to Board litigation. Indeed, in this regard, we believe the Rule's demanding standard is substantially more restrictive than the pleading requirements applied in formal adversarial unfair labor practice proceedings, in which the Board freely permits amendments to the complaint through the conclusion of the hearing. Further, an administrative law judge may even permit the litigation of issues – nowhere mentioned in the pleadings – if the issue is closely connected to complaint allegations,

and the Board will decide that issue if it agrees that it is closely connected and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

The mandatory written statement requirement, coupled with the preclusion of litigation on issues that are not raised in the statement (which must be filed just 7 days from the notice of a petition) are quantitatively and qualitatively different from the current longstanding practices. The Final Rule treats the employer Statement of Position like a formal pleading, binding on the employer as both admission and limitation and virtually precluding subsequent changes in position, and subject to restrictive standards regarding amendment. The Final Rule provides no rational basis for the imposition of such one-sided and onerous requirements with such severe consequences attendant on any failure to meet them.

Consider again the above litany of issues that must be raised in a timely written statement or the employer will be precluded from raising them. Many employers would have little knowledge of these issues and how they may apply to business operations. Employers will have little choice but to secure assistance from labor counsel or other consultants who, even with specialized expertise, may not be able to identify relevant issues without a reasonable period to review the employer's business operations. Putting aside the difficulty of preparing for a hearing, it is clearly unrealistic and unfair to impose an *inflexible* 7-day deadline for the start-to-finish preparation and submission of a comprehensive legal document, to which the Board will apply a rigorous "pleading" standard that will not permit later amendment, except in narrow circumstances, even as to concededly relevant issues that were fully and fairly litigated at the hearing. Meanwhile,

the employer must also busy itself preparing the required employee lists and a written statement of preferences on election details that may be difficult to define in advance of resolving any appropriate unit or unit scope issues.

What does the petitioning union have to do during this period? Other than filing the petition with minimum details and simultaneously serving the petition and accompanying documents on the employer,[609] the union has no mandatory pleading obligation, nor are any selective "amendment" standards applicable to the union. The union's views on potential issues and preferences on election details may be orally solicited, but it does not have to provide them. Even if the union does not orally state *at* the hearing a position responding to issues raised by the employer in its written statement, the Final Rule does not preclude it from introducing evidence in response to evidence presented by the employer as to those issues, and it permits the union to amend the petition during the hearing sua sponte, even as to an issue not raised by the the employer. In other words, while the existing voluntary and informal regional practices in obtaining pre-hearing information from the petitioning union remain essentially the same, those practices are transformed into binding legalistic requirements for the employer, with significant adverse consequences for any failure to comply by the time the hearing opens.

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[609] One of the documents is the current Form 4812, a single page document that summarily notifies parties of certain election procedures. This document will have to be revised to reflect the Final Rule's amendments, and, as a matter of fundamental fairness, it must be expanded to include sufficient explanation of the issues that must be raised in a Statement of Position.

Under the Final Rule, there is no question about the preclusive effect of omitting from the Statement of Position anything that must still be addressed in a pre-election hearing.[610] Here, the Final Rule provides:

- A party generally may not raise any issue, present evidence relating to any issue, cross-examine any witness concerning any issue, and present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response.

- If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit, the party may not raise any issue or present evidence or argument about the appropriateness of the unit.

- [I]f the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

The Final Rule plainly intends to strictly apply these waiver provisions, to the detriment of any employer whose Statement of Position fails to describe specific issues and contentions with sufficient particularity. For this reason, the Final Rule provides little comfort – and no adequate degree of fairness – when it states that "the regional director

[610] As noted previously, the Act and its legislative history indicate that Congress clearly intended that the pre-election hearing would include evidence regarding voter eligibility and unit inclusion issues, which is the only means by which these issues can be afforded meaningful review by the regional director and, in the event of a pre-election request for review, by Board members. Because the Final Rule provides that evidence regarding such issues should be excluded until after the election, the Rule provides that there would not be a waiver of post-election review at least as to these issues based on the failure to include them in the pre-hearing Statement of Position. See Final Rule, part VI. D, *supra* (notwithstanding failure to submit Statement of Position, "no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction" and "no party is precluded from challenging the eligibility of any voter during the election on the ground that the voter's eligibility or inclusion was not contested at the pre-election hearing").

has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary." If anything, this amplifies that the Rule's most onerous requirements are only applied to employers, in contrast to the ability of regional directors and other parties to address whatever election issues they deem relevant. Although the Rule also gives regional directors the "discretion" to permit parties to "amend" the Statement of Position, the Rule permits such requests only if made "in a timely manner," such amendments will be granted only "for good cause," and if an amendment is permitted, then all "other parties" are then given the opportunity to "respond to each amended position." Here as well, the employer is the only party constrained by these onerous requirements, which, as noted above, are more restrictive than the liberal pleading requirements applicable to the Board's General Counsel in formal unfair labor practice proceedings. Such formal and restrictive pleading requirements are not only unprecedented in Board proceedings, they are especially unwarranted in representation cases, which have always been regarded as nonadversarial in nature.[611]

The Final Rule fails to provide any reasonable justification for its failure to require the same or similar written Statement of Position from the petitioning union in advance of the hearing. In the response to our dissent, the majority states that the position statement does not unfairly burden employers because petitioners are already required to

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[611] See, e.g., *Solar International Shipping Agency, Inc.*, 327 NLRB 369, 370 n.2 (1998) ("[A] hearing in a representation proceeding 'is nonadversary in character [and] is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.' Sec. 101.20(c) of the Board's Statements of Procedure.").

state their position in the petition itself. But they draw a false equivalency. For example, the petition must only describe a unit, state that the unit is appropriate, provide some preferred election details, and identify perfunctory address and agent information. In contrast with what the employer is required to submit in the Statement of Position, a petitioning union is not required to state "the basis for its contention that the proposed unit" is appropriate; the union is not required to state any position regarding other matters likely to be in dispute – regardless of how foreseeable they may be – relating to included or excluded "classifications, locations, or other employee groupings," "individuals whose eligibility to vote" may reasonably be in question, or the "basis for each such contention"; nor is the union required to describe "any other issues it intends to raise at hearing." As to these and other matters, no preclusion attaches to the information the union provides or does not provide in advance of the pre-election hearing. Further, the petitioner is permitted to amend the petition during the hearing without any showing of good cause. Moreover, although the Final Rule provides that a petitioner may not litigate any issue that it failed to "place in dispute" in response to a Statement of Position, the burden of placing an issue in dispute for the petitioner is satisfied by an oral statement or description at the hearing, and not before. This is obviously far less onerous than the burden placed primarily on employers to contest issues in a formal written statement of position submitted prior to the hearing. This inequality of treatment is yet an additional fundamental deficiency that makes the Final Rule impermissibly arbitrary. Moreover, it is a denial of due process to selectively make such requirements applicable only to one party in the proceedings and not to other parties.

We believe the Statement of Position and its preclusive effects should at least be no more onerous than the standards applied by the Board to the amendment of unfair labor practice complaint allegations during a more formal adversarial hearing,[612] and to the amendment of the petition itself in the pre-election hearing, so that a party retains the right to address issues not specifically identified in the Statement of Position that are responsive to another party's contentions and presentation of evidence. The absence of such provisions strongly undermines any suggestion that the Final Rule treats parties and important election issues in an even-handed manner.

- Limiting "Voter Eligibility" and Unit Inclusion Evidence. The Final Rule provides for hearing officers to exclude evidence regarding eligibility and inclusion issues involving up to 20 percent of the employees in a petitioned-for unit, absent a direction to the contrary from the regional director, which would normally defer any evidence regarding such voter eligibility issues until following the election.

There is no judicial or Board precedent for this exclusionary practice. All cases cited by the majority voice general approval of the Board's discretion to defer *deciding* eligibility and inclusion issues for a certain percentage of the unit. It has never been the Board's practice to defer *the taking of evidence* regarding such issues, if validly introduced in a pre-election hearing, which then permits a determination (by regional directors and the Board) of whether they must be resolved prior to the election. The majority reasons that if an issue's resolution is potentially going to be deferred, it is "administratively irrational" and a waste of time and expense to permit a party to litigate

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[612] See *Pergament United Sales*, *supra*, 296 NLRB at 334.

it. Further, they mistakenly declare that the 20 percent exclusionary rule is the applicable historical norm in Board practice and strikes an administratively appropriate balance between the public interest in prompt resolution of questions concerning representation (in other words, the majority's interest in holding an election "as soon as practicable") and employees' interests in knowing who would be in the unit should they choose representation.[613] As asserted proof of the reasonableness of this standard, our colleagues rely on the fact that "more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not have compromised the Board's ability to immediately determine election results in the vast majority of cases."

The majority has at least modified the NPRM proposal that the 20 percent exclusionary rule be mandatory. Regional directors will have the discretion to defer eligibility and inclusion issues for up to 20 percent of a unit, but they are not obligated to do so. We credit our colleagues for this modification, but any flexibility is clearly undermined by our colleagues' additional statement that they "strongly believe that regional directors' discretion would be exercised wisely if regional directors typically

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[613] Notably, this articulation of a balancing test excludes any consideration of employer interests. That is consistent with the views expressed by some academicians and union advocates who maintain that -- contrary to statutory language, clear Congressional intent, and well-established precedent and practice -- employers should not have the status of a party in a representation election proceeding. See generally Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1992-93).

chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20% of the proposed unit." It seems likely, then, that there may be no practical difference between the NPRM's "hard" 20 percent rule and the Final Rule's nominally discretionary standard.

In our view, the majority's rationale for excluding and deferring evidence regarding voter eligibility until after the election – which would effectively ignore the interests of up to 20 percent of voters – is beset with irremediable problems.

First, it is unreasonable to conclude that hearing officers or regional directors should exclude evidence regarding who can vote or be part of a bargaining unit – affecting up to 20 percent of the unit – when nobody can determine prospectively how the exclusion may affect the future election. The Third Circuit long ago cogently observed that "the problem of substantiality, in our view, is one to be determined prospectively" because evidentiary rulings are not made from the "vantage point of hindsight."[614] At the pre-election hearing stage, a regional director will not, absent mystical powers of clairvoyance, have any idea what the final vote margin will be in an election and whether particular eligibility and inclusion issues would not have an effect on the outcome. Indeed, under the Final Rule, the regional director will now necessarily be making the exclusionary ruling on a purely speculative basis, without the benefit of any actual evidence by which to judge the importance of contested issues.

Second, the majority's 20 percent standard is hopelessly arbitrary. The majority maintains it is acceptable to disregard and exclude evidence from the pre-election hearing

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[614] *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 431 (3d Cir. 1950).

regarding up to 20 percent of unit employees because – based on 2013 statistics – this would adversely affect *only* three of every 10 elections conducted. Even if one could accept the accuracy of this figure as a recurring annual norm,[615] it is not rational to conclude that adversely affecting 30 percent of elections is acceptable or reasonable, particularly since the Act requires the Board "in *each* case" to decide unit issues in order to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."[616] The majority's analysis also likely understates the scale of potential risk because it fails to consider the very real possibility that statutory eligibility issues will frequently relate as well to election objections, particularly when the alleged supervisory status of an individual or group of individuals is at issue. Consequently, the mere fact that an election vote margin exceeds 20 percent is no guarantee that the eligibility or inclusion issue will not have to be litigated and decided at the post-election stage.

Third, the 20 percent rule has not been the Board's historical standard for deferring resolution of pre-hearing eligibility and inclusion issues to the post-election stage of proceedings. In a handful of cases, the Board has held that it did not need to set

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[615] The 30 percent figure the majority cites is for all elections held in FY 2013. We do not know what the percentage was for the relevant subset of cases in which there were contested pre-election issues. Our colleagues further confound with their statistical analysis by contending that, because a party favoring the electoral result by any vote margin will not pursue litigation of nondeterminative challenges, this will eliminate "about half of the remaining litigation, even in those cases where the vote margin is narrow. Thus, at most, only 15% of deferred issues will ever have to be addressed." Valid bases for this statistical assumption elude us. We do not know what percentage of elections involve nondeterminative challenges filed by a party favoring the election result. We do know that petitioning unions annually prevail in far more than 50 percent of initial organizing elections, so there is no basis for assuming an equal 50-50 mooting of challenges based on election results.

[616] Section 9(b) (emphasis added).

aside an election based on post-election determinations resulting in as much as a 20 percent variation in unit size from that which was contemplated by the pre-election litigation and resolution of issues. However, several courts of appeals have invalidated elections based on these types of variations in unit size based on post-election Board rulings.[617]

The Board's actual historical standard has been not to defer *decision* on eligibility and inclusion issues if they potentially involve more than approximately 10 percent of a unit. Even this more limited deferral standard has not been applied as a general or per se rule. Moreover, although the Board has sometimes deferred making a *decision* on certain eligibility and inclusion issues that involve no more than 10 percent of a unit, such a practice has never been inflexibly applied, and – when the Board has deferred rendering a decision resolving such issues – *it has always been with the benefit of a pre-hearing evidentiary record* that includes evidence regarding these issues. Only with such an evidentiary record can regional directors and the Board determine whether and when these issues warrant resolution prior to the election and, if so, whether to stay the election until those issues have been resolved. See also notes 570 and 581, *supra*.

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[617] These courts have reasoned that a difference of this magnitude impermissibly interferes with employee free choice because those who vote in the election do not have an accurate understanding of the bargaining relationship they must approve or reject. See *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpub., per curiam), *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294 (9th Cir.1985), and *Hamilton Test Systems, New York, Inc. v. NLRB,* 743 F.2d 136 (2d Cir. 1984). As will be discussed later, we agree that the courts' reasoning presents a compelling rational argument against the 20 percent pre-election exclusionary rule as well, but the point we make here is that the cited Board precedent is inapposite to the issue of an historical practice.

Fourth, we believe our colleagues clearly exaggerate the "specter" that employers may use the potential delay associated with a pre-election hearing to force unions to enter into stipulated election agreements. Here, our colleagues rely on anecdotal claims by some commenters that employers *generally* contest pre-election issues as a matter of gamesmanship and for the sole purpose of delay, rather than out of any genuine concern that the unit status of an individual or group of individuals be resolved at this early stage. However, the majority ignores the fact that the Board itself encourages *all* parties to enter into stipulated election agreements, and the Board has received comments from all sides that favor the high number of stipulated elections that have resulted from the Board's current procedures.

It cannot be the prospect of delay from a pre-election hearing itself that so compels unions to accept unwanted terms in an election agreement. A hearing conducted under current full litigation practices most often lasts only 1 day, and very rarely exceeds 3 days. Further, with the Final Rule's elimination of both the 7-day period for filing post-hearing briefs and the automatic 25-day waiting period to permit pre-election requests for review, the prospect of that cumulative delay will no longer "loom" over the negotiation of a pre-hearing election agreement in all cases, if it ever did. In any event, the deterrent effect of a 20 percent exclusionary rule is illusory. Employers and their legal counsel (or unions and theirs) who wish to "extort" concessions in an election agreement and/or to delay the election date can continue to do so simply by contesting issues on questions concerning representation that must still be litigated at a pre-election hearing.

We can readily agree that employers should not raise the possibility of frivolous pre-election litigation to leverage their position in bargaining for an election agreement,

but the majority has failed utterly to show by objective evidence that this conduct routinely takes place.[618] Further, we have great confidence that regional personnel currently take an active role in post-petition negotiations and are fully capable of advising employers that frivolous issues will be swiftly dealt with as such. Election agreements are, after all, absolutely essential to the achievement of regional success in expeditiously processing petitions.

Fifth, the majority improperly disregards the fact that the early resolution of certain eligibility and inclusion issues is highly desirable and often extremely important. In this regard, our colleagues' view is contrary to common sense and it conflicts with longstanding Board and judicial precedent. The establishment of the *Excelsior* list requirement, which the Final Rule expands, is based on the fundamental proposition that the early identification of "bona fide disputes between employer and union over voting eligibility" may avoid resorting to "the formal and time-consuming challenge procedures."[619] Further, as stated by the Ninth Circuit, while the need to avoid unnecessary delay in the electoral process is undisputedly important, "it is at least of equal importance that employees be afforded the opportunity to cast informed votes on

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[618] We note that the reply comment of former Region 7 Field Examiner Michael D. Pearson describes a "not uncommon" scenario of employer tactics that allegedly force a petitioning union to concede to "a significantly delayed election date in order to secure an election agreement." Pearson reply statement pp. 1-3. At several points in the Final Rule, our colleagues extrapolate from Mr. Pearson's multiple statements and testimony as to his regional experience, which ended in 2005, to generalize about representation casehandling practices nationwide. We do not believe this evidence is entitled to such weight. Among other things, it is difficult to reconcile with the facts concerning the Board's success rate in conducting elections in a median of 38 days.

[619] *Excelsior Underwear*, *supra*, 156 NLRB at 1243.

the unit certified."[620] It is plainly unreasonable to require employees to vote in an election, conducted on an extremely accelerated timetable, *before* the Board *even considers evidence* regarding (i) who is eligible to vote; (ii) whose votes will be counted, and whose will not; and (iii) what employees will be part of the unit – and thereby affected by the election – and what employees will not. In this regard, our colleagues also fail to appreciate that uncertainty as to these fundamental issues also adversely affects employees' informed choice in the election, and will unnecessarily create greater confusion and a potential need to set aside the election because parties will not know (i) what employees are non-unit supervisors who can act as agents of the employer and who cannot lawfully take certain actions for or against union representation; and (ii) what individuals are unit employees who, as eligible voters, can freely participate in campaigning without being subject to restrictions applicable to supervisors. Our colleagues' position on this point is no different from that of the Board majority that voted for the vacated December 2011 rule, as to which dissenting Member Hayes correctly observed:

> My colleagues may not think so, but *there are employees, employers, and unions who believe that there is value in the early resolution of individual issues* that do not bear on whether an election should be held at all. In particular, *employees quite reasonably would like to know if they are eligible to vote and will be part of a bargaining unit that the union seeks to represent*. Telling them they can cast a

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[620] *NLRB v. Lorimar Productions*, *supra*, 771 F.2d at 1302. Our colleagues are simply wrong in contending that the court's view in this case, and in cases cited above at note 83, represent a minority view among the courts of appeals. The decisions cited by the majority decline to set aside elections based on the facts of a particular case, but none of them disavow the fundamental principle that information regarding unit scope and composition – i.e., understanding what other employees will be included or excluded – is fundamentally important when employees decide what vote to cast in a representation election.

> challenged ballot, with their eligibility possibly to be resolved later, is hardly an inducement to participate in the electoral process. Further, *individuals whose status as supervisors is disputed would reasonably like to have that issue resolved before an election*, as would their employer and the participating union. *It is unbecomingly blasé of my colleagues to state that, because resolution of this issue would in any event not undo the effect of antecedent actions taken in the election campaign, there is no problem with postponing such resolution until after the election, if then*.[621]

- Offers of Proof. The Final Rule gives hearing officers the discretion to require offers of proof on any issue, including those that must still be litigated under the majority's impermissibly restrictive interpretation of the scope of a pre-election hearing. The record fails to show that hearing officers have often required offers of proof under existing practices, and there is good reason for that.

We begin with the language of the Act. Section 9(c)(1) requires the Board to conduct an "appropriate hearing" before any election, and it is well established that one of the primary purposes of the hearing is to create a record – consisting of evidence (i.e., oral testimony under oath and documents admitted into the record) – which provides the basis for decisions by regional directors, the Board, and possibly courts of appeals. See *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999).

An "offer of proof" is not evidence.[622] Rather, when an advocate (usually an attorney) makes an "offer of proof," this is an informal short-form description of *potential* evidence. For example, an "offer of proof" can be requested by a judge or hearing officer who believes the potential evidence will be irrelevant or cumulative – i.e.,

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[621] 77 FR at 25566.

[622] 75 Am. Jur. 2d Trial Section 353 (2014) ("A proffer is not evidence, ipso facto.") (citing *Crawley v. Ford*, 43 Va. App. 308, 316 (2004)); *United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir.1997) (same). See also cases cited in note 625, *infra*.

not logically related to a contested material issue or clearly duplicative of evidence already in the record – and if the "offer of proof" reveals that the potential evidence would be irrelevant or cumulative, the potential "evidence" is not permitted.[623] When evidence is ruled inadmissible, a party can also make an "offer of proof," which permits the evidentiary ruling to be reviewed on appeal.[624] In all cases, the "offer of proof" describes evidence that is *not* part of the "record," which means the described matters – since they have been *excluded* from the record – cannot be the basis for any decision or appeal on the merits.[625]

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[623] The Federal Rules of Evidence (FRE) provide for the admission of all "relevant" evidence, FRE 402, and evidence is relevant whenever it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." However, relevant evidence can be excluded, based on an offer of proof, if it would be cumulative. *Cedar Hill Hardware and Construction Supply, Inc. v. Insurance Corp. of Hanover*, 563 F.3d 329, 353 (8th Cir. 2009) ("Cedar Hill's offer of proof, if anything, showed that the court needed to impose limits to curtail the presentation of cumulative evidence."); United States v. Stokes, 506 F.2d 771, 777 (5th Cir. 1975) (exclusion of testimony not prejudicial where the offer of proof showed the evidence would have been cumulative).

[624] FRE 103(a)(2) (a party may claim error based on the exclusion of evidence, in part, if the party "informs the court of its substance by an offer of proof, unless the substance was apparent from the context"). See also *Kline v. City of Kansas City, Fire Department*, 175 F.3d 660, 665 (8th Cir. 1999) ("An offer of proof serves dual purposes," including "to inform the trial court * * * of the substance of the excluded evidence" and "to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous.") (citation and internal quotation marks omitted); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406-07 (10th Cir. 1991) (offers of proof are designed "to allow the trial judge to make an informed evidentiary ruling" and "to create a clear record that an appellate court can review to 'determine whether there was reversible error in excluding the [testimony]'") (citation omitted).

[625] *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 416 (6th Cir. 2014) ("proffer" by party's attorney "is not evidence"); *United States v. Wade*, 120 Fed. Appx. 638, 640-41 (7th Cir. 2005) ("counsel's proffer was not evidence"); *Campania Mgmt. Co. v. Rooks, Pitts, & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) ("[I]t is universally known that statements of attorneys are not evidence."); *United States v. Reed*, 114 F.3d 1067 (10th

Under the Final Rule, offers of proof are made part of the record and treated as a *substitute* for record evidence.[626] While the Final Rule nominally gives hearing officers discretion to require offers of proof, it is patently clear that they are expected to do so

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Cir. 1997) (reversing district court ruling that was based on party's "proffer of its evidence," where the "proffer was merely that, and in summary form as well," resulting in remand because court's decision "should be based only on the facts as they emerge at trial"); *Fulton v. L&N Consultants, Inc.*, 715 F.2d 1413, 1416-21 (10th Cir. 1982) (remand required to admit relevant evidence where party's offer of proof revealed that the evidence was improperly excluded). Cf. *Luce v. United States*, 469 U.S. 38 (1984), where the Supreme Court stated that appellate review is "handicapped" – even when an appeal involves evidentiary rulings – without a "factual context," which requires the court to know "the precise nature of the defendant's testimony, which is unknowable when * * * the defendant does not testify." *Id.* at 41 (footnote omitted). The Court differentiated between admitted evidence and a "a proffer of testimony" because "trial testimony could, for any number of reasons, differ from the proffer." *Id.* at 41 n.5.

[626] Respectfully, we must point out that our colleagues are simply wrong when they state, in response to our dissent, that the Final Rule does "not treat offers of proof as 'evidence' in decisions 'on the merits.'" The Final Rule explicitly makes offers of proof the sole basis for deciding whether many issues have *merit*, whether the facts warrant pre-election *litigation*, and whether the evidence if admitted might warrant pre-election *resolution*. See, e.g., Final Rule § 102.66(c) ("If the regional director determines that the evidence described in an offer of proof *is insufficient to sustain the proponent's position*, the evidence *shall not be received*.") (emphasis added); § 102.69(c)(1)(ii) (the regional director shall deny post-hearing objections without a hearing if "the evidence described in the accompanying offer of proof *would not constitute grounds for setting aside the election*") (emphasis added).

As President Lincoln is reputed to have said, "How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg." Calling an offer of proof part of the "record" does not make it record evidence. And when an offer of proof is made the sole basis for deciding the merits (or deciding whether there will even be litigation), the offer of proof is being treated as a substitute for evidence. This infirmity is not cured by the possibility that, infrequently, a regional director or the Board might consider an offer of proof for the limited, proper purpose of determining whether evidence has wrongly been excluded, which can result in a remand and reopening of the record. Indeed, the fact that the Rule predictably will also cause an increase the number of remands and resulting delays, based on the improper exclusion of relevant evidence, is another reason the Final Rule should not be adopted.

more frequently, particularly on appropriate unit issues. This will preclude the existence of evidence needed to permit what the Act requires: decisions by regional directors, the Board, and possibly the courts, based on a record developed in an "appropriate hearing" held before the election.[627]

Consider the requirement of an offer of proof under the *Specialty Healthcare* standard.[628] Almost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate under that standard. Thus, a hearing officer will likely fulfill the Final Rule's stated expectation by requiring an offer of proof on the issue. Having nominally preserved the right to contest the appropriateness of a petitioned-for unit in the prehearing Statement of Position, an employer will really have done no more than to preserve the right to make an offer of proof attempting to show an overwhelming community of interest between petitioned-for classifications and excluded classifications. It is unclear what offer would suffice for a regional director to permit the introduction of oral evidence. It is clear that the requirement of an offer would make an already difficult burden almost impossible to meet. If not met, then not only would the employer be precluded from further contesting

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[627] Section 9(c)(1). There is little question that the Final Rule contemplates hearing officers will substitute "offers of proof" for record evidence. How else is one to read the footnote comment that "we would expect hearing officers to typically require an offer of proof from an employer arguing against the appropriateness of a unit considered presumptively appropriate under Board caselaw. If the employer's proffered evidence would be insufficient to rebut the presumption, then it would be appropriate for the regional director to foreclose receipt of the evidence without regard to the proposed 20% rule."

[628] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

the issue, but employees in excluded classifications would generally not even be permitted to cast challenged ballots.

Section 9(c)(1) also provides that pre-election hearings "may be conducted by an officer or employee of the regional office, *who shall not make any recommendations*" and "[i]f the Board finds *upon the record of such hearing* that such a question of representation exists, it shall direct an election by secret ballot" (emphasis added). As the statutory language makes clear, the hearing officer may conduct the pre-election hearing, but the evidentiary record constitutes the sole basis for the ultimate decisions made by the regional director and the Board. Again, an offer of proof is an informal summary, provided by a party's attorney or representative, which is most often used to prevent the introduction of irrelevant evidence. In contrast, the statute's "appropriate hearing" requirement – combined with the Act's careful delineation of responsibilities between and among the hearing officer, the regional director, and the Board – requires that decisions be based on an appropriate "record" *consisting of evidence*.

The majority's analogy of the Rule's pre-election offer of proof process to the use of that process by courts, administrative law judges, magistrate judges, and hearing officers fails for one fundamental reason. In these other contexts, offers of proof are elicited by a presiding official who has the authority to make evidentiary rulings and decide substantive issues. By contrast, as previously stated, the hearing officer in a pre-election Board hearing has no authority to make recommendations, much less factual findings or legal conclusions. See Section 9(c)(1).

(c) *Off-the-Record Consultation and Decisionmaking Between Hearing Officers and Regional Directors*. In an attempt to avoid conflict with express statutory language

(id.), the Final Rule purports to vest regional directors, not hearing officers, with the exclusive authority to make substantive rulings and decisions. However, the Final Rule in this respect remains objectionable. Under the Act, although hearing officers may preside over the "appropriate hearing" (Section 9(c)(1)), Congress clearly intended that all decisions would be based on the hearing record. Here, the Final Rule departs from the statutory scheme by codifying and dramatically increasing reliance on private consultations between hearing officers and regional directors, in the absence of a record, with "real time" decisionmaking by regional directors while the hearing remains incomplete.

There are numerous deficiencies in this process, especially in relation to issue-determinative rulings and when combined with the Final Rule's other changes. First, the Rule relies on this process to resolve important election-related issues, including whether to exclude or defer evidence regarding voter eligibility and other matters. Second, decisions are made by an absentee regional director, who is *not* presiding over the hearing, and who is completely dependent on second-hand information conveyed by the hearing officer. Third, during these off-the-record consultations, the hearing officer has a near-impossible task, which is to refrain from making "recommendations" (based on the prohibition set forth in Section 9(c)(1)); to describe complex facts, some based on admitted evidence, and others based on offers of proof; and to summarize the parties' competing arguments outside of the parties' presence. This makes hearing officers the agency equivalent of a one-man band: he or she makes all of the arguments for everyone and describes all of the evidence (real and potential), with all decisions ostensibly being made by someone else (who has observed nothing and cannot lawfully even receive

recommendations from the hearing officer). And this entire process occurs without the parties' participation or presence, with no verbatim record being made of the consultation. Regional directors have no appropriate basis for making such decisions because they are absent from the hearing, and the Act's "appropriate hearing" requirement reflects Congress' intention to have disputed issues resolved based on the evidentiary record, not second-hand off-the-record descriptions provided outside of the parties' presence while the hearing remains incomplete. Conversely, hearing officers, though ostensibly without decisionmaking authority, have *exclusive* control over what is and is not conveyed to regional directors, and the absence of any record regarding these consultations precludes meaningful review by the parties or the Board.[629]

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[629] In Member Miscimarra's view, the Final Rule's reliance on private off-the-record consultation and decisionmaking between hearing officers and regional directors—especially in conjunction with the Rule's other changes—is precluded under the Act. This does not involve any doubt about the integrity and competence of the Board's hard-working regional directors and hearing officers. Rather, in representation cases, Section 9(c)(1) permits regional hearing officers to preside over a representation hearing, but states they "*shall not make any recommendations* with respect thereto" (emphasis added). In unfair labor practice (ULP) cases, Section 10(c) provides for administrative law judges (originally called "trial examiners") to preside over the hearing, but Section 4(a) states "*no administrative law judge shall advise or consult with the Board* with respect to exceptions taken to his findings, rulings, or recommendations" (emphasis added). Member Miscimarra believes these restrictions, both part of the 1947 Taft-Hartley amendments, were designed to guarantee, first, that the Board would maintain a *bright-line separation* between decisionmakers, on the one hand, and the actions of hearing officers (in representation cases) and administrative law judges (in ULP cases) that are subject to review; and second, that hearing officers and judges would *absolutely refrain from attempting to influence*, by informal means, either the Board or regional directors (the latter inherited the Board's authority to decide representation cases pursuant to a delegation authorized by Sec. 3(b) of the Act). Both restrictions were explained in detail by Senator Taft – principal sponsor of the Taft-Hartley amendments in the Senate – when these amendments were adopted. See 93 Cong. Rec. 3953 (April 23, 1947), reprinted in 2 LMRA Hist. 1011 (statement of Sen. Taft) (stating, among other things, that the amendments preclude "private" or "secret meetings" between trial examiners and the Board, and provide that questions concerning representation are to be decided by the

(d) *No Post-Hearing Briefs – The Final Rule impermissibly eliminates the right to file post-hearing briefs*. Reflecting longstanding practice, § 102.67(a) of the current Rules gives parties the right to submit post-hearing written briefs within 7 days of the hearing's conclusion, and parties nearly always do so. The Final Rule takes this right away. Instead, "[t]he hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants a motion to file such a brief." Although the majority does not define the range of discretion vested in the regional director to deny a motion, it clearly anticipates that briefing will *not* be necessary "[i]n the majority of representation cases."

Under the Final Rule, the stated justification for eliminating the right to file post-hearing briefs is twofold: (1) "given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and

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Board "on the basis of the facts that are shown in the hearing" to avoid decisions "almost completely free from any review by the courts"). See also S. Rep. No. 80-105, at 25, reprinted in 1 LMRA Hist. 431 ("Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendation to the Board at the close of such hearing. By the amendment, such hearing officer's duties are confined to presiding at the hearing."). In Member Miscimarra's view, the Final Rule contemplates what the Act prohibits: the Rule improperly blurs the role of the hearing officer (whose duties, under the Act, should be "confined to presiding at the hearing") with the decisionmaking of the regional director (who, under the Act, should decide issues solely "on the basis of the facts that are shown in the hearing"). Id. Although due process requires that disputed matters be addressed in open hearings, the Final Rule essentially provides for a "private" or "secret meeting" (id.), with increased reliance on off-the-record consultation between hearing officers and regional directors, outside the parties' presence, in which the hearing officer, rather than the parties, makes all relevant arguments and presents all relevant facts; and the lack of any verbatim record effectively means this off-the-record decisionmaking is "almost completely free from any review" by the Board or "the courts." Id.

accurate decisions;" (2) "[b]y exercising [the] right [to file] or even by simply declining to expressly waive that right until after the running of the 7-day period, parties could potentially delay the issuance of a decision and direction of election and the conduct of an election unnecessarily."[630]

Current practice nearly always involves post-hearing briefs submitted by the parties, and these briefs – along with record evidence – are then the central focus when relevant issues are decided by regional directors, a practice which contradicts the Final Rule's suggestion that such briefs are unnecessary and unimportant. Even though there may be some cases – few in number – when parties may dispense with post-hearing briefing, this certainly does not justify a rule finding that briefs will presumptively not be permitted in "the majority of cases."[631]

The procedural context for this briefing issue is the same as for offers of proof. The regional director is the only person who, under the statute, is permitted to decide

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[630] We note that the majority also relies on the inapposite fact that the APA exempts the Board's representation case proceedings from its requirements for formal adjudication, including any requirement of the right to file a brief. Of course, the APA does not proscribe the Board from permitting post-hearing briefs as a matter of right in its own rules for representation proceedings, which is what the Board has done for many years. Moreover, we cannot help but note the majority's reliance on the APA's exemption, which is founded on the premise that our pre-election hearings are nonadversarial investigative proceedings, in a Final Rule that imposes unprecedented formal adversarial pleading requirements.

[631] The majority suggests that parties retain the right to file one post-hearing brief in every case because, even if denied permission to file an immediate post-hearing brief, they can still file a brief in support of a request for review of the regional director's subsequent decision. The right to file a brief directly with the regional director prior to his de novo review of the evidence and issues is fundamentally different from the right to file a brief seeking to persuade that there are "compelling circumstances" for Board review of an adverse regional director's determination. In the latter instance, the horse has most often left the barn.

relevant election issues, subject to potential Board review. However, *neither the Board nor regional directors even preside over the hearing*. Rather, the only Board representative who conducts the actual hearing is a "hearing officer" and *hearing officers, under Section 9(c)(1) of the Act, are prohibited even from making any "recommendations" with respect to election-related issues* which, of course, must be resolved based on the record evidence combined with the parties' arguments and positions.

Here, the Final Rule operates in a world devoid of common sense. In comparison to current practice, eliminating post-hearing briefs will pare 7 days, at most, from the period between petition-filing and the election. Yet, on top of the Final Rule's other changes, eliminating post-hearing briefs will necessarily cause unfairness and confusion regarding (i) what arguments parties have made concerning what issues and based on what evidence; (ii) what arguments and issues can fairly be raised by the employer – and which ones have been waived – based on the pre-hearing Statement of Position. Moreover, the absence of post-hearing briefs will give parties an enormous incentive to file pre-election requests for Board review, including requests to stay the election, because this will provide the *only* opportunity for parties to file *any* briefs. In such circumstances, the Board will undoubtedly be confronted with an array of arguments that regional directors – without the benefit post-hearing briefs – *never considered*. Alternatively, the Board may conclude that many meritorious arguments have been waived by employers because the positions were not identified with sufficient particularity in the pre-hearing Statement of Position, or in the employer's end-of-hearing oral argument.

We have no lack of confidence in the ability of management- and union-side labor law practitioners to make effective closing arguments. However, with due respect for our colleagues, the Final Rule identifies nothing that justifies depriving those practitioners of a longstanding right to file briefs, adversely affecting their ability to frame parties' positions in light of the record evidence. Further, our decided cases over nearly 80 years demonstrate that some measure of factual and/or legal complexity is the norm, and not the exception, for issues contested in pre-election hearings. In this context, we have difficulty understanding why a regional director--even with the expertise, experience, and acumen of persons who typically occupy that office--would not benefit from the written definition of issues and supporting evidence in a brief in more than a few complex cases. The alternative of reviewing and deciding issues based on a cold transcript and ad hoc oral argument is far less likely to lead to the expeditious and reasoned resolution of those issues.

Take just one example of a recurring pre-election issue: a petitioner seeks to represent as an appropriate bargaining unit a group of workers whom the employer contends are independent contractors excluded from coverage. The employer bears the heavy burden of proving its contention. As recently described by the majority in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), resolution of the issue whether the workers are independent contractors or statutory employees requires an analysis of evidence relevant to a nonexhaustive list of 11 factors. In *FedEx*, which involved a petitioned-for unit of approximately 20 truck drivers, the majority opinion consumed over 4 two-columned pages (3,732 words) describing the facts of the case, and another 3-plus pages (2,736 words) analyzing the facts under its multifactor test. With the elimination of post-

hearing briefs, an employer's sole opportunity to persuade a regional director that it has met its burden under the *FedEx* test will be to accurately summarize all the relevant facts and their application to at least 11 factors of the legal test in semi-spontaneous oral argument at the conclusion of a hearing, usually without the benefit of a transcript; i.e., the employer must accomplish in oral argument what the FedEx majority needed 6,468 written words to accomplish.[632] We fail to see how this approach facilitates the fair and accurate resolution of a question concerning representation.

If the Board's experience under its longstanding practice of generally permitting written briefs contradicted this supposition, then there might be a factual basis for amending the current rule. The Final Rule cites no such evidence, however. It acknowledges that a procedure already exists under the current practice for hearing officers to encourage the *voluntary* use of oral argument in lieu of a written brief, and that the General Counsel's 1998 best practices memo endorsed this voluntary approach as appropriate "in some cases."[633]

The Final Rule's other rationale sounds a very familiar refrain, i.e., speculation that a party could use the right to file a brief as an instrument of delay. Has that been shown to have happened with any frequency over decades of experience under the current Rules? No it has not, at least not based on the considerable record before us, which on this point is factually no different than in 2012 when dissenting Member Hayes

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[632] Assuming a person speaks 2.5 words per second, it would take approximately 45 minutes just to read aloud the relevant sections of the *FedEx* majority opinion.

[633] See Representation Casehandling Manual Sec.11242 and G.C. Memo. 98-1, "Report of Best Practices Committee – Representation Cases December 1997," at 10, 28.

cogently observed: "In practical terms, the majority points to no evidence that the 7 days currently afforded parties to file briefs following pre-election hearings actually causes delay in the issuance of Regional directors' decisions. In real terms, this is already an extraordinarily short period of time. Our colleagues have presented no evidence that parties routinely file briefs in those cases in which the issues are so simple that a Regional director could routinely issue a decision in less than 7 days, and certainly no evidence that briefs in general have no utility. There is no reason why a Regional director or his decision writer cannot begin preparing a decision before the briefs arrive and, if the briefs raise no issues the Regional director has not considered, simply issue the decision immediately. In fact, the Agency's internal training program expressly instructs decision writers to begin drafting pre-election Regional directors' decisions before the briefs arrive. See 'NLRB Professional Development Program Module 5: Drafting Regional director Pre-Election Decisions, last updated May 23, 2004, Participants Guide and Instructors Guide.'"[634]

In short, there is no valid justification for the briefing rule change. It is a solution in search of a problem. Properly managed under the existing regional practice, which represents the best practice, briefing should improve and expedite representation case decisions. Getting rid of briefs, on the other hand, is as likely to delay final resolution of representation issues as it is to facilitate it.

[634] See 77 FR 25567.

(e) *Eliminating Board Review – There is no rational reason to eliminate the right of Board member review regarding post-election issues.*[635] The Final Rule eliminates mandatory Board review of post-election disputes under a stipulated election agreement. It provides that post-election Board review – currently a guaranteed option – would become discretionary in all cases. Thus, the Final Rule contemplates that the Board may never review post-election reports of the hearing officer or decisions of the regional director. As set forth below, we find the elimination of mandatory Board review of post-election disputes to be arbitrary and capricious.

In recent years, about 90% or more of representation elections were promptly held pursuant to election agreements. Our statistics show that, under current regulations, parties are far more likely to enter into a stipulated election agreement than a consent election agreement, under which post-election issues are decided by the regional director.[636] Under the stipulated agreement, the parties negotiate resolution of all pre-election issues but preserve the automatic right to Board review of a regional director or hearing officer's resolution of post-election disputes. The Final Rule now eliminates that right, replacing mandatory review with a discretionary system of review that currently

[635] Much of the analysis in this section is drawn from former Member Hayes' dissent to the vacated December 2011 rule. See 77 FR 25566. In our view, the majority has yet to provide sufficient answers to the criticisms originally voiced there.

[636] According to the Office of Executive Secretary, in 2012, 1,401 elections were held pursuant to stipulation, while only 48 consent elections were held. In 2013, 1,411 elections were held pursuant to stipulation, while only 39 consent elections were held.

exists for the disposition of pre-election disputes in the absence of any election agreement.[637]

Without any empirical support, our colleagues assert that eliminating automatic Board review will not result in fewer pre-election agreements. It seems obvious to us that parties would resolve known pre-election issues for the guarantee that the Board will be the final arbiter of any unforeseen election conduct and eligibility issues that occur during the critical election period. It also seems natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues. Thus, making Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation.

Our colleagues disagree. They contend that the parties will take what little we give them, preferring an agreement that permits discretionary Board review over one that provides for final disposition of post-election disputes at the regional level. They maintain that the parties will continue to look at the same factors previously considered when deciding whether to enter into any pre-election agreement. Yet, our colleagues could be wrong, and it was their duty to give more than passing thought to this potential adverse consequence for a process utilized in 1,401 elections, comprising 97 percent of all election agreements executed, in FY 2013. The guarantee of mandatory, as opposed to

[637] Even in the absence of an election agreement, the Final Rule also eliminates a regional director's choice of issuing a report and recommendations on post-election issues, to which there would be an automatic right to secure Board review by filing exceptions.

discretionary, Board review of post-election disputes *could* be the main reason some employers give up the right to litigate pre-election issues. Even if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction of purported delay due to the Final Rule's implementation. Our colleagues' willingness to make this change without considering the possible negative impact is attributable in significant part to their apparent agreement with comments that argue that employers use the election agreement procedure to extort unwarranted concessions from unions, who capitulate in order to prevent the delay due to litigation of pre-election disputes. This view stems from their belief that employers could not really have legitimate issues to raise in litigation. But we believe there are legitimate disputes, and thus, the process of negotiating an election agreement in which an employer foregoes its litigation rights in exchange for concessions on unit scope, unit placement, or election details seems to fairly mirror the give-and-take bargaining that takes place after a petitioning union wins an election and is certified.

In justifying the elimination of the automatic right of Board review of post-election challenge and objections issues, our colleagues also contend that "the final rule will enable the Board to devote its limited time to cases of particular significance." Regardless of how insignificant the issues may seem to be in most post-election cases, it is our duty to give those cases the same consideration as in "cases of particular significance." Moreover, we disagree with our colleagues that the Board does not have enough time to provide full consideration of post-election decisions. This is not 1959, when Congress adopted Section 3(b) to remedy the Board's undisputed inability to manage its pending caseload. At that time, there were 9,347 representation case filings,

8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases.[638]

In Fiscal Year 2013, 1,986 representation case petitions were filed in the regions, almost the same number as FY 2012, when 1,974 petitions were filed.[639] In other words, petition filings are down 80 percent from 1959. Moreover, the Board's pending caseload is near to historically low levels. Based on statistics prepared by the Board's Executive Secretary, as of October 1, 2014, there were 338 pending unfair labor practice cases and 48 pending representation cases.[640] Given the decline in case filings, this caseload is unlikely to increase. Thus, with *five times fewer* representation cases entering the system at the regional level, and a tiny fraction of all cases reaching the Board on exceptions, we clearly have the time to timely resolve all pending cases without abandoning stipulated election agreements for review of post-election decisions on a mandatory basis.

There is yet another problem with the new request for review standard for all post-election decisions. Under the existing rule, the Board engages in a *de novo* review of the entire record with respect to factual findings, other than credibility findings, of the decision maker below. Under the Final Rule's discretionary review standard, the Board will only grant review of regional factual findings where it is established that the finding

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[638] Twenty-Fourth Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1959, Appendix A—Tables 1 and 3.

[639] Representation Petitions, National Labor Relations Board, available at http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

[640] The pending caseload statistics would be even less were it not for a temporary" bubble" created by the need to decide anew cases in which prior decisions have been invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

is clearly erroneous and prejudicial. Based on statistics for cases covered by the current request-for-review practice,[641] this standard will predictably rarely be met.

Our colleagues contend that mandatory Board review is unnecessary because under the current *de novo* review standard the Board affirms the majority of post-election decisions made at the regional level. While this may be true as to decisional outcome, there have been many Board decisions reversing the hearing officer's or regional director's findings in post-election cases.[642] Also, in numerous cases, even if the Board has affirmed the decision below, it has modified or clarified the supporting factual findings.[643] There also have been several cases where a Board member or members dissent to the findings below.[644] The new Rule provides significantly less opportunity for reversal, clarification, or dissent with respect to such findings and their application to the controlling legal principles.[645] This is counter to the Final Rule's assertion that it intends

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[641] According the Board's internal casehandling statistics, the Board granted review, for *any* of four compelling circumstances defined in the Rules, on only 9 of 77 requests for review of regional directors' decisions and directions of election filed in FY2012, 7 of 57 filed in FY 2013, and 9 of 65 filed in FY 2014.

[642] See, e.g., *Labriola Baking Co.*, 361 NLRB No. 41(2014); *Sweetwater Paperboard and United*, 357 NLRB No. 142 (2011); *Go Ahead North America*, LLC, 357 NLRB No. 18 (2011); *Rivers Casino*, 356 NLRB No. 142. (2011); *Trustees of Columbia University*, 350 NLRB 574 (2007); *Madison Square Garden CT, LLC*, 350 NLRB 117 (2007); *In re Woods Quality Cabinetry Co*. 340 NLRB 1355 (2003); *Manhattan Crowne Plaza,* 341 NLRB 619 (2004).

[643] See, e.g., *Automatic Fire Systems*, 357 NLRB No. 190 (2012); *Enterprise Leasing Company-Southeast, LLC*, 357 NLRB No. 159 (2011).

[644] See, e.g., *Tekweld Solutions, Inc.*, 361 NLRB No. 18 (2014); *UniFirst Corp.*, 361 NLRB No. 1 (2014); *FJ Foodservice*, Case 21-RC-21310, 2011 WL 6936395 (December 30, 2011); *Mastec Direct TV*, 356 NLRB No. 110 (2011); *American Medical Response*, 356 NLRB No. 42 (2010).

[645] The majority cites *Mental Health Association, Inc*., 356 NLRB No. 151 (2011), as an

to improve transparency in decision making. The Board decisions addressed above may not ultimately be of precedential value, but because they involve a *de novo* review by the Board, they play an important role in assuring the public and reviewing courts that there is a uniform and consistent application of the law.

It has been the Board's long-held practice to develop and establish uniformity in representation case law. The Final Rule's discretionary review standard for all cases greatly increases the possibility that individual regions will reach different unreviewed results in factually identical or similar circumstances.[646] This presents an unacceptable risk of uncertainty and balkanization of substantive representation case law. It will likely lead to a system in which parties have to litigate issues in light of regional precedent, despite the well-settled Board principle that regional directors' decisions do not have precedential value.[647] There is a further risk that the ongoing development and understanding of labor law will be stunted inasmuch as the Board will be deciding few representation cases. It is particularly troubling that the Board will now be reviewing few appeals concerning election misconduct because the issues raised in these appeals go to the heart of employee free choice, and narrow factual distinctions have often determined

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example of a case which did not require Board review because it involved the application of settled precedent. However, the Board modified the hearing officer's findings because it disagreed with part of the hearing officer's analysis and found it unnecessary to rely on another part. *Id.*, slip op. at 1 n.4.

[646] We note that our critique of this aspect of the Final Rule has nothing to do with the expertise and competence of regional directors and hearing officers, for whom we have great respect. However, like administrative law judges deciding unfair labor practice cases, expert and accomplished persons reviewing the same or similar sets of facts can reach different conclusions of law. It is the Board's role to reconcile those differences.

[647] E.g., *Rental Uniform Service, Inc.*, 330 NLRB 334, 336 n.10 (1999) (citing *S.H. Kress & Co.*, 212 NLRB 132 n.1 (1974)).

whether specific conduct has had an objectionable effect on that choice. These cases warrant *de novo* Board review. In sum, the Final Rule will significantly impair the important central oversight function of the Board in making representation case law.

The elimination of mandatory post-election Board review is also likely to cause an increase in "test of certification" cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.[648] Whether or not an employer would secure judicial reversal of a regional director's decision is irrelevant. An employer will now be forced to litigate in an unfair labor practice case, before the Board and in federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case.

The collective effect of the Final Rule amendments, notably including the elimination of stipulation agreements providing for the automatic right to Board review of post-election issues, is the creation of a system in which the Board is an absentee overseer of the representation case process. This is taking our delegation authority under Section 3(b) to the extreme. Absent the singular factual circumstance that motivated Congress to create this authority---i.e., that the Board in 1959 was overwhelmed by the task of deciding *all* contested representation case issues---or any other rational basis for taking this step, what we are left with is best described as agency "delegation running

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[648] *Id.*

riot,"[649] an impermissibly overbroad and arbitrary abdication of the Board's central role in the process.

(f) *Due Process – Collectively, the Final Rule's revisions constitute an impermissible deprivation of what has traditionally been regarded as necessary procedural due process in representation case proceedings.* "The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues."[650] For decades, the due process accorded parties to representation proceedings has included adequate notice and time to prepare for a pre-election hearing, the opportunity to present oral testimony and cross-examine witnesses on all validly contested issues (including eligibility and inclusion issues), the opportunity to file a post-hearing brief, and the opportunity and incentive to enter into election agreements guaranteeing the automatic right to secure Board review of a regional director or hearing officer's findings on post-election objections and challenges. This is how the Board has traditionally complied with the Supreme Court's statement that "'[t]he fundamental requisite of due process of law is the opportunity to be heard'" at "'a meaningful time and in a meaningful manner.'"[651]

Now, in one fell swoop of agency policymaking, those procedural rights are gone. In their place, the Final Rule (i) creates new inflexible prehearing "pleading"

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[649] The phrase is best known for its articulation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[650] *Bennett Industries, Inc.,* 313 NLRB 1363 (1994).

[651] *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385,394 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

requirements –primarily and most severely affecting employers; (ii) greatly accelerates the timetable for scheduling the hearing; (iii) eliminates the right to contest eligibility and inclusion issues at a hearing; (iv) directs hearing officers to limit the introduction of evidence regarding both these issues as well as those that must still be litigated prior to an election; (v) eliminates post-hearing briefs except in unusual circumstances; and (vi) eliminates mandatory Board member review in all post-election cases.

The private interests affected by this extraordinary government action are substantial. They involve the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation, the paramount right of employee free choice, and the fundamental right of an employer to pursue its interests in maintaining autonomous control of a business operation in which it has a substantial capital investment (rather than sharing control in collective bargaining), and to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit.[652] Against this array of protected private interests, the Final Rule's primary asserted government interest is the need to conduct elections as soon as possible, with the notable exception of cases where a union's blocking charge allegedly justifies prolonged delay. In the foregoing sections, we have detailed the glaring lack of objective factual or policy grounds for the wholesale changes in representation case procedure founded on a perceived need for speed. Under that analysis, the Final Rule's revisions are shown to be collectively and individually invalid as arbitrary under the *State Farm* "hard look" test. Necessarily then, the asserted government interest in speed is inadequate to

[652] As we have noted elsewhere, the Final Rule also contravenes due process by impermissibly infringing free speech and privacy interests.

justify changes that deprive parties of previously enjoyed procedural rights and impose new procedural burdens that will inequitably affect employers more than other parties to an election. Accordingly, in our view, the Final Rule must be invalidated on procedural due process grounds as well.

(g) *Expanded Mandatory Disclosures – The Revised Excelsior list requirements impose unreasonable compliance burdens and fail to adequately address privacy concerns.* In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), the Board established the requirement that an employer must file with the regional director an election eligibility list—containing the names and home addresses of all eligible voters—within 7 days after approval of an election agreement or issuance of a decision and direction of election. The regional director, in turn, makes the list available to all other parties to the representation case. Failure to comply with this requirement constitutes grounds for setting aside the election whenever proper objections are filed.[653] *Id.* at 1240.

The Final Rule substantially modifies the current *Excelsior* list requirements. It requires the employer to furnish to the regional director *and* to other parties not only a list of the full names and home addresses of eligible voters, but also their available[654] personal e-mail addresses, home and personal cell telephone numbers, as well as their work locations, shifts, and job classifications. Employees who are to vote subject to

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[653] The Supreme Court subsequently deferred to the Board's judgment, permitting the *Excelsior* list requirement to stand. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

[654] We take our colleagues at their word that "available" means an employer need only provide employee personal contact information already in the employer's possession and "do[es] not require the employer to ask the employee for it."

challenge—either by direction or the agreement of the parties—must be enumerated with the same required information in a separate section of the list. Further, the Final Rule dramatically shortens the time for production of the *Excelsior* list from the current 7 calendar days to 2 business days after an election agreement or direction of election, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The employer must provide the voter list alphabetized (overall or by department) in an electronic format generally approved by the Board's General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form, and must serve the voter list on the other parties electronically, when feasible, at the same time the employer files the list with the regional director. Failure to file or serve the list and related information within the specified time and in the proper format will be grounds for setting aside the election whenever proper and timely objections are filed. Finally, the parties are restricted from using the voter list "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters."

We do not quarrel with the idea that it would be convenient for organizing unions to have some of the additional information that must now be provided under the Final Rule. However, it has long been established that the *Excelsior* requirements are satisfied based on the disclosure of employee home addresses, *and nothing more*. For instance, both the Board and the Supreme Court in *Excelsior* and *Wyman-Gordon*, respectively, refrained even from requiring the disclosure of employee home telephone numbers. Thus, the majority, by finding rights to additional information beyond what *Excelsio*r required, cannot then use *Excelsior* as the "policy bootstrap" to justify the additional information.

Moreover, it is well established that the Act "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it." *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958). The question is whether the majority has established, based on the record in this proceeding or on our experience with the current *Excelsior* list, that it is necessary for unions to have this information in the absence of adequate protection of employees' legitimate privacy concerns and with the expedited compliance burden imposed on employers. We think that the majority has clearly failed to make such a showing, and we explain each of our concerns in turn.

- Absence of Rational Justification. The majority bears the burden of showing that the Final Rule's *Excelsior* rule revisions are rationally justified and consistent with the Act. In the Final Rule, our colleagues maintain that personal cell phone communications and texting are essential means by which employees engage in organizing and concerted activity, which is the reason our colleagues expand the *Excelsior* disclosure requirements to require employers to disseminate available personal telephone numbers and email addresses. For example, our colleagues call personal phones "a universal point of contact today" and cite the "prevalence of cell phones, which are typically carried with adults on their person whether at home, at work or around town," which "now allows callers' messages to reliably reach their recipients" with "shocking" reliability and speed, "enhanced through text messaging, * * * the preferred mode of communication for many young people." Yet our colleagues have taken precisely the opposite view in *Purple Communications*, 361 NLRB No. 126 (2014),

where the majority insists that "social media, texting, and personal email accounts" are not even "germane" because they "simply do *not* serve to facilitate communication among members of a particular workforce" (emphasis added). Both justifications cannot be correct. Given the Board majority's holding in *Purple Communications*, supra, the Final Rule's justification for requiring the disclosure of personal employee phone numbers and personal email addresses cannot be considered rational. [655]

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[655] Our colleagues reason that no inconsistency exists between the Final Rule and *Purple Communications* – regarding the role played by social media in union organizing and related protected activities – because the Rule (which emphasizes the importance of smartphones and texting, for example) deals with communications involving "the union" and "other non-employer parties," whereas *Purple Communications* (which states these modes of communication are not even "germane") addresses "employee communications among themselves." We respectfully disagree with this distinction. Electronic communications and social media function in the same manner regardless of whether the user is an employee, a union organizer, or someone else. These communications also facilitate discourse to the same degree and with the same effectiveness, which means they cannot be "a universal point of contact" (quote from the Final Rule majority as justification for expanding mandatory *Excelsior* disclosures) at the same time these communications "simply do *not* serve to facilitate communication among members of a particular workforce" (quote from *Purple Communications* majority as justification for giving employees a statutory right to use employer email systems) (emphasis added). Although our colleagues justify the Final Rule's expanded *Excelsior* disclosures on the basis that "no practical way" may exist for unions or employees to obtain "email addresses, social media account information, or other information necessary to reach each other" (Final Rule, supra, quoting *Purple Communications*), this has already been disproven by the widespread use of social media, emails and texting, both in the workplace and in shaping world events. See *Purple Communications*, *supra* (Member Miscimarra, dissenting, at fn. 5).

Because the Final Rule's justification is irreconcilable with the Board majority's holding in *Purple Communications*, *supra* (as discussed in the text), and because we believe these revisions lack adequate privacy safeguards and our colleagues have unreasonably shortened the existing 7-day deadline for providing *Excelsior* list disclosures (which, among other things, would provide adequate time for the opt-out procedure described in the text below), it is unnecessary to address whether the revisions otherwise have sufficient support in the administrative record.

- Personal E-mail Addresses and Phone Numbers / Restriction on Use. In sum, the majority's message to employees in a Board representation election is that "the government wants your personal data –and we are going to compel it without your consent – and then we are giving it to someone else, too." To say the least, that is not a good message to give the citizenry in 2014.

The Final Rule fails to provide employees a reasonable opportunity to opt out from the disclosure of their personal contact information to other parties.[656] It also fails to provide that any petitioner-initiated electronic communications or phone calls would contain an "unsubscribe" feature that, if utilized, would prevent any further communications or calls from the petitioner and its agents. Finally, the Final Rule fails to provide, and cannot meaningfully provide, for specific appropriate restrictions and remedies regarding the use and misuse of voter list information. In declining to include these safeguards, the majority relies on the rationale set forth in *Excelsior* itself. There, the Board required the provision of employee names and home addresses to "all parties" (1) to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation" so employees may make a "free and reasoned [electoral] choice," and (2) to "further the public interest in the speedy resolution of questions of representation" by "eliminat[ing] the necessity for challenges based solely on lack of knowledge as to the voter's identity." *Excelsior*, 156 NLRB at 1240-43. According to the majority, advances in communications technology necessitate the

[656] Several comments support the inclusion of an opt-out procedure. See, e.g., Baker & McKenzie LLP; Council of Smaller Enterprises (COSE); Anchor Planning Group; SHRM II.

provision of employees' available personal contact information to serve and further these dual purposes. Thus, despite "employees' acknowledged privacy interests in the information that will be disclosed,"[657] our colleagues conclude that "the public interests in fair and free elections and in the prompt resolution of questions of representation outweigh employee privacy interests" and that it would be inconsistent with *Excelsior*'s concern for informed electoral choice "to begin allowing employees to opt in or opt out of [the] disclosures." We disagree.

Our colleagues posit that any invasion of employees' privacy is minimized because the required disclosures are limited in scope, recipients, permissible usage, and duration of use. Thus, they conclude that because the Final Rule does not "reveal employees' personal beliefs" or require the disclosure of what they apparently regard as more important private information, such as medical records or aptitude test results, it is a permissible invasion of privacy. In these times, when new reports of computer hacking, identity theft, and phishing scams surface daily, we are astonished that the majority fails to recognize that employees who may have provided their personal contact information to their employer would otherwise not want to share that information with anyone they do not know and trust. We seriously doubt that their privacy concerns will be assuaged by our colleagues' assurances that personal contact information will be disclosed to

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[657] The majority cites *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010), for its characterization of lobbyists' privacy interests in their e-mail addresses as "minor." However, the majority fails to mention the court's conclusion that it could "easily envision possible privacy invasions resulting from public disclosure of the email addresses" and that such e-mail addresses should only be disclosed under Freedom of Information Act ("FOIA") Exemption 6 when "a particular email address is the *only* way to identify the [lobbyist] at issue from the disputed records." *Id.* (emphasis in original).

representation case parties but not to the public at large. We note, for instance, that in a decertification election the employer would have to provide to the employee-petitioner the available personal contact information of fellow employees.[658] There are any number of reasons totally unrelated to the election campaign why those employees might be uncomfortable with this arrangement.[659]

Once the contact information is provided to a party, it does not disappear after election day. With respect to the limitations on its further permissible use and duration, the majority assumes the efficacy of its vague restriction limiting the use of disclosed personal contact information to "the representation proceeding, Board proceedings arising from it, and related matters." Although we acknowledge our colleagues' attempt to list particular types of Board proceedings presumably covered by this language, we are nonetheless troubled by the vagueness and potential breadth of "related matters." Beyond that, the Final Rule fails to specify any remedy for violating the restriction, promising only an "appropriate remedy" to be determined in case-specific adjudication "if misconduct is proven and it is within the Board's statutory power to do so." Proving such

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[658] Inasmuch as our colleagues assume that "a union seeking to persuade employees to select it as a bargaining representative would tend [not] to act coercively toward those employees," this assumption—regardless of its merits—ignores the possibility that employee-petitioners could act coercively.

[659] For instance, the decertification petitioner may have had conflicts with other unit employees inside or even outside of the workplace (e.g., domestic disputes/violence (HCP), stalking incidents, failed business dealings, etc.). Such other employees, fearing harassment, may therefore not want the petitioner to have their personal contact information. At least one commenter raised the concern that unqualified disclosure carries a general risk of employee harassment (IFA II). Another commenter expressed concern that the disclosure itself could cause intra-office conflicts (AAE).

misconduct may be difficult enough,[660] but the greater problem is that an effective remedy is probably not within the Board's statutory authority. The majority fails to guarantee – because it can't – to employees that the data won't be leaked or misused, whether intentionally or by error. In fact, in some cases, we know it will be leaked or misused, and the majority does not provide a serious sanction for doing so. Consequently, the Final Rule's restriction is meaningless. The opt-out and unsubscribe options we propose are therefore essential safeguards.

The majority counters with the argument that there is no evidence of voter lists being misused by non-employer parties in the nearly 50 years of the *Excelsior* requirement. Thus, they reason that our concerns and the need for safeguards are "entirely speculative." To the contrary, it is apparent that requiring the provision of a new type of information poses a new type of risk. The majority's rationale is tantamount to arguing the low incidence of accidents involving horses in the 19th century proved there would be a low incidence of accidents involving cars in the 20th century. Their attitude is blasé at best. As previously mentioned, the news is full of daily abuse stories relating to, e.g., disclosure of personal email addresses.[661]

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[660] For example, the Indiana Chamber of Commerce observed that a party alleged to have misused a voter list may claim that it obtained the misused information independently from another source, and thus was not "using" the voter list at all, let alone for a restricted purpose (IN Chamber). Our colleagues miss the point in dismissing this concern as a "question of fact for the factfinder" in a particular case. The Indiana Chamber's valid concern is that an employer would find it extremely difficult, if not impossible, to prove misuse of a voter list to a fact finder.

[661] See, e.g., Shelly Banjo, *Home Depot Hackers Exposed 53 Million Email Addresses*, WALL STREET JOURNAL, Nov. 6, 2014, http://online.wsj.com/articles/home-depot-hackers-used-password-stolen-from-vendor-1415309282. As for the majority's suggestion that employees' personal contact information is unlikely to be misused, see

Our colleagues also assume that providing an opt-out procedure for employees would be inconsistent with the Board's reasoning in *Excelsior* that "the access of *all* employees to [election-related] communications can be insured only if all parties have the names and addresses of all the voters." *Excelsior*, *supra* at 1241 (emphasis in original). Of course, that basic assurance of communication access remains unchanged today. Employees' names and addresses are required to be disclosed without restriction, regardless of any privacy concerns that might apply. Further, those privacy concerns are fundamentally different from those attendant to email and phone contact information. A home is a readily identifiable, fixed physical point of geography that people in the public can typically visit, independent of the disclosure of address. An email address is a thing entirely created by the employee who thus has more of a privacy interest and it is typically not identifiable at all without the consent of the employee; and a personal phone number is also created, in part, by an employee, who gets to determine whether or not it is publicly listed and thus identifiable at all. Any limited and neutral opt-out provision for these additional means of access cannot be deemed to disrupt the balance struck in *Excelsior*.

Our colleagues' other objections to opt-out procedures are similarly misplaced. Thus, the majority speculates that an opt-out process would require too much "extra time" (a too-familiar refrain) for employees to decide whether to disclose their personal contact information and for employers to implement that decision, thereby exacerbating election delay. They further speculate that an employer-administered opt-out process

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Cedars-Sinai Medical Center, 342 NLRB 596 (2004) (setting aside election based on telephonic threats of violence).

would engender new areas of costly litigation arising from "accusations of improper employer coercion" in influencing employees to opt out of disclosure. Finally, the majority suggests that because an opt-out process "could not be administered in a blind fashion," the resulting employer knowledge of who opted out would "require the invasion of employee privacy in the name of protecting employee privacy."

In our view, none of the majority's criticisms would preclude the administration of a workable opt-out procedure that we could support. The employer could be directed to post and provide notices and opt-out forms to all employees at the time initial and final election notices are distributed (recipients of the forms accompanying the initial election notice could be identified based on the preliminary voter list). Employees who wished to opt out could be directed to submit their completed forms to the Region prior to the existing 7-day *Excelsior* list deadline, which, in our view, should be retained without change. The Region could retain responsibility for distributing the *Excelsior* list, from which the Region, before serving the list on the petitioner and any intervenor, could easily redact personal contact information relating to those employees who opted out. The Region could administer the opt-out process in a simple, efficient manner that minimizes administrative burdens without delaying the election. And the employer would not know which employees, if any, had opted out. Federal and state courts commonly use nearly identical opt-out procedures, for example, to protect third parties' privacy interests in class action cases. In our view, no pejorative message would be associated with this type of procedure – administered by the neutral agency overseeing the election – and we believe the majority's argument otherwise is plainly without merit. Nor would such an opt-out procedure reveal either to the employer or union an employee's sentiments

regarding representation, since the opt-out information would be available only to the Region, and there is no necessary correlation between an employee's sentiments regarding union representation and his or her individual preference regarding dissemination of personal contact information.

The majority sees no need to permit employees to "unsubscribe" from petitioner-initiated electronic communications or phone calls. They observe that such an option "would do nothing to allay privacy concerns" occasioned by the employer's initial mandated disclosure of employees' available personal contact information. This observation would be accurate were the unsubscribe option to be the sole means for protecting privacy interests. In our view, however, any such option would at least have to work in tandem with a reasonable initial opt-out procedure. Thus, employees who decided not to opt out of the initial disclosure could later decide to stop receiving a petitioner's messages by personal e-mail or phone call. In any event, employees continue to have a privacy interest in their personal contact information even after the initial disclosure.

Our colleagues assure that an unsubscribe option is unnecessary because "some" unions voluntarily provide this option anyway. If this is the case, then we have before us proof that such a procedure is reasonable and can be workable. And if, as our colleagues claim, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act")[662] and Federal Trade Commission's Do-Not-Call Rule[663]

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[662] 15 U.S.C. 7704.

[663] 16 CFR part 310.

"may already impose" a similar requirement for an unsubscribe option, we see no harm in making this requirement explicit and clear as applied to voter lists under Board law. Indeed, the Final Rule codifies the *Excelsior* rule's requirement that employers provide voters' names and home addresses even though this rule has stood for nearly 50 years without previously being codified.

- Timing. As stated above, the Final Rule dramatically shortens the time for production of the voter list from the current 7 calendar days to 2 business days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction of election. The 2-business-day maximum time limit, with the possibility of setting aside an election for failing to comply, is far too short a time period for a number of reasons. First, this timeframe is insufficient given the significant variation that exists among different potential bargaining units (e.g., large unit size,[664] multi-site units[665]). Second, certain industries and job classifications that have historically been recognized as involving substantial complexity (e.g., construction,[666] education,[667] entertainment, and contingent or regular part-time or on-call employees in, *inter alia*, the healthcare industry[668]) will routinely need more than 2 business days to finalize a voter list. Third, the majority's timeframe is unrealistic given the cumulative effect of the other

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[664] See, e.g., Sheppard Mullin; AHCA; AHA.

[665] Such units may commonly occur within employers with decentralized operations. See, e.g., ACE; Con-Way.

[666] See, e.g., ABC II; AGC II.

[667] See ACE.

[668] See, e.g., AHA II.

accelerated time frames included in the Final Rule.[669] Fourth, the rush to comply with the 2-day time limit for production of the *Excelsior* list can reasonably be expected to produce more inaccuracies in the substantially greater information that must now be provided. Inasmuch as inaccuracies can be the basis for setting aside an election upon the timely filing of an objection,[670] the Final Rule will likely make more rerun elections necessary when a union fails to secure a majority vote in the first election.[671]

Our colleagues largely dismiss these concerns. Primarily, they assume that advances in recordkeeping, retrieval, and record transmission technology warrant the reduction in time for production to 2 business days for all employers in the interest of "expeditiously resolv[ing] questions of representation." We can readily concede that *some* employers may be able to comply with the new 2-day deadline for production of the expanded *Excelsior* list, but the record falls far short of establishing that all, or even most, employers will be able to do so, particularly those who lack modern technology or who operate in industries with complex eligibility formulae.

- Excelsior Disclosures – Summary. The majority relies on a bundle of assumptions to justify its rejection of the need for any privacy safeguards and its insistence that it is not onerous to require all employers to provide the expanded list in

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[669] See, e.g., Bluegrass Institute; GAM; Sheppard Mullin; AHA.

[670] See, e.g., *Mod Interiors, Inc.*, 324 NLRB I64 (1997) (setting aside election where *Excelsior* list contained a significant number of inaccurate addresses).

[671] As previously noted with respect to the required posting of the initial election notice, our colleagues seem greatly concerned with expediting the electoral process in general, but the possibility of delay from this second-chance failsafe opportunity apparently escapes such concern.

just 2 days. None of those assumptions bears a rational relation to the factual record before us or to statistically proven probabilities.

What remains of the majority's rationale is quite familiar. With respect to privacy concerns, they say that "[w]ithout minimizing the legitimacy of the concerns underlying these comments, we conclude for the reasons that follow that the public interests in the fair and free choice of bargaining representatives *and in the expeditious resolution of questions of representation* outweigh the interests employees and employers have in keeping the information private." With respect to the 2-day deadline, they reason that "[s]hortening the time period from 7 calendar days to 2 business days will help the Board *to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided*." It is readily apparent that the irrational need for speed in the pre-election period is the primary motivation for rejecting any impediment to shortening that period, even the allotment of a just a few extra days to allay significant privacy concerns and to facilitate employers' accurate and timely compliance with the new *Excelsior* list requirements.

(h) *No Change in Blocking Charges and Resulting Delays – The failure to change the Board's blocking charge policy perpetuates lengthy delays, and making it part of the Rule will impede future changes.* As fully discussed in Section B below, the Final Rule fails to address the statistical "long tail" of representation cases that have actually been shown to account for a large portion of overall delay in representation case processing. Cases involving application of the current blocking charge policy are a major part of this

"long tail."[672] Also, as indicated in the NPRM, the blocking charge doctrine has not previously been codified in the Board's formal Rules. In the Final Rule, however, the blocking charge policy is being retained – with the most minimal modifications – and it is being embedded in the Final Rule itself. This is retrenchment, not progress.

As stated in Section 11730 of the Board's Casehandling Manual for Representation Proceedings, "[t]he Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted." However, the manual admonishes that "the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process."

The sense that the Board's blocking charge policy causes problems in case processing is hardly a new concept.[673] The Board has acknowledged the reality that its blocking charge policy can be improperly overutilized. See *Shaw's Supermarkets*, 350 NLRB 585, 589 (2007) (noting with respect to decertification petitions that "in many

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[672] As noted by the majority, a study conducted by commenter and Professor Samuel Estreicher of data pertaining to blocking charges filed in 2008 determined that the filing of blocking charges in a case increased the time to an election, on average, by 100 days. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 ABA J. LAB. & EMP. L. 1, 9-10 (2009).

[673] See, e.g., Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* LABOR LAW JOURNAL, Vol. 39, No. 10 (October 1988). The author was for many years director of the Board's Office of Representation Appeals.

cases, blocking charges are filed and delay the election until the charges are resolved one way or another"). Indeed, multiple comments describe experiences where unions filed unfair labor practice charges to block an upcoming decertification election that such unions concluded they were likely to lose.[674] Our colleagues thus rightly acknowledge that "incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections." We would add that unions filing initial election (RC) petitions may likewise file meritless blocking charges to delay an election and buy additional time for campaigning and shoring up support where electoral defeat appears likely. Of course, many unfair labor practice charges that currently block an election may have merit, or at least warrant litigation, just as many unit eligibility and inclusion issues raised by employers may have merit or warrant litigation. We wish our colleagues paid as much attention to the potential for unacceptable election delay from the former as they do to the latter.

The Final Rule adopts from the NPRM and codifies certain evidentiary requirements applicable when a party requests than an unfair labor practice charge block the processing of an election petition. Specifically, the requesting party must "simultaneously file [with the Board], but not serve on any other party, a written offer of proof in support of the charge * * * * provid[ing] the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony." Further, the party must "promptly make available to the regional director the witnesses identified in its offer of proof." The Final Rule does not otherwise modify the extant

[674] See, e.g., NRTWLDF; Chamber II; COLLE; CDW II.

blocking charge policy. Our colleagues' stated purpose in adopting these requirements is "to protect against abuse of the blocking charge policy by those who would use the unfair labor practice procedures to unnecessarily delay the conduct of elections."

Although the Final Rule's modest reforms to the blocking charge policy are arguably improvements over the status quo in the pre-complaint investigatory stage,[675] they do not, standing alone, adequately address the frequent substantial delay in processing election petitions caused by blocking charges. In particular, we believe that the overbreadth of the current policy causes unacceptable delay in the conduct of elections even when the charge filing is not itself abusive of process.

As indicated in Section 11730.1 of the Representation Casehandling Manual, "[b]locking charges fall into two broad categories. The first, called Type I charges, encompasses charges that allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges that allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself."[676] In the Type I situation, unless the filing party requests that the election proceed, a petition is held in abeyance until the charge is dismissed or withdrawn, or if found meritorious, until final resolution of the ensuing unfair labor practice complaint litigation, which could take years. In the Type II situation, a merit determination will ordinarily result in the petition's dismissal.

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[675] We say "arguably" because, as the majority notes, the General Counsel already accords "highest priority" to investigating blocking charges.

[676] Casehandling Manual Sec. 11730.1.

In our view, experience has shown the Board should refrain from holding petitions in abeyance for Type I blocking charges. Current policy represents an anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs outside the critical election period, would nevertheless be the basis for substantially delaying holding any election at all.[677] Further, we find it paradoxical that the filing party, almost invariably a union in the blocking charge context, may control the timing of an election by requesting that it proceed. Objectively, if the Board's stated intention in the blocking charge policy is "to protect the free choice of employees in the election process,"[678] it does not make sense for one party – in this case, the union that chooses to file a charge – to control whether or when employees exercise that choice by participating in the election.

Even with the new pre-complaint evidentiary requirements, we also oppose having the blocking charge policy codified in the Board's formal Rules. In this regard, we do not believe the Final Rule articulates a sufficient basis for incorporating the blocking charge doctrine, particularly since the Final Rule does not otherwise adopt any of the substantial potential changes referenced in the Proposed Rule, and codifying the policy is likely to impede or preclude further changes or improvements in this important area. At a minimum, we favor keeping the blocking charge policy out of our formal Rules during a 3-year trial period in which petitions will be routinely processed and elections conducted in Type I blocking charge cases, with the votes thereafter impounded, even in cases

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[677] *Ideal Electric Mfg. Co.*, *supra* (to be found objectionable, alleged conduct must occur in critical period between petition and election dates).

[678] Casehandling Manual Sec. 11730.

where a regional director finds that there is probable cause to believe an unfair labor practice was committed that would require the processing of the petition to be held in abeyance under current policy. The Board would then have empirical evidence for evaluation of the need for permanent amendment of the policy, weighing any benefits in eliminating protracted delay in the conduct of elections against possible risk to the exercise of employee free choice.

Our colleagues decline to substantively modify the blocking charge policy principally because, as they claim, "holding a tainted election results in damage beyond that caused by the employer's unfair labor practices, which damage cannot be fully remedied simply by conducting a rerun election." Again, speaking only in reference to Type I cases—those *not* involving conduct that necessarily taints the petition process—it remains possible, even if the election takes place, for the union to file post-election objections and charges, causing the election to be set aside, followed by a rerun election. This remains the standard Board approach to election-related misconduct during the critical period. Given our colleagues' relentless focus on conducting elections as soon as possible – in literally every other context addressed in the Final Rule – it is irrational and self-defeating to retain the blocking charge doctrine, which prevents many elections from taking place *for years*.

In sum, the Final Rule's incorporation of the current blocking charge policy with minimal pre-complaint changes provides nothing of meaningful value and leaves completely unaffected the enormous delays caused by this policy. Codifying the policy, without meaningful change, makes even more difficult the future prospect of giving this policy the serious attention and substantial reforms that, in our view, are warranted.

B. The Final Rule Still Fails to Target Election Cases that Involve Too Much Delay.

The NLRA involves more than procedures in representation cases. The Act's *substance* consists of important election-related rights, obligations, and constraints, including the prohibition against restraint or coercion by employers or unions regarding any employee's exercise of protected rights.[679] In our NPRM dissent, we noted the absence of proposals directly addressing the commission of unfair labor practices during an election campaign. Still, the Final Rule makes no overt changes regarding the Board's treatment of unlawful election conduct by employers or unions. That is a matter for another day, say our colleagues. However, it is well known that many union advocates have argued for greatly expedited representation elections based on alleged employer misconduct that, it is claimed, adversely affects the outcome.[680] They maintain that the longer the pre-election period is, the greater is the potential for such misconduct to take place. Notwithstanding the majority's disclaimers, the absence of a rational justification for so many of the revisions discussed above that concentrate on the acceleration of the pre-election stage of representation case proceedings makes it difficult, if not impossible, to avoid the conclusion that the majority accepts the unions' argument and that the Final Rule's focus on the need for speed is compelled by this argument.

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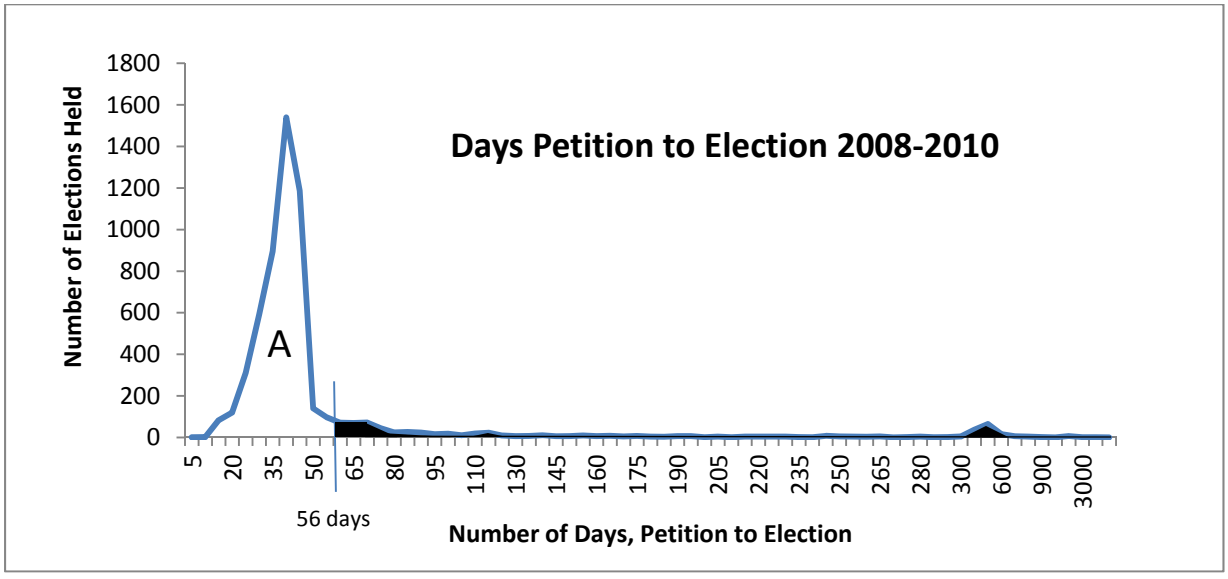
[679] See Sec. A.2., *supra*.

[680] These arguments were referenced in the preamble accompanying the now-vacated final election rule issued in December 2011. See 76 FR 80138 (2011) (prior final rule regarding representation case procedures with explanatory preamble). The preamble noted that many labor organizations cited research studies indicating that shorter election periods would result in "fewer unfair labor practices," although the preamble also acknowledged that various management-side organizations "question[ed] the validity of such studies." *Id*. at 80149 n.33.

Furthermore, to the extent that the Final Rule seeks to address unacceptable election delay, the objective evidence shows such delay occurs, at most, in only a very small percentage of Board-conducted elections. These relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.

The graph below, based on a breakdown of all NLRB initial elections conducted between 2008 and 2010, is republished from our Proposed Rule dissent and still illustrates this point. In more than 90 percent of those cases, elections occurred within 56 days after the filing of the petitions (these cases are reflected in the graph area appearing in white, marked "A"). As noted previously, this represents a dramatic improvement over the Board's track record since the early 1960s. Conversely, less than 10 percent of the cases identified in the graph involved elections that occurred more than 56 days after petition-filing (these delayed cases are reflected in the graph area shaded in black, which is barely visible, to the right of the 56-day line).



The case distribution in the graph shows there is no evidence of delay evenly apportioned across the universe of Board-conducted elections, i.e., delay affecting a large

group of cases to a significant degree. In fact, the graph is far from a standard bell curve; it does not show *any kind of significant distribution of cases greater than 56 days* between petition-filing and election.[681] We are not the first to note this wildly uneven statistical distribution in the context of an asserted "systemwide delay" problem. An earlier study addressing the same distribution findings accurately described the scattering of cases along the extended time continuum beyond 56 days as the "long tail" of election cases.[682] In other words, empirical data seem to disprove the existence of a systemwide delay problem, and instead demonstrate that delay is only an issue confined to a discrete minority of cases, possibly for issues unique to those cases.

The Final Rule contains many references to increased speed and efficiency, but fails here by making no differentiation between the overwhelming majority of elections that already take place quickly and the relatively small number that do not. Instead, the Final Rule rewrites the procedures that govern *all cases*, the overwhelming number of which *already* take place quickly.

Suppose, for instance, that the U.S. Fish and Wildlife Service had a mandate to stop the poaching of manatees, which reside almost exclusively in Florida.[683] It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most

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[681] As noted previously, 56 days is the Board's own traditional target for conducting at least 90 percent of elections, a target that the Board has surpassed in recent years. See notes 560-562, *supra*, and accompanying text.

[682] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, *1999-2004*, 62 INDUS. & LAB. REL. REV. 3, 10 n.9 (Oct. 2008).

[683] Manatees, sometimes known as "sea cows," are large aquatic marine mammals considered to be relatives of the elephant. *See* http://en.wikipedia.org/wiki/Manatee; http://www.defenders.org/florida-manatee/basic-facts. The Florida manatee is Florida's state marine mammal. *Id*.

states do not even have bodies of water where manatees live. This is precisely the approach reflected in the Final Rule. It applies almost entirely to elections that do *not* involve significant delay, while failing to identify and target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

As we have repeatedly stated in this opinion, every federal agency has a legally mandated responsibility to take action that bears a rational relation to relevant facts and the matters being addressed.[684] In this respect, even putting aside the many ways in which the Final Rule is contrary to statutory mandates (see Part A above), it creates poor public policy and is not rationally related to the genuine problems of delay in case processing. At a minimum, there needs to be a better fit between rulemaking in this important area and any problems that ostensibly warrant Agency action.

In Section D below, we suggest rulemaking changes that would represent significant progress addressing the unacceptable delay in the "long tail" of representation cases. If our colleagues wish to immediately reduce the number of overage representation cases, they need look no further than the Board's own pending caseload. As of October 1, 2014, the beginning of Fiscal Year 2015, there were 33 pre-election representation cases pending before the Board *for over a year*, 4 of which have been pending *for over 3 years*. Nothing prevents the Board from adjusting its own internal procedures – combined with due diligence, effort, and commitment, rather than rulemaking – to resolve all of these cases, and to ensure that *every* future representation case is timely resolved. Indeed, the

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[684] *State Farm, supra*, 463 U.S. at 43.

countless number of hours spent by Board personnel in rulemaking might much better have served the purpose of expeditiously processing representation cases by attending to this problem. In Part D below we identify measures that, in our view, would accomplish these objectives and otherwise improve representation procedures consistent with the Board's responsibilities under the Act.

C. The Final Rule Still Does Not Reflect A Comprehensive *De Novo* Examination of Important Election Issues.

We credit our colleagues for affording the opportunity to have renewed public comment on the republished NPRM. Further, we recognize that they have made some changes in the Final Rule that we support. For example, (1) the Final Rule abandons the proposal to eliminate pre-election requests for review and pre-election requests to stay the election, which the statute requires the Board to permit; (2) the Final Rule recognizes to some degree that the Act does not permit hearing officers even to make "recommendations" regarding election issues (although we believe these changes do not adequately cure the improper vesting of controlling authority in hearing officers);[685] (3) some restrictive provisions pertaining to the new Statement of Position and issue preclusion requirements have been modified;[686] (4) the 20 percent evidence-exclusion

[685] Section 9(c)(1). For example, the Final Rule ostensibly places authority in regional directors to exclude evidence (which conclusively precludes review by the regional directors and the Board regarding excluded matters), but it remains clear that hearing officers – not regional directors – preside over the hearing; and we believe the exclusion of evidence regarding issues like voter eligibility will improperly limit the scope of the hearing, contrary to Section 9(c)(1)'s "appropriate hearing" requirement. The Final Rule, therefore, will predictably cause litigation over hearing officer rulings that exceed what is permitted by Section 9(c)(1) and *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994).

[686] In the Final Rule, a non-petitioning party can now modify a Statement of Position "for good cause"; the inapposite use of the term "joinder" is eliminated, as is inapposite reliance on language drawn from the summary judgment standard in Federal Rule of

rule is no longer a mandatory standard; (5) the proposal to state in the Rule that parties have a maximum of 5 days to move to quash a subpoena has been abandoned;[687] and (6) the expanded *Excelsior* list disclosure requirements do not mandate employers to furnish the work email addresses and work phone numbers of eligible voters.[688]

However, the Final Rule clearly retains essential elements from the Proposed Rule that the Board issued in June 2011, which generated more than 65,000 sets of written public comments, with a further 66 individuals representing nearly as many different organizations making oral presentations to the Board. It is true that our colleagues incorporated by reference the entire administrative record of the 2011 rulemaking, including "numerous arguments both for and against the proposals,"[689] rather than requiring the public to resubmit the same comments. And the Proposed Rule stated "[a]ll of this material will be fully considered by the Board in deciding *whether* to issue any final rule" (emphasis added).[690] However, we believe the Board should have considered this voluminous material *before* determining the contours of the 2014 Proposed Rule.

Civil Procedure 56; contested issue requirements are revised to expressly exempt from preclusive effect a party's ability to challenge the eligibility of any voter during the election; and the mandate to require offers of proof on a potential issue prior to the introduction of testimony is eliminated.

[687] We nevertheless strongly disagree with the suggestion that limited caselaw supports a Board practice permitting a region to regire the filing of a motion to quash in less than 5 days. Such a requirement would be in direct conflict with the express language of Section 11(1) of the Act, which mandates a minimum of 5 days for a motion to quash.

[688] The significance of this revision is limited, due to our colleagues' determination that employers must ordinarily allow their employees access to work email systems to engage in organizational activities. See *Purple Communications, supra*.

[689] 79 FR at 7318.

[690] *Id*.

Having reviewed the earlier material and more recent additional comments and oral presentations, we believe the Board should have published an amended Proposed Rule for further comment. Even putting aside our disagreements with the Final Rule, the scope of the proposed changes combined with the voluminous, diverse comments received by the Board make it advisable, at the least, to do now what we believe our colleagues should have done when, in February 2014, they republished the 2011 NPRM.

The Board is an independent agency, first and foremost. We would serve the public better by "listening first, formulating later" instead of "formulating first, listening later." Once the NPRM issued anew, it necessarily reflected a conscious set of public policy choices or preferences. Just as the exchange of views during bargaining leads to improved outcomes and furthers industrial peace, so does engagement with the public in rulemaking. The Act itself disfavors the assumption that there is a "perfect initial offer" leaving nothing to discuss. See *General Electric*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970).

From the beginning of this particular era of a confirmed five-Member Board in August 2013, we already had before us an enormous record in this rulemaking proceeding. Further, there was an apparent commitment to proceed with rulemaking. Why, then, would it not have been preferable to review what was not definitively reviewed until later? In the 6 months before republication of the original NRPM in February 2014, there was ample opportunity to consider and include the revisions discussed above in a new, modified Proposed Rule. The modified NPRM would have represented an appreciable midpoint for further comment in this proceeding, a far preferable alternative to the first disclosure of revisions in the Final Rule without further

opportunity for public comment. The republication of the original NPRM could not help but convey the impression that the Board majority was set on an intractable course. The issuance of this Final Rule, presenting no opportunity for revisions of the NPRM's proposals, does not alter that impression.

The conduct of elections lies at the heart of the Board's statutory responsibilities, and the rulemaking path taken by the current Board to this point is far too suggestive of a fait accompli. Inasmuch as there will be no opportunity for public comment on the Final Rule, it falls to us to discuss its provisions in the foregoing sections of this opinion and, in the next section, to explain why it would be far better to take a different approach.

D. The Path Not Taken.

We support rulemaking if it is necessary to address relevant issues consistent with the Board's authority and the Act's requirements. We join our colleagues in their overall desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We fully agree that the Board should do everything within its power to conduct representation elections in a way that gives effect to employee free choice. And we agree that the Board should work aggressively in carrying out its statutory responsibilities to everyone covered by the Act.

Our opposition to the Final Rule stems from its variance from choices already made by Congress, in addition to provisions that predictably will cause unfairness and adverse consequences for many parties. The most important threshold question to answer – still not adequately explained in the Final Rule – is whether and why such expansive rulemaking is necessary at all. As the Supreme Court has stated, a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will

carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."[691]

Regarding the substance of the Final Rule, we believe there would be broader support, substantially less opposition, and greatly enhanced prospects for judicial enforcement if the Final Rule took a more limited, better defined, and less potentially disruptive form that had unanimous support among Board members. We believe reasonable changes incorporating the following elements, had they been accepted by our colleagues, would also have broad-based support among scholars, practitioners, and advocates for employees, unions and employers.

1. Address the "Speed" Issue. For the reasons stated in our dissent to the Proposed Rule,[692] we believe it is important that the Board provide guidelines regarding reasonable minimum and maximum times between the filing of a representation petition and the holding of the election. The majority continues to reject this suggestion, focusing almost exclusively on their objection to the setting of a minimum time. In their view, such an action is not necessary to accord with Congressional intent or to assure against infringement of free speech rights. As we have discussed at length, we disagree with the majority on these critical points.

We believe it would be reasonable to have a *minimum* guideline time period between 30 and 35 days from petition-filing to election. This would be consistent with the indications that Congress intended that employees should have no fewer than 30 days

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[691] *Atchison, T. & S. F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973).

[692] 79 FR 7340, 7344, 7347.

between petition-filing and an election to become familiar with relevant issues.[693] This standard would also permit other reasonable efforts to streamline election procedures, while retaining the 7-day period for having post-hearing briefs and a reasonable time for parties to file pre-election requests for Board review of regional director decisions and actions.

We also believe to the Board should establish a *maximum* guideline period of 60 days from petition to election, unless the Board or the regional director (subject to Board review) determines that unusual circumstances preclude holding the election within this 60-day timeframe. As previously discussed, 90 percent of Board elections are already held within 56 days or less after a petition is filed. With few exceptions, we believe a 60-day maximum represents a rational and attainable standard for all elections.

2. Address the Specific Issues Responsible for Delayed Elections. As noted above, there have been particular cases—few in number—where elections and related issues have taken too long to resolve. Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Final Rule should directly address the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay (depicted as the statistical long "tail" in the above graph).

Again, a prime candidate is the Board's "blocking charge" doctrine (which permits parties to indefinitely delay an election by filing certain unfair labor practice charges, addressed in our recommendation no. 3 below). More generally, there is no lack of data regarding factors that may have contributed to the relatively small number of

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[693] See note 576, *supra*, and accompanying text.

cases involving too much time. This data should be carefully examined, with a view towards targeting the problem cases, rather than reformulating the procedures governing all elections.

3. Reform the Board's Internal Procedures So Election Issues Are Addressed More Quickly, and Eliminate Blocking Charge Deferrals for a Three-Year Trial Period. One of the biggest contributors to the delays associated with resolving election-related issues is the time that particular cases are pending before the Board, rather than in regional offices. The Final Rule does not foreclose changes in the Board's internal election case-handling procedures, but the Final Rule's expansive rewriting of the rules govering all elections – before the Board explores improvement in its own election case-handling – obviously undermines any argument that the Final Rule's changes are necessary.

The far better approach, in our view, would be for the Board to exhaust – or at least attempt – reasonable improvements in its own election casehandling practices, possibly combined with targeted changes, such as the 3-year trial period for "blocking charge" reform that we advocate. This change and similar targeted improvements could result in having nearly all elections occur between 30 and 60 days after petition-filing, while obviating the need to change other election procedures that are well known and have well served parties and the Board for many decades.

4. Aggressively Pursue Measures to Prevent and Remedy Unlawful Election Conduct. To the extent that unlawful employer or union conduct occurs during any election, this is already prohibited by the Act, and we continue to support aggressive Board enforcement and the formulation of effective remedies, including the pursuit of

civil and criminal contempt sanctions to the extent available under the Act and federal law. We continue to believe one of the greatest deficiencies in the Final Rule is its failure to address these substantive issues in any meaningful way. The Act deserves to be enforced by the Board, and to be respected by the parties, as much as any other federal or state legal requirements. See, e.g., *HTH Corp. d/b/a Pacific Beach Corp*., 361 NLRB No. 65 (2014) (addressing enhanced remedies and various Board member views regarding recurring unfair labor practices). Of course, the Board may not presume the existence of unlawful conduct, and much of the Board's statutory responsibility involves the adjudication of unfair labor practices if they are alleged. However, when violations of the Act occur, including instances where they affect elections, they should be dealt with promptly and aggressively by the Board, and we support further consideration of ways in which employer or union violations can be more effectively remedied.

5. Deal with the Need to Preserve and Enhance Privacy. Although the Proposed Rule solicited public input concerning the safeguarding of privacy interests regarding personal information, and the possibility of giving employees the opportunity to choose whether and how any personal information might be disclosed, the Final Rule dispenses with any meaningful effort to address these concerns.

6. Summary. Under the *State Farm* "arbitrary and capricious" standard, an agency engaged in policymaking has "a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives."[694] This is

[694] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

particularly so where, as here, "the choice embraced suffers from noteworthy flaws."[695] To that end, we regret that our colleagues would not consider enacting a limited final rule and implement other procedural changes outside the rules.

CONCLUSION

The Final Rule represents the culmination of a rulemaking process characterized by discontinuity, a near-complete change in the Board's composition, an unprecedented number of comments espousing widely divergent views, and the rewriting of virtually all procedures governing Board-conducted representation elections. The end result has been predictable only in its nearly complete conformity to what the Board originally proposed. In this regard, we believe the Final Rule is inconsistent with the Act and Congressional intent. It fails to provide adequate protection of employee rights of free choice and privacy and of all employees' and parties' rights of free speech and procedural due process. Although our colleagues go to great lengths to suggest the Final Rule's amendments do nothing more than reflect best practices and respond to changing times, we are not convinced. "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice."[696] Necessarily, the Board itself has a statutory obligation to "remain 'wholly neutral' as between the contending parties in representation elections."[697] Unfortunately, the inescapable impression created by the Final Rule's

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[695] *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

[696] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973).

[697] *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985).

overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.

The Board would better serve employees, unions and employers – and the public interest in general – by undertaking a more neutral, limited and even-handed approach, which would focus on specific problems in our representation procedures and formulate targeted solutions. Under our existing procedures, the Board has been extremely successful, with very few exceptions, in conducting elections and resolving all election issues without significant delay. We support reasonable efforts to make the Board's representation procedures as fair and effective as possible. However, we believe this is not accomplished by the Final Rule. Accordingly, for the reasons stated above, we respectfully dissent.

VIII. Comments on Other Statutory Requirements

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601 *et seq*., requires agencies to prepare a regulatory flexibility analysis if the regulations will have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking").

The RFA only requires analysis of a rule, however, where notice and comment

rulemaking is required. 5 U.S.C. 604(a). The provisions of this final rule are generally procedural and could have been promulgated without notice and comment under the APA, 5 U.S.C. 553(b)(3)(A) ("this subsection does *not* apply * * * to interpretative rules, general statements of policy, or *rules of agency organization, procedure, or practice*) (emphasis added).[698] These procedural provisions change the manner in which parties present themselves or their viewpoints to the Board in one category of cases, but do not alter the rights or interests of the parties. *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) ("A useful articulation of the [APA's] exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."). Despite its use of notice-and-comment procedures, and RFA certification, to promulgate and amend the rules here, the Board has not waived the exemption, because voluntary compliance with procedures will not operate as a waiver of the exemptions. *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1059 n.12 (5th Cir. 1985); *Malek-Marzban v. Immigration & Naturalization Serv.*, 653 F.2d 113, 116 (4th Cir. 1981); *Washington Hosp. Ctr. v. Heckler*, 581 F. Supp. 195, 199 (D.D.C. 1984).[699]

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[698] In the Board's judgment, only the changes pertaining to contact information provided in the voter list may arguably be considered substantive. Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (assuming *arguendo* that the *Excelsior* list requirement is a substantive rule). As discussed below, the cost of including additional information in the voter list is not significant under the RFA. The codification of extant blocking charge policy in the regulations may also be considered substantive, but mere codification imposes no costs on small business, and the only changes to blocking charge policy are clearly procedural.

[699] This conclusion is in contrast to those cases in which courts have found that agencies have expressly waived an APA exemption by publishing a rule or regulation stating that it will only use notice-and-comment procedures to promulgate or amend its regulations

Nevertheless, in the interests of providing the public with additional information regarding the rule's effects, as a matter of discretion, the Board is providing the analysis contemplated by Section 605 of the RFA for the entire rule.

Under Section 605, an agency is not required to prepare a regulatory flexibility analysis if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). To so certify, the agency must publish the certification in the Federal Register and include "a statement providing the factual basis for such certification." *Id.*

In its Notice of Proposed Rulemaking, the Board determined that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of 5 U.S.C. 605(b). 79 FR 7349-7350. There, the Board invited comments from the public regarding the entire rule, including this certification. *Id.* at 7318. The Board has reviewed those comments and has concluded that certification remains appropriate. Accordingly, the Board's Chairman hereby certifies to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") that the amendments will not have a significant economic impact on a substantial number of small entities.

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regardless of whether an APA exemption is applicable. See, e.g., *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 447-448 (9th Cir. 1994) (Department of Housing and Urban Development adopted requirements for notice and comment rulemaking in 24 CFR 10.1 and expressly waived APA exemption); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1084 nn.103 & 104 (D.C. Cir. 1978) (Department of Health, Education and Welfare expressly waived APA exemption in 36 F.R. 2532 adopting notice-and-comment procedures); *Rodway v. Dep't of Agriculture*, 514 F.2d 809, 814 (D.C. Cir.1975) (express waiver of APA exemption by Department of Agriculture at 36 FR 13804). The Board has published no such rule or regulation requiring such procedures for amendment of its rules.

The Chamber asks the Board to provide more detailed calculations and cost estimates for its certification. Similarly, other comments including those from NAM, CNLP, COLLE, COSE, NFIB, AEM, and NRF expressed concern that the Board underestimated the economic impact of the rule in its certification. The Board believes that the NPRM's certification was adequate, but seeks to be responsive to comments received. To that end, the Board will provide the more detailed analysis of the economic impact of the regulation below.

The analysis supports the Board's conclusion. As the analysis will show, the provisions of the final rule will cause less than one small entity per year to incur a significant economic impact. This is not a substantial number of small entities.

We start with a few key definitions. The RFA does not define either "significant economic impact" or "substantial number of small entities." 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's economic impact. The agency is in the best position to gauge the small entity impacts of its regulation." SBA Office of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act" ("SBA Guide") at 18, http://www.sba.gov/sites/default/files */rfaguide_0512_0.pdf*.

The Board has assessed "significant economic impact" upon a small entity by examining whether increased costs under the rule exceed 1% of that entity's estimated gross annual receipts. This determination is consistent with guidance from the SBA's Office of Advocacy, which indicates that a cost might be significant if "the costs of the proposed regulation * * * exceeds 1 percent of the gross revenues of the entities in a

particular sector." SBA Guide at 19.

The Board has determined that a rule impacts a substantial number of small entities when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities. This determination is equal to assessments in regulations promulgated from the Department of Labor, see, e.g., *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 FR 10038, 10144 (2012).

The Board has used the definitions of small entities promulgated by the United States SBA. See U.S. Small Business Administration, "Small Business Size Standards," *http://www.sba.gov/content/small-business-size-regulations*. For this analysis, the Board applied information from the North American Industry Classification System (NAIC) to its most recent data on representation petitions.[700]

With these definitions in mind, we first consider the costs that entities that are not party to a representation case proceeding may choose to voluntarily incur. Second, we consider the changes generally relating to filing or responding to a petition, and the new costs associated with these changes. Third, we consider the costs impacting only a small number of proceedings. Finally, we summarize changes which impose no new costs. In each of these groups, the Board has reviewed the estimated costs and determined that the rule does not impose a significant economic impact on a substantial number of small entities.

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[700] In this analysis, the Board has relied on publically available data, particularly data from the United States Census Bureau's Survey of United States Businesses, as well as agency data and expertise to provide reasonable estimates. This agency data is included in the administrative record of this proceeding.

Some background on the Board's representation case docket is in order. In FY2013, a total of 2,507 RC, RD, and RM representation proceedings were initiated.[701] A total of 205 pre-election hearings were held. Post-election litigation in some form also took place following the election in 216 cases, hearings were held in 54 cases, and exceptions were filed in 32 cases. Blocking charges were filed in 223 cases. We expect this data to be similar in future years.[702]

Table 1: Frequency of the Use of Particular Procedures During Election Cases

	Total	% "R" Cases
Petitions	2507	n/a
Pre-election hearings	205	8.2%
Challenges or objections	216	8.6%
Post-election hearing	54	2.1%
Post-election exceptions	32	1.3%
Blocking charges	223	8.9%

Certain changes to Board procedure instituted in the final rule will apply to all or most representation cases. Those provisions, however, are unlikely to impose a significant economic impact upon any regulated small entity. To the extent that the changes in the final rule have the potential to significantly increase costs for any small entities, those costs primarily occur in cases where post-election hearings are held, and

[701] There were 1986 RC, 472 RD, and 49 RM petitions. An additional 145 other petitions were filed (UD, UC, AC) but these matters are generally not impacted by the final rule and will not be included in this analysis. See NLRB Graphs & Data, Petitions and Elections, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/* (last visited July 15, 2014).

[702] NAM claims that the rule will cause an increase in representation petitions. The Board considers that prediction to be speculative. Even if the number of representation petitions goes up, for the reasons discussed below, the Board reaffirms its certification, because only a very small percentage of regulated small entities are significantly affected by the costs of the final rule.

parties appeal the hearing officer's report. Such cases are a small minority of all representation cases, and as we demonstrate below, the costs associated with those cases significantly affect less than 10% of the relevant small entities.

A. Entities That Are Not Party to a Representation Case Proceeding

In response to the Board's proposed rule, some of the comments assert that the rule would impose costs upon all employers subject to the jurisdiction of the Board, because each must, for example, read and understand the rule, train human resources and management staff concerning the rule, educate their employees about the rule, and find or hire labor counsel to provide advice concerning the rule. Comments of this type were submitted by the Chamber, NAM, NRF, and NFIB, among others. NRF, the Chamber, and COLLE posited that the rule would change employers' typical reactive approach to election petitions to proactive employee education about unionization and/or require employers to maintain a constant state of alert for union organization and create HR protocols to deal with potential future elections.

The Board disagrees that any of those costs are compelled by the rule where there is no representation case proceeding. The RFA does not require an agency to consider wholly discretionary employer expenditures. Rather, the RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities. *See Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("[I]t is clear that Congress envisioned that the relevant 'economic impact' as the impact of compliance with the proposed rule on regulated small entities."); accord *White Eagle Co-op. Ass'n v. Conner*, 553 F.3d 467, 478 (7th Cir. 2009); *Colo. State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991). This construction of the RFA

is supported by Sections 603 and 604 of the RFA, which list the items to be included in a regulatory flexibility analysis (if one is required). In describing the impact, agency analysis must contain "a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record[.]" E.g., 5 U.S.C. 604(a)(4) (emphasis added). Guidance from the SBA also supports this construction of the RFA because it cites only direct, compliance-based costs as examples of financial burdens that agencies must consider:

> (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 37.[703]

Thus, nothing in the RFA, its prior construction, or SBA guidance suggests that the Board must consider the wholly discretionary expenditures that an employer which is not party to a representation proceeding may choose to incur. Instead, the "impact" analysis required under the RFA focuses on direct compliance costs. The final rule imposes no such costs on small entities not party to a representation proceeding. There

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[703] The same guidance requires agencies to consider the cost of professional expertise, including lawyers, *as needed to comply with any recordkeeping requirements imposed by the regulation.* Because this rule imposes no recordkeeping requirement, small entities need not retain such professional expertise to comply with this rule. SBA Guidance at 36.

will be no "reporting, recordkeeping and other compliance requirements" for these small entities. See 5 U.S.C. 603(b)(4), 604(a)(4). And the final rule imposes on them no mandatory capital costs, no mandatory costs of modifying existing processes, no costs of lost sales or profits, and no costs of changed market competition. See SBA Guide at 37. For small entities not party to representation proceedings, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. See *id.* Finally, there is no reason why a small entity not party to a representation proceeding would hire or otherwise retain employees dedicated to compliance with the final rule any more than it would have under the current rules. Of course, employers may train their managerial and supervisory staff and educate their employees as they wish, but compliance with the final rule does not require such action.[704]

Similarly, the rule does not require employers that do not receive an election

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[704] The rules do not assume pre-petition familiarity. Indeed, as discussed above, helping small businesses familiarize themselves with Board procedures is one of the important functions of the enhanced instructions and notice provided when the petition is served under the new rules. No monetary penalties or fines are assessed against employers who fail (for whatever reason) to comply with the rule, and the instructions given to the employer note that the Board agent at the regional office can provide assistance with a number of aspects of Board procedure. The cost estimates set forth below assume that an employer has not undertaken any preparation prior to receiving an election petition.

Nonetheless, the Board agrees that an employer who has not received a petition may voluntarily choose to read the rule. A labor compliance employee at a small employer who voluntarily undertook to generally familiarize him- or herself with the changes in this final rule may take at most 2 hours to read FAQ's and other explanatory documents published by the Board, and perhaps the summary of the rule in the introductory section of the preamble. It is also possible that a small employer might wish to consult with an attorney (est. 1 hour). Combined, this would cost [2 hr x $37.58 + 1 hr x 78.58] $153.71. See infra, discussing wage statistics. This would not be a significant impact on a substantial number of small entities.

petition to educate their employees or conduct anti-union campaigns.[705] Under both existing regulations and the new final rule, employers have the right to non-coercively state their views (whether positive or negative) about unionization generally or about particular unions, at any time, whether or not an election petition has been filed. Employers also have the right to refrain from expressing any such views. This rule does not change any of that. Costs incurred in conducting such campaigns are discretionary and beyond the scope of RFA analysis. Thus, there is no direct economic impact within the meaning of the RFA to small entities not receiving an election petition in a given year.

B. Changes Relating to Filing or Responding to a Petition

1. Service of the Petition

We now analyze the final rule's economic impact on the parties to representation proceedings. We first consider petitioners. Each of the three kinds of "R" petitions is typically filed by a different kind of entity: RC petitions (1,986) are filed by unions, RM petitions (49) are filed by employers, and RD petitions (472) are filed by individuals. Unions[706] and employers are covered by the RFA, but individuals are not, thus, only RC

[705] The Chamber states that it does "not know how many employers would undertake such [education] efforts." Other similar comments also lack factual support or are conclusory, including NRF's assertion that this rule will require employers to preemptively educate their employees, COLLE's assertion that the NPRM's RFA certification was a "fait accompli," and NAM's comment that the sheer number of comments indicates that small businesses dispute the Board's conclusion that they will not be significantly impacted by the rule. COLLE's suggestion that the Board must prove that employers will not engage in additional training in response to the final rule, is similarly not required by the RFA.

[706] The vast majority of all labor unions are small entities as defined by the SBA. The SBA's "small business" standard for "Labor Unions and Similar Labor Organizations" is $7.5 million dollars in annual revenue. 13 CFR 121.201. In 2007, the most recent year for

and RM *petitioners* are considered. In assessing labor costs for compliance with the final rule, we have used the Bureau of Labor Statistics' estimated wage and benefit costs for certain classifications of workers, as shown in the following table:

Table 2:
Labor Costs As Per the Bureau of Labor Statistics

Employee	**Wages**	**Plus Benefits**
Labor Relations Specialist 13-1075	$26.27	$37.57
Gen'l & Op Mgr. 11-1021	$46.36	$66.29
Lawyer 23-1011	$54.95	$78.58

The final rule amends § 102.60 to require that petitioners serve all interested parties a copy of the petition, a form describing representation case procedures, and a blank Statement of Position form. Based on the Board's experience with the way petitions and other documents are filed with the Board in representation cases currently, we estimate that electronic service will be used in 1,670 RC and 41 RM cases; mail in 231 RC and 6 RM; fax in 46 RC and 1 RM; and in person in 31 RC and 1 RM.[707]

In most RC and RM cases, only one party must be served. Email, fax, phone and physical addresses for unions and employers are generally publically available. We

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which data on annual receipts are available, 322 out of 15,006 labor unions had receipts equal to or greater than $7.5 million. See *http://www2.census.gov/econ/susb/data/2007/us_6digitnaics_receipt_2007.xls*, NAICS classification #81393.

[707] We do not have information directly applicable to the method of service of the petition, but, by analogy to the electronic filing of briefs and other documents, we estimate that this procedure will be used approximately 84% of the time. In addition, data relating to the method of filing of the petition (where hitherto electronic filing has not been permitted) suggests that, in situations where electronic service will not be used, express mail will be used 73% of the time, fax 15%, and personal service 12%. This is the basis for the estimates above.

estimate that electronic or fax service will take approximately 10 minutes. For unions, the task will likely be performed by an organizer or business agent costing $37.57 per hour.[708] Ten minutes at this rate is $6.26. For an express mailing, the cost is ten minutes to prepare the mailing plus postage of $19.99, for a total of [$6.26 + $19.99] $26.25.[709] For in person service, we estimate an average of 20 miles round trip, requiring 2 hours. Using GSA's privately owned vehicle reimbursement rate for 2014 of $0.56 per mile as a benchmark for estimating fuel and other costs, we reach a total cost of [2 hr x $37.57+ 20 mi x $0.56] $86.33.[710]

2. Posting and Distributing the Notice

The final rule amends § 102.63 to require that the employer post a notice when an RC, RD, or RM petition is filed. In addition to posting paper copies of the notice, employers who customarily communicate with their employees electronically will be required to distribute the notice electronically. The notice and instructions will be served on the employer. We estimate that this will require at most 30 minutes of time for reading

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[708] "Organizer" and "business agent" job titles are not analyzed by the Bureau of Labor Statistics May 2013 Occupational Employment Survey; however, there is a listing for "Labor Relations Specialist" (13-1075), and the median hourly wage for such an employee is $26.27. Base wages, however, are only 69.9% of a private employer's costs according to June 2014 data from BLS Employer Costs for Employee Compensation. Thus, to account for the cost of benefits, the wage must be multiplied by 1.43. This results rate of $37.57 per hour.

[709] According to published USPS rates, this is the price of flat-rate envelope USPS Priority Mail Express, which is a common choice.

[710] In addition to requiring service, the final rule also amends § 102.61 to file the showing of interest at the same time as the petition, rather than thereafter. There is no cost associated with this change. Also, the rule amends § 102.114 to permit parties to file petitions (and certificates of service) electronically. This change is optional, and likely to save costs. Because these changes impose no new costs on the parties, they are not included in this analysis.

and understanding the instructions, followed by at most 60 minutes of time for posting paper copies of the notice and (if necessary) electronic posting. The cost is therefore [1.5 hr x $37.57] $56.35.

3. Completing the Statement of Position Form

In § 102.63, the final rule requires non-petitioners to complete a Statement of Position form. For RC petitions the employer will complete the form, and for RM and RD petitions both the union and employer will complete the form.[711] The form will be similar to the current form for filing a petition, and asks for a summary statement of what issues the employer does and does not contest. The task of investigating the issues and arriving at a position is a necessary predicate for either entering into an election agreement or litigating. Accordingly, reading the petition, gathering information, and formulating a legal position are not costs that flow from the Statement of Position requirement. The cost of completing the form is the primarily administrative one of committing the position to paper. This can be accomplished in approximately 1.5 hours of lawyer time. Using May 2013 BLS OES statistics, the median hourly wage for a lawyer (23-1011) is $54.95 per hour, which equals [$54.95 x 1.43 x 1.5] $117.87 in compensation including benefits.

The Chamber II commented that the requirement to file a Statement of Position will require employers to expend significantly more resources than under current

[711] We note that this cost will generally only be incurred in the subset of cases that do not reach an election agreement on or before the 7th day after the petition is filed. In FY13, 21% of petitions reach a stipulation on or before the 7th day. However, for the purposes of this analysis, the cost is being assessed to all petitions.

regulations, particularly where preclusion would result.[712] We disagree. Under current rules, the parties must either enter a binding election agreement or must be prepared to litigate these very issues. Whichever choice is made, the results will bind the employer. In this context, a simple statement of position should not prove an onerous addition, as specifically discussed in connection with § 102.63 above.[713] (To the extent these arguments relate to the voter list or the timing of the statement of position, these matters are discussed separately below.)

4. Changes Related to the Timing of the Position Statement and Pre-election Hearing

Section 102.63 of the final rule provides that the statement of position will be due in most cases on the seventh day after notice of the hearing issues, and so the necessary investigation must take place in that time. In one sense, this not a significant change in the law in that the Board's decision in *Croft Metals* already requires that a party must receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays. Nonetheless, certain commenters have argued that this is faster than actual current practice, and will therefore result in increased costs to the parties. Several comments, including from the NFIB, the Chamber and ABC contend that this time compression will increase costs because legal work is more expensive when it must

[712] See also National Meat Association; COSE; ALG; Bluegrass Institute.

[713] Other comments, like those from the Independent Electrical Contractors, and a form letter submitted by the NFIB, among others, specified that the Statement of Position requirement will significantly increase costs because it will cause small businesses to hire outside counsel. We disagree. There is no basis to conclude that parties which felt comfortable entering a binding election agreement or litigating these very matters without the advice of counsel will feel any differently under the new rules. And the instructions, like the current petition instructions, will state that the party can call the Board Agent in the Regional Office with questions or to obtain assistance in completing the form.

be done in a shorter period of time.[714] However, none of the comments which raised this issue provided any basis for an increased cost, or any source of information by which this cost could be estimated.

The comments overstate the argument; in fact, the timeline for stipulating or preparing to litigate is not meaningfully changed in the majority of Board cases. More than 75% of hearings were scheduled to open in 7 to 10 days in FY13, and 52% of stipulated election agreements were also reached in fewer than 10 days.[715] In addition, we note that the hearing can be postponed, and that, for example, a joint motion of the parties to postpone a hearing to permit them to continue productive discussions on an election agreement would be relevant in considering whether to do so. For this reason, and for those discussed in greater detail in connection with § 102.63 above, the Board concludes that costs of preparing for a pre-election hearing are unlikely to increase because of a compressed time frame.

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[714] One comment suggested that an effect of the final rule will be to increase the percentage of cases which go to pre-election hearings. Testimony of Jonathan Fritts on behalf of CDW II. The Board has already considered and rejected this view in detail, supra, and has concluded that the long term impact of the rules, taken as a whole, will be to slightly increase the rate at which election agreements are reached. In any event, any such change in agreement rates would be the result of the individual choices of litigants, and would thus be an indirect effect exempt from RFA analysis, as discussed above.

The same commenter argued that shortened time frames may impede discussions to reach election agreements because one or more parties will lack sufficient time to formulate a position. Testimony of Fritts on behalf of CDW II. As discussed in detail supra, the time frames are within the range of current practice, and the uniformity provided will likely encourage parties to expect more focused agreement discussions. The increased disclosures of the statement of position will also promote agreements. See Testimony of Caren Sencer on behalf of Weinberg, Roger & Rosenfeld II.

[715] If the 11th and 12th days are considered, the scheduled hearing date within that time rises to more than 95% of cases. Meanwhile, 81% of stipulations are reached in 14 or fewer days.

Nonetheless, in the interest of providing a conservative estimate of the economic impact of this rule, we will assume that the cost of stipulating or preparing to litigate is increased in every case as a result of this change. One reasonable method for estimating the order of magnitude would be to assume that this additional time pressure would result, by analogy to overtime for hourly employees, in an increase in the base hourly rate (exclusive of fringe benefits) by 50%. We estimate that the task of preparing for either stipulation or litigation requires an attorney to spend, in the average case, a total of 8 hours, and a general and operations manager to provide 4 hours of support and consultation. In other words, overtime would add a cost of [$54.95 x ½] $27.48 per hour for the attorney and [$46.36 x ½] $23.18 for the manager, for a total of [8 x $27.48 + 4 x $23.18] $312.52 increase for the hearing preparation.[716]

5. Employee Lists

We next consider the lists of employees required by the rule. Two lists are required: the initial employee list, filed with the statement of position, requires only names and job information; the voter list, due 2 business days after an election agreement or direction of election, additionally requires available contact information such as home addresses, personal phone numbers and email addresses. Current law also requires a voter

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[716] The entities impacted by this change will vary depending on the type of petition filed. Logically, by completing the petition form itself, some of the petitioner's preparation will be done in advance, and as the petitioner is not typically required to file a statement of position, the petitioner will not incur increased costs as a result of the changes related to the timeline for the statement of position or the hearing.

Finally, we note that Stanley J. Penkala, president and part-owner of a small business, expressed concern that the shortened time frames could be problematic if a petition is filed when an owner is on vacation. But many types of unexpected events may occur when an owner is on vacation and businesses already make reasonable contingency plans to accommodate such possibilities.

list, which is due 7 days after an election agreement or direction and includes employee names and home addresses. Nonetheless, for the purposes of this cost analysis, we will conservatively estimate the cost of the lists as if the entire employee list requirement was wholly new, and applied to employers in all RC, RM, and RD cases (rather than only those which go to an election).[717]

Compilation of the lists required under the rule is an administrative task. The lists can be compiled by utilizing various already-existing resources. Small entities are already required to maintain employee records under other federal employment laws, including the Fair Labor Standards Act, which mandates that employers keep records of various job information and wage and hour data for each employee, and the Immigration Reform Control Act, which mandates employers maintain I-9 records which include optional emails and personal phone numbers. We estimate that, even using paper records, and absent special circumstances, a labor relations specialist needs approximately 5 minutes per employee to compile all the information required for both the initial employee list and the voter list, and to place them in the required formats.[718] A total of 25% of elections have 11 or fewer names on the list, 50% of cases have 26 or fewer, and 75% of cases have 65 or fewer. We further estimate that an additional one minute per employee will be required at the time that the voter list is created, to recheck employer records to ensure

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[717] We note that the voter list will not be necessary where the petition is withdrawn or dismissed, and that no initial employee list will be necessary where the parties stipulate before the statement of position is due. However, for the purposes of this analysis, the cost is being assessed to all petitions.

[718] This estimate recognizes that the employer's files are not "in the format required by the Board right now [and t]here's not a button they can push where the [voter] list just comes out." See Testimony of Elizabeth Milito on behalf of NFIB II.

that changes (such as departures or new hires) have not occurred between the date upon which that list was filed and the voter eligibility date. Thus, this task will take between 60 minutes and 6 hours to complete in most cases.[719]

The Board received comments from, among others, ABC, ALFA, Klein, NFIB, CNLP, COSE, stating that 2 days is insufficient to produce an eligibility list. In this regard, ABC suggests that determining which voters are eligible may be particularly difficult in the construction industry because complicated issues such as the *Steiny/Daniel* formula, disappearing units, multi-craft versus single craft unions, and Sections 8(f) and 9(a) require counsel and time. Testimony of Maury Baskin on behalf of ABC. The Board disagrees with these various comments. We do not believe that the economic impact will vary significantly across industries. And, due to the relatively short lists applicable in most cases, requiring the lists be produced in 2 days will not add to the cost. In addition, regional directors retain discretion to expand this time period.

Nonetheless, similar to the analysis for the reduction in time before hearings above, the Board will conservatively assume that, in every case, the employer will incur

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[719] Some comments stated the time reduction is onerous because small employers often do not have a designated human resources employee to handle such issues, or readily available job descriptions or classifications, possibly necessitating expensive technological solutions. We note, however, that the format requirements of the rule need not be followed where the burden would be unreasonable. NFIB commented that only 12% of small employers have an employee dedicated to HR or personnel. Of course, this comment would not apply to employers with many employees because they, in light of other recordkeeping requirements, must keep sophisticated electronic records and dedicated human resources staff or contractors; meanwhile, the task of assembling a voter list with only a few score employees should not prove unduly burdensome for any size employer. See Testimony of Milito on behalf of NFIB II (testimony that the voter list requirement is typically not onerous where fewer than 50 employees are involved, and that employers with more than 50 employees typically already have professional human resources).

costs at the overtime rate. The cost will therefore be, in the median case, [25 (median employees) x 0.1 (hours required per employee) x $50.70] $126.75.[720]

6. Electronic Distribution of the Final Notice of Election

Under the current rules, the employer is required to post paper copies of a Notice of Election no less than 3 full working days before the opening of the election. This requirement is unchanged in the final rule. However, the final rule amends § 102.67(b) to provide that the Notice of Election will be transmitted to the employer by electronic mail rather than hard copy mail if the employer provided an email address. The time spent opening the email and printing the notice is likely to be approximately the same as time spent opening a physical mailing and extracting the printed notice within. The final rule additionally requires employers who customarily communicate electronically with their employees to distribute the final election notice electronically, which may require 15 minutes of a labor relations specialist's time, or [15 minutes x $37.57] $9.39.[721]

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[720] This cost will be greater in units with more than 25 employees, but this does not change the result of the analysis here because such employers also typically have much higher revenues. The average employer with between 20 and 99 employees had revenues of $6.9 million, and the cost of compiling the voter list—even when added to all other costs which could be imposed by this rule—does not come close to the 1% threshold for such businesses discussed below. Furthermore, employers with greater than 25 employees are much more likely to use electronic recordkeeping, permitting this information to be compiled at a rate of less than 5 minutes per employee.

[721] CNLP commented that electronic filing and communication can be difficult for small employers because many do not have access to the internet or use it in their business plan. We note that a 2010 survey by conducted by a contractor for the Office of Advocacy of the SBA in the spring of 2010, on the use of Internet connectivity by small businesses, called "The Impact of Broadband Speed and Price on Small Business" (*http://www.sba.gov/sites/default/files /rs373tot_0.pdf*), suggests that, as of four years ago, at least 90 percent of small businesses surveyed used the Internet at their business. The data show that it is rare for a business, no matter how small, to lack internet access. Nonetheless, to the extent that an employer or union lacks internet access, the Board has

7. The Significance of these Changes

We will now apply these cost estimates to parties in RC, RM, and RD proceedings to identify whether the costs exceed 1 percent of gross revenues for the small entities in any particular sector. The SBA maintains a table of small business size standards matched to the North American Industry Classification System (NAICS) for industries. The standards are based either on annual revenues or number of employees. SBA, Table of Small Business Size Standards, *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf* (last visited July 24, 2014). Using NAICS, the Board categorized each RC, RM and RD petition into its proper industry.

The Board next reviewed election petitions to estimate the size of the employers. The Board examined data on petitions filed in 2010, the most recent year for which it has industry data matched to NAICS data and the unit size. Using this data, for each petition, the Board determined if the entity might qualify as small based on its estimated number of employees or estimated revenues. The Board used the petitioned-for unit size to estimate the number of employees,[722] and it estimated annual revenues based upon census

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made the provisions relating to electronic filing and communication either optional or required only if the employer customarily communicates with employees electronically.

In addition, we note that this cost will generally only be incurred in the subset of cases that go to an election. However, for the purposes of this analysis, the cost is being assessed to all petitions.

[722] The Board used petitioned-for unit size as an extremely conservative estimate, since employers generally employ supervisors, managers, and other individuals that are not part of the bargaining unit. In addition, very few petitions are for "wall-to-wall" units, and in almost every case, the employer has many statutory employees which are not in the unit.

data.[723] The Census Bureau classifies employers by number of employees in the following categories: 0-4; 5-9; 10-19; 20-99; 100-499; and 500 or above. For purposes of this analysis, the Board estimates that each business has revenues equal to the average revenue for a business in the same size/industry category. Thus, for example, where a petition is filed for a unit of 16 employees at a construction firm (NAICS industry 23), this analysis assumes that that employer has revenue equal to the average revenue for a business with 10-19 employees in NAICS category 23.

Based upon this data, the Board estimates that in 2010, approximately 2480 petitions out of a total of 2777, or 89.3%, were filed concerning employees of small entity employers. Applying this estimate to the Board's 2013 caseload, we estimate that approximately 2239 petitions per year (89.3% of 2507 petitions) going forward will be filed concerning employees of small entity employers. The Board then compared the size of the economic impacts in question to entity receipts and determined whether any size/industry classification of employers subject to a petition might be significantly impacted.

The Board does not possess comparable data by which to estimate the size of unions participating in NLRB elections, and so we must rely on reasonable assumptions. We will assume that the number of elections involving a particular union is proportional to that union's total receipts. We again refer to the same Census Bureau data described

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[723] The Census Bureau surveys businesses' receipts rather than their revenues. Receipts are a subset of revenues. United States Census, Statistics of U.S. Businesses, Definitions, *https://www.census.gov//econ/susb/definitions.html*. The Board conservatively estimates that revenues are equal to receipts. Census Bureau data on receipts are collected only every 5 years, and the most recent year for which data are available is 2007.

above, focusing specifically on unions (NAICS # 81393). This data shows, for example, that 9 percent of all labor union receipts in 2007 were received by labor unions with 0-4 employees, and so we are estimating that 9 percent of representation cases involve labor unions of this size (which have average receipts of $221,572). Using this method, we estimate that approximately 63% of representation cases, or about 1559 cases, involve unions which are small entities as defined by SBA.

The economic impact of the final rule's procedures upon each type of entity is described in the following charts:

Table 3: Estimated Additional Costs in All Representation Cases Initiated by Unions

(RC Cases)

RC Petitions	**Employer**	**Union serving petition via email or fax**	**Union serving by mail**	**Union serving personally**
No. of Cases	1986	1716	231	38
Service	-	$6.26	$26.25	$86.33
Notice of Petition	$56.35	-	-	-
Statement of Position	$117.87	-	-	-
Costs related to timeline	$312.52	-	-	-
Voter Lists	$126.75	-	-	-
Notice of Election	$9.39	-	-	-
TOTAL additional cost	**$622.88**	**$6.26**	**$26.25**	**$86.33**

Table 4: Estimated Additional Costs in All Representation Cases Initiated by Employers (RM Cases)

RM Petitions	Union	Employer serving petition via email or fax	Employer serving by mail	Employer serving personally
No. of Cases	49	42	6	1
Service	-	$6.26	$26.25	$86.33
Notice of Petition	-	$56.35	$56.35	$56.35
Statement of Position	$117.87	$117.87	$117.87	$117.87
Costs related to timeline	$312.52	-	-	-
Voter Lists	-	$126.75	$126.75	$126.75
Notice of Election	-	$9.39	$9.39	$9.39
TOTAL additional cost	**$430.39**	**$316.62**	**$336.61**	**$396.69**

Table 5: Estimated Additional Costs in All Representation Cases Initiated by Individuals (RD Cases)

RD Petitions	Union	Employer
No. of Cases	472	472
Notice of Petition	-	$56.35
Statement of Position	$117.87	$117.87
Costs related to timeline	$312.52	$312.52
Voter Lists	-	$126.75
Notice of Election	-	$9.39
TOTAL additional cost	**$430.39**	**$622.88**

The final rule will not impose a significant economic impact a substantial number of small entities who receive a representation petition but do not litigate post-election objections or ballot challenges. The estimated cost of the final rule to such entities does not exceed $622.88. The Census Bureau data referenced above show that no size/industry classification has average annual receipts of less than 100 times that number, or $62,288. Thus, few, if any, entities participating in NLRB representation cases will incur costs of

greater than 1% of that entity's annual revenues due to the final rule.[724]

C. Costs Impacting a Very Small Number of Cases: Blocking Charges, Post-election Hearings, and Requests for Review of Decisions on Objections and Challenges

The final rule also makes changes to blocking charge procedure, post-election hearing timelines, and the steps necessary to obtain Board review of a decision on objections and challenges. These changes do not impact a substantial number of small employers. In FY13, parties filed 223 blocking charges, 54 post-election hearings were held, and 32 exceptions regarding objections and challenges were filed. Thus, none of these changes will impact more than a small percentage of small entities involved in a representation proceeding. By definition, none of these changes impact a substantial number of small entities, as none will impact 10% or more of the relevant universe. Nonetheless, we will briefly estimate the costs associated with these changes to come to a more precise figure for the number of small entities significantly impacted.

1. Blocking Charges

The final rule requires parties that file blocking charges to also file an offer of proof and make witnesses available. The information provided in the offer of proof must be collected regardless of the rule in order to support the charge itself, and providing the information to the Board in a written offer likely would require approximately an hour and a half of a lawyer's time, for a cost of [1.5 x $78.58] $117.87. Combining this cost

[724] Indeed, $622.88 is only 0.32% of average annual receipts for Educational Services (NAICS #61) employers with 0-4 employees, the size/industry category with the lowest volume of receipts per firm. Thus, even if the Board's estimate of final rule costs were tripled, the total cost of a representation petition without post-election litigation or blocking charges would less than 1% of average revenues for any size/industry classification. This large margin for error emphatically reinforces the Board's conclusion that a substantial number of small entities will not incur significant costs as a result of the rule.

with the maximum new costs a party might reasonably be expected to incur under other changes in the rule,[725] we reach the following result:

Table 6: Estimated Additional Costs to Parties Filing Blocking Charges[726]

No. of Cases	223
Maximum cost of changes without post-election litigation or blocking charges	$622.88
Blocking offer of proof	$117.87
TOTAL additional cost	$740.75

Census Bureau data show that no size/industry classification has average annual receipts of less than $74,075. Using the same methodology discussed above for costs related to filing and receiving a petition, we estimate that few, if any, entities that file blocking charges will incur a cost of greater than 1% of their gross receipts as a result of

[725] This is the maximum additional cost that an employer respondent in an RC or RD case might reasonably be expected to incur under the final rule. Employers in other kinds of cases will incur less cost but this does not change the final result here.

This cost does not include the other matters addressed in this section, (i.e., post-election hearing costs or request for review costs). This is because each occurs so infrequently that they are unlikely to coincide in any particular case. For example, if the distribution is random, the number of cases involving both blocking and a post-election hearing would be [75 x 223 / 2507] 6 or 7 cases per year.

In addition, the amounts involved are sufficiently small as to make little difference in the final analysis. Even in the rare case where blocking, post-election hearings, and a request for review of a decision on objections and challenges all occurred in the same case in the same year, the rule would impose additional costs of [$740.75 + $117.87 + $312.52 + $1,257.26] $2,428.40.The only size/industry categories for which this amount represents a significant impact are the same four categories for which a request for review without a blocking charge represents a significant impact.

[726] The number of cases listed in the chart corresponds to the number of representation cases that were listed as blocked for some period of time by charges filed in FY 2013. The number does not correspond to elections held during FY 2013 that had previously been blocked for some period of time (including by charges filed in prior fiscal years).

the final rule.

2. Timeline for Post-election Hearings

Under current practice, parties have a median of 14.5 days to prepare for the hearing once the notice of hearing is issued. Although this time might decrease by a few days, we do not expect that the change will be very large. Under the rule, the time for post-election hearings will generally be 21 days from the tally, and the objections and challenges are due in 7 days. The rule does not specify when the notice of hearing will be issued, but regional directors will be expected to assess the offer of proof and very promptly determine whether to hold a hearing so that the parties have time to prepare. Thus, we do not believe there will be any increased cost.

Nonetheless, using similar assumptions to those discussed above regarding the pre-election hearing, we will conservatively assume that costs for the 54 employers and unions subject to post election hearings will increase by $312.52. Combining this cost with the maximum new costs a party might reasonably be expected to incur under other changes in the rule, we reach the following result:

Table 7: Estimated Additional Costs for Parties in Cases with Post-Election Hearings

No. of Cases	54
Maximum cost of changes without post-election litigation or blocking charges)	$622.88
Post election hearing preparation timeline	$312.52
TOTAL additional cost	$935.40

Census Bureau data show that no industry/size classification has average annual receipts of less than $93,540. Thus, using the same methodology discussed above for

costs related to filing and receiving a petition, we estimate that few, if any, entities that are involved in a post-election hearing, but do not file a request for review of the regional director's decision with the Board, will incur a cost of greater than 1% of their gross receipts as a result of the final rule.

3. Requests for Review of Decisions on Objections and Challenges

Section 102.69 of the final rule—just as § 102.69 of the current rules—allows the regional director to resolve any objections or challenges without conducting a post-election hearing. However, if a post-election hearing is held concerning the objections or challenges, § 102.69(c) of the final rule requires the regional director to issue a decision on any exceptions filed to the hearing officer's report. It further provides that the Board will exercise only discretionary review of regional directors' disposition of exceptions to hearing officers' decisions. Previously, these exceptions were decided directly by the Board in the vast majority of cases involving objections or determinative challenges. Thus, if a party files exceptions to the hearing officer's report, and the regional director affirms the hearing officer, the new rule requires the party to file a previously unnecessary request for review if the party desires review by the Board. Although there is no change in cost for cases in which the regional director disposes of objections or challenges without a hearing, we will nevertheless conservatively estimate that requests for Board review of a regional director's decision represent a new cost in all cases. We estimate that it will require 16 lawyer hours to prepare the request, for a cost of [16 x $78.58] $1,257.26. Combining this cost with the maximum new costs a party might reasonably be expected to incur under other changes in the rule, we reach the following result:

Table 8: Estimated Additional Costs for Parties in Cases Where Parties Request Board Review of Regional Directors' Post-Election Disposition of Objections and Challenges[727]

No. of Cases	32
Maximum cost of changes without post-election litigation or blocking charges	$622.88
Post election hearing preparation timeline	$ 312.52
Request for review of post-election decision	$1257.26
TOTAL additional cost	$2192.66

Only 32 exceptions were resolved in FY13. In all likelihood, a sizeable number of these exceptions will be satisfactorily resolved by regional directors with no further appeal. However, in the interest of providing a conservative estimate, we will assume that this change will impact litigants in 32 cases per year, or approximately 1.3% of all NLRB representation cases. Assuming that small and large employers are equally likely to litigate post-election exceptions, these changes are projected to affect 29 small entity employers per year.

Four employer size/industry classifications have average annual receipts of less than $216,266.[728] Employers in those categories could incur a significant adverse economic impact as a result of the final rule if they litigate a representation petition through post-election hearing and file a request for review of a regional director's

[727] The 32 cases listed in the chart include cases from FY 2013 in which regional directors disposed of objections or challenges without a hearing. As explained above, these cases would not in fact result in additional costs if these circumstances were repeated under the final rule.

[728] These classifications are employers in the industries of Administrative and Support and Waste Management (#56), Educational Services (#61), Accommodation and Food Services (#72), and Other Services (Except Public Administration) (#81), with 0-4 employees.

disposition of objections or challenges. However, only about 1.7% of NLRB petitions (in 2010, 52 out of 2,974 petitions) are filed in bargaining units with 2-4 employees in those industries. Thus, fewer than one case a year[729] will involve both a very small employer and a post-election request for Board review of a regional director's disposition of objections or challenges. The Board accordingly projects that the final rule's changes to post-election exceptions procedure will adversely affect less than one small entity employer per year. Meanwhile, the average annual receipts for a union with zero to four employees are $221,572, so the estimated cost of the rule is therefore less than 1% of receipts even for unions with 0-4 employees.

Thus, the number of significantly impacted small entities falls below the 10% threshold established by the Board. For these reasons we conclude that the rule's changes to post-election exceptions procedure will not impose a significant economic impact on a substantial number of small entities.

D. Other changes

The remainder of the changes will not result in any direct cost on small entities, and will clearly not cause a substantial impact on a significant number of small entities. We first consider the changes to the litigation at the pre-election hearing. Ultimately, the statement of position form will provide cost savings to the parties in cases where hearings are held by preventing unnecessary litigation and leading to a more orderly process. The

[729] The Board determined this number by taking the estimated number of cases with a small employer respondent that go to a post-election hearing (29) and multiplying by the probability that the case will involve a unit in one of the four classifications noted above (0.017). This estimate conservatively assumes that small and large parties are equally likely to fully litigate election objections in any particular case.

same is true for those portions of § 102.66 of the final rule which provide for the parties to begin the hearing by responding to the issues raised in the statement of position, and taking discretionary offers of proof. So too, the changes to § 102.64, focusing the hearing on its statutory purpose, and overruling *Barre-National*, will substantially reduce needless testimony. New provision § 102.64(c) provides that pre-election hearings shall be continued day to day absent extraordinary circumstances. Section 102.67 provides that summing up of pre-election hearing testimony usually will be done by means of closing arguments, rather than concluding written briefing. Section 102.67(b) specifies that the date and time of the election ordinarily will be set forth in the decision and direction of election. All of these changes will uniformly lead to efficiencies and savings for the parties and the Board, as discussed in detail in the relevant sections of this preamble. Therefore, these changes will not impose any costs on any small entities. In addition, such pre-election hearing procedures take place in fewer than 10% of cases, and so cannot impact a substantial number of small entities.

Second, § 102.67 of the final rule revises the deadline for seeking Board review of a regional director's decision and direction of election at any time up to 14 days after a final disposition of the proceeding by the regional director. Existing law sets a shorter deadline, within 14 days of the decision and direction of election. This change in due date will potentially create savings for parties, and will impose no costs. Parties remain free to file their requests within the time frame provided under the former rules if they prefer. Such requests are also filed in fewer than 10% of cases.

Third, the final rule eliminates guidance which recommended waiting 25-30 days to hold the election after the direction of election. This change imposes no direct costs

upon parties, as nothing in the rule requires any preparation for the election itself. The rule also directly impacts the fewer than 10% of cases which are subject to a direction of election. The final rule also eliminates automatic impounding of ballots where a request for review is pending. Impoundment only took place in a handful of cases each year, and the change imposes no cost.

Fourth, § 102.69(a) of the final rule requires parties to file simultaneous offers of proof with any post-election objections, whereas current rules give parties 7 additional days to file offers of proof. However, as previously discussed, filing offers of proof involves writing down the results of an investigation conducted before the objection was filed. Compressing the time frame for this administrative task will not impose increased costs. This change also impacts fewer than 10% of cases.

Finally, the final rule eliminates a rarely used procedure, formerly codified at § 102.67(h)-(k), whereby a case could be transferred from the region to the Board after the pre-election hearing. This procedure has not been used in approximately 15 years.

E. Conclusion

As the foregoing discussion shows, the bulk of the changes to this rule will impact less than 10% of the relevant universe of small entities. In addition, most of the changes here will not impose any new costs on the parties to representation cases. The few costs in the rule are either modest, or impact only a handful of cases, or both. For these reasons, the rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In the NPRM, the Board explained that the "proposed amendments would not

impose any information collection requirements" and accordingly, the proposed amendments "are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*." No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

The NLRB is an agency covered by the PRA. 44 U.S.C. 3502(1) and (5). The PRA establishes rules for such agencies' "collection of information." 44 U.S.C. 3507.

The Board has considered whether any of the provisions of the final rule provide for a "collection of information" covered by the PRA. Specifically, the Board has considered the following provisions that contain petition and response requirements, posting requirements, and requirements that lists of employees, eligible voters or offers of proof be filed:

(1) Under the final rule, as under the current rules, parties seeking to initiate the Board's representation procedures are required to file a petition with the Board containing specified information relevant to the Board's adjudication of the specific question raised by the filing of the petition. Under the final rule, non-petitioning parties to such representation proceedings are required to file a Statement of Position setting forth the parties' positions and specified information relevant to the Board's adjudication of the question raised by the petition. Employers are currently asked to supply the portion of the information specified in the final rule relating to their participation in interstate commerce, and are typically asked to share their positions concerning many of the same issues covered by the form prior to the hearing or at a prehearing conference.

(2) Under the final rule, employers are required to post a notice about the filing of the petition and a notice about the election. The second posting requirement exists

currently. Employers are currently asked but not required to post the first notice (in a different form).

(3) Under the final rule, as under current case law, employers are required to file a list of eligible voters prior to an election. Under the final rule, an initial list of employees is required before the pre-election hearing. Currently, employers are often asked but not required to provide an employee list with job classifications prior to the hearing or at a prehearing election conference. For the reasons given below, the Board believes that none of these actions constitutes a collection of information covered by the PRA.

(4) Under the final rule, a party filing an objection to the conduct of an election or to conduct affecting the results of an election is required to simultaneously file a written offer of proof with the objection, absent a showing of good cause to extend the time for filing an offer of proof. Currently, a party filing an objection is required to simultaneously file a short statement of reasons with the objection and file evidence in support of its objections within 7 days after filing its objections.

5) Under the final rule, a party filing an unfair labor practice charge, together with a request that the charge block the processing of a representation petition, is required to simultaneously file a written offer of proof with the charge.

The PRA exempts from the definition of "collection of information" "a collection of information described under section 3518(c)(1)" of the Act. 44 U.S.C. 3502(3)(B).

Section 3518(c) provides:

- Except as provided in paragraph (2), this subchapter shall not apply to the collection of information--
    - during the conduct of--

- an administrative action or investigation involving an agency against specific individuals or entities;

- This subchapter applies to the collection of information during the conduct of general investigations * * * undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

44 U.S.C. 3518(c). The legislative history of this provision makes clear that it is not limited to prosecutorial proceedings. The Senate Report on the PRA states, "Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties." S. Rep. No. 96-930, at 56 (1980). See also 5 CFR 1320.4(c) (OMB regulation interpreting the PRA, providing that exemption applies "after a case file or equivalent is opened with respect to a particular party.").

The Board believes that all of the above-described provisions of the final rule fall within the exemption created by sections 3502(3)(B) and 3518(c)(1)(B)(ii). A representation proceeding under Section 9 of the NLRA is "an administrative action or investigation involving an agency." That is, the filing of a petition together with a showing of interest triggers an administrative investigation into the sufficiency of the petition. A regional Board agent is assigned to investigate the petition and a case file is opened. A representation proceeding is also "against specific individuals or entities" within the meaning of section 3518(c)(1)(B)(ii). The Board's decisions in representation proceedings are binding on and thereby alter the legal rights of the parties to the proceedings. For example, the employer of any employees who are the subject of a

petition is a party to the resulting representation proceeding.[730] If the Board finds in a representation proceeding that a petition has been filed concerning an appropriate unit and that employees in that unit have voted to be represented, the Board will thereafter certify the petitioner as the employees' representative for purposes of collective bargaining with the employer. As a direct and automatic consequence of the Board's certification, the employer is legally bound to recognize and bargain with the certified representative. If the employer refuses to do so, it commits an unfair labor practice.[731] If such an employer is charged with a refusal to bargain, it is precluded from relitigating in the unfair labor practice proceeding any issues that were or could have been raised in the representation proceeding.[732] Finally, if such an employer seeks review of the Board's order in the unfair labor practice proceeding or the Board seeks to enforce its order in a court of appeals, the record from the representation proceeding must be filed with the court and "the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript." 29 U.S.C. 159(d); see also *Boire v. Greyhound Corp*. 376 U.S. 473, 477-79 (1964).[733]

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[730] See, e.g., *Pace University v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008); *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782, 786-88 (7th Cir. 1953).

[731] See, e.g., *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882, 886 (D.C. Cir. 1988).

[732] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

[733] Similarly, a union that has been certified or recognized as the representative of employees in an appropriate unit has a legal right to continue to be recognized as the exclusive representative of such employees. See *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002). However, if a petition is filed under section 9 seeking to decertify such a union, which is a party to the resulting representation proceeding, see *Brom Mach.*

Three limitations on the filing and posting requirements in the final rule lead to the conclusion that they fall within the statutory exemption. First, the final rule imposes requirements only on parties to the representation case proceeding, or in the case of blocking charges, charging parties in the unfair labor practice proceeding, an administrative action or investigation against specific individuals or entities within the scope of section 3518(c)(1)(B)(ii). Second, any adverse consequences for failing to provide the requested information are imposed only on persons and entities that are party to the administrative proceeding. Third, the possible adverse consequences that may result from noncompliance do not reach beyond the administrative case proceeding. The final rule imposes no consequences on any party based on its failure to file or provide information requested in a petition or statement of position form other than to prevent the party from initiating a representation proceeding or to restrict a party's rights to raise issues or participate in the adjudication of issues in the specific representation proceeding and any related unfair labor practice proceeding. Similarly, as is the case currently,[734] no consequences attach to a failure to post either notice or to file the eligibility list beyond the overturning of an election conducted as part of the specific proceeding. Finally, no consequences attach to a failure to file an offer of proof simultaneously with an election

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& Foundry Co. v. NLRB, 569 F.2d 1042, 1044 (8th Cir. 1978), and at the conclusion of the proceeding the Board certifies the results of an election finding that less than a majority of the voters cast ballots in favor of continued representation by the union, the union loses its legal right to represent the employees. *Retail Clerks Int'l Ass'n v. Montgomery Ward & Co.*, 316 F.2d 754, 756-57 (7th Cir. 1963).

[734] See John E. Higgins, Jr., The Developing Labor Law 595, 607 (5th ed. 2006) (noting that failure to provide *Excelsior* list or post notice of election constitutes grounds for setting aside election).

objection or a blocking charge beyond the regional director's dismissal of the election objection, refusal to block the election, or the possible dismissal of the charge.

Sections 102.62(e), 102.63(a) and 102.67(k) of the final rule require that an employer which is party to a representation proceeding post a Notice of Petition for Election subsequent to the filing of a petition and, if an election is agreed to or directed, a Notice of Election. The Board will make available both notices to the employer in paper and electronic form, and employers will be permitted to post exact duplicate copies of the notices. The Board does not believe these posting requirements are subject to the PRA for the reasons explained above. Moreover, the Board does not believe that the notice posting requirements constitute a "collection of information" as defined in section 3502(3) of the PRA for additional, independent reasons. The notice posting requirements do not involve answers to questions or any form of reporting. Nor do they involve a "recordkeeping requirement" as that term is defined in section 3502(13) of the PRA because the notice posting requirements do not require any party to "maintain specified records." The Board notes that this construction is consistent with the Office of Management and Budget's regulations construing and implementing the PRA, which provide that "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. See 5 CFR 1320.3(c)(2). For all of these reasons, the Board concludes that the posting requirements are not subject to the PRA.

Accordingly, the final rule does not contain information collection requirements that require approval of the Office of Management and Budget under the Paperwork Reduction Act.

Congressional Review Act

As explained in the discussion of the Regulatory Flexibility Act, only the provisions of this rule relating to voter lists and possibly blocking charges are substantive. Nevertheless, as a matter of its discretion, the Board has chosen to submit the entire rule to the process contained in the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act), 5 U.S.C. 801-808.

Under Section 804 of that Act, this rule is not a major rule because it will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. The Board has, in any event, determined that the effective date of the rule will be 120 days after the rule is published in the Federal Register.

IX. Statement of the General Course of Proceedings Under Section 9(c) of the Act

A. Representation Case Petitions

Petitions may be filed in representation cases to resolve questions of representation in many different circumstances. For example, a union may file a petition for certification because it seeks to become the collective-bargaining representative of an employer's employees. An employer may file a petition to determine the majority status of a union demanding recognition as the representative of the employer's employees. If there is already a certified or currently recognized representative, an employee may file a decertification petition to oust the incumbent representative. Or, a party may file a petition for clarification of the bargaining unit or for amendment to reflect changed

circumstances, such as changes in the incumbent representative's name or affiliation.

Petition forms are available on the Board's Web site and in the Board's regional offices. The petition must be in writing and signed, and must either be notarized or contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his or her knowledge and belief. The petition is filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. Petition forms provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, the names of all labor organizations that claim to represent the employees, the type, date(s), time(s) and location(s) of the election sought, and the name and contact information of the individual who will serve as representative of the petitioner and accept service of papers in the representation proceeding. A petitioner seeking certification as the collective-bargaining representative or seeking to decertify an incumbent representative must supply, at the same time it files its petition, evidence of employee interest in an election ("showing of interest"). Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or providing that the employees no longer wish to be represented by the incumbent union. If a petition is filed by an employer, the petitioner must supply, at the same time it files its petition, proof of a demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

The petitioner may file the petition electronically, by fax, by mail or in person at one of the NLRB's regional offices. The petitioner must serve a copy of its petition on other interested parties along with a description of the Board's representation case procedures and the Board's Statement of Position form, both of which are available on the Board's Web site and in the Board's Regional Offices. However, the petitioner need not serve a copy of its showing of interest on any other party. If the petition and showing of interest are filed electronically or by fax, and the showing of interest consists of authorization cards with handwritten signatures, the petitioner must provide to the regional director the documents containing the original signatures constituting the showing of interest no later than 2 days after the electronic or facsimile filing.

B. Pre-Hearing Withdrawals and Dismissals; Notice of Hearing; Posting and Distribution of Notice of Petition for Election; Statement of Position Form

Upon receipt of the petition in the Regional Office, it is docketed and assigned to a Board agent to investigate (1) whether the employer's operations affect commerce within the meaning of the Act, (2) the existence of a bona fide question concerning representation in a unit of employees appropriate for the purposes of collective bargaining within the meaning of the Act, (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition or an employee seeking decertification of an incumbent representative, there is sufficient evidence of employee interest in an election. The evidence of interest submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have demonstrated interest, it

being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has demonstrated interest among at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required, and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The Board agent attempts to ascertain from all interested parties whether the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing upon such terms as the regional director deems proper.

The petitioner may request to withdraw its petition if the investigation discloses, for example, that the petitioner lacks an adequate showing of interest. The regional director may request that the petitioner withdraw the petition if further processing at that time is inappropriate because, for example, a written contract covering the petitioned-for unit is currently in effect. If, despite the regional director’s recommendations, the petitioner refuses to withdraw the petition, the regional director may dismiss it. The petitioner may within 14 days request review of the regional director's dismissal by filing such request with the Board in Washington, DC; if it accepts review, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

If, however, the regional director determines that the petition and supporting documentation establish reasonable cause to believe that a question of representation

affecting commerce exists and that the policies of the Act will be effectuated, then the regional director serves a notice of a pre-election hearing on the parties named in the petition. Except in cases presenting unusually complex issues, the regional director sets the hearing for a date 8 days from the date of service of the notice excluding intervening federal holidays. Along with the notice of hearing, the regional director serves a copy of the petition, a form describing representation case procedures, a "Notice of Petition for Election," and a Statement of Position form on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding. The director marks the correspondence containing these materials as "Urgent." The Notice of Hearing also sets the due date for the parties to file and serve their Statements of Position. Ordinarily, the Statement of Position must be filed and served such that it is received by the regional director and the other parties at noon on the business day before the opening of the hearing.

The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may also postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. If the hearing is set to open more than 8 days from service of the notice, the regional director may set the due date for the Statement of Position earlier than at noon on the business day before the hearing is set to open.

The Notice of Petition for Election states the name of the party filing the petition, briefly describes the type of petition filed and the proposed unit, lists employee rights, and sets forth in understandable terms the central rules governing campaign conduct. This notice also lists the Board's Web site address, through which the employer's employees can obtain further information about the processing of petitions. The notice indicates that no final decisions have been made yet regarding the appropriate bargaining unit and whether an election will be conducted. Within 2 business days after service of the notice of hearing, the employer must post paper copies of the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and it must also distribute the notice electronically if it customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the notice is replaced by the Notice of Election, discussed below. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed. However, a party may not object to the nonposting or nondistribution of the notices if it is responsible for the nonposting or nondistribution.

The Statement of Position form solicits information which will facilitate entry into election agreements or streamline the pre-election hearing in the event parties are unable to enter into an election agreement. Where the petition is filed by a labor organization in an initial organizing context, the employer's Statement of Position states whether the employer agrees that the Board has jurisdiction over it and provides the requested commerce information; states whether the employer agrees that the proposed unit is appropriate, and if the employer does not so agree, states the basis for its

contention that the proposed unit is inappropriate, and states the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identifies any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raises any election bar; states the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; states its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describes any other issues it intends to raise at hearing. The employer also provides the name, title, and contact information of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding.

As part of its Statement of Position, the employer also provides an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names must be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list(s) in the required form.

In cases involving employer-filed petitions, each individual or labor organization named in the petition states whether it agrees that the Board has jurisdiction over the employer; states whether the proposed unit is appropriate, and if it does not so agree,

states the basis for its contention that the proposed unit is inappropriate, and states the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identifies any individuals whose eligibility to vote it intends to contest at the pre-election hearing and the basis of each such contention; raises any election bar; states its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describes all other issues it intends to raise at hearing. Each individual or labor organization also provides the name, title, and contact information of the individual who will serve as its representative and accept service of papers for purposes of the representation proceeding. The employer's Statement of Position states whether it agrees that the Board has jurisdiction over it and provides the requested commerce information; identifies any individuals whose eligibility to vote it intends to contest at the pre-election hearing and the basis of each such contention; provides the list(s) of employees; and states the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

In cases involving decertification petitions, although the general rule is that the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized bargaining unit, the Statements of Position of both the certified or recognized representative and the employer nevertheless must state whether each agrees that the proposed unit is appropriate, and if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. The Statements of Position of both the certified or recognized

representative and the employer must also state whether each agrees that the Board has jurisdiction over the employer; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; describe all other issues each party intends to raise at hearing; and state the name, title, and contact information of the individual who will serve as each party's representative and accept service of all papers for purposes of the representation proceeding. The employer's Statement of Position must also state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; and provide the requested commerce information and the employee list(s).

C. Voluntary Election Agreements; Notice of Election; Voter List

1. Voluntary Election Agreements

Elections can occur either by agreement of the parties or by direction of the regional director or the Board. In many cases, the parties, with Board agent assistance, are able to reach agreement regarding all election matters, thereby eliminating the need for the regional director or the Board to issue a formal decision and direction of election. By entering into an election agreement, the parties may, depending upon when the agreement is reached, avoid the time and expense of participating in a hearing (as well as having to complete the Statement of Position form).

The Board has devised and makes available to the parties three types of informal voluntary procedures through which representation issues can be resolved without recourse to formal procedures. Forms for use in these informal procedures are available

in the regional offices and on the Board's Web site. One type of informal procedure is the consent election agreement with final regional determination of post-election disputes. Here, the parties agree with respect to the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit are eligible to vote in the election, and the type, place, date, and hours of balloting. The consent election is conducted under the direction and supervision of the regional director. This form of agreement provides that the rulings of the regional director on all questions relating to the election, such as the validity of challenges and objections, are final and binding. The regional director issues to the parties a certification of the results of the election, including a certification of representative where appropriate, with the same force and effect as if issued by the Board.

A second type of informal procedure is commonly referred to as the stipulated election agreement. Like the consent agreement above, the parties agree on the unit, payroll period to be used in determining voter eligibility, and election details, but provide that they may request Board review of the regional director's resolution of post-election disputes. The stipulated election is conducted under the direction and supervision of the regional director.

The third type of informal procedure is referred to as the full consent election agreement. Here, the parties agree that all pre-election and post-election disputes will be resolved with finality by the regional director. For example, the parties agree that if they are unable to informally resolve disputes arising with respect to the appropriate unit or other election details, those issues will be presented to, and decided with finality by, the regional director after a hearing. Upon the close of the hearing, the entire record in the

case is forwarded to the regional director. After review of the record, the regional director issues a final decision, either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director. Similarly, all matters arising after the election, including determinative challenged ballots and objections to the conduct of the election, are decided with finality by the regional director. The regional director issues to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

2. Notice of Election

Upon approval of the election agreement or issuance of the direction of election pursuant to a full consent election agreement, the regional director promptly transmits to the parties and their designated representatives the Notice of Election, which publicizes the holding of the election. This notice reproduces a sample ballot and outlines such election details as the date(s) of the election, location(s) of polls, time of voting, and the eligibility rules. If the election agreement or direction of election provides for individuals to vote subject to challenge, the Notice of Election so states, and advises employees that such individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the election agreement or the direction of election has permitted them to vote subject to challenge. The Notice of Election further advises employees that the eligibility or inclusion of such individuals will be resolved, if necessary, following the election. The employer must post paper copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the date of the election. The employer

must also distribute the notice electronically if it customarily communicates with employees in the unit electronically. The employer's failure properly to post or distribute the Notice of Election is grounds for setting aside the election whenever proper and timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

3. Voter List

Within 2 business days after the regional director's approval of the election agreement or issuance of the direction of election pursuant to a full consent election agreement, the employer must provide the regional director and the parties with an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in order to allow the nonemployer parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the nonemployer parties' lack of knowledge of voters' identities. The employer must also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction within 2 business days after approval of the agreement or issuance of the

direction of election unless a longer time is specified in the agreement or direction. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties. The list must be in an approved electronic format, unless the employer certifies that it does not have the capacity to produce the list in the required format. The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure. The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Hearing

If the parties have not entered into a voluntary election agreement, a hearing must be held to determine if a question of representation affecting commerce exists before a regional director or the Board may direct an election to resolve that question. The hearing continues day to day until completed absent extraordinary circumstances. The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified agency employee. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the hearing officer is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of whether a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is

being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Such matters can be resolved, if necessary, following the election. Each party is afforded full opportunity to introduce evidence of the significant facts that support its contentions and are relevant to the existence of a question of representation. Witnesses are examined orally under oath. The rules of evidence prevailing in courts of law or equity are not controlling.

After the Statement of Position is received into evidence, the other parties respond to each issue raised in the Statement. Thus, for example, the petitioner may amend its petition to conform to an alternative unit proposed by the non-petitioning party. The regional director has discretion to permit parties to amend their Statements of Position or their responses in a timely manner for good cause. If the regional director permits a party to amend its Statement of Position, the other parties respond to each amended position. A party generally may not raise any issue, present evidence relating to any issue, cross-examine any witness concerning any issue, and present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response. However, no party is precluded from challenging the eligibility of any voter during the election on the ground that the voter's eligibility or inclusion was not contested at the pre-election hearing. In addition, no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction, and the regional director has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary. If a

party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party may not raise any issue or present evidence or argument about the appropriateness of the unit. And if the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

The regional director directs the hearing officer regarding the issues to be litigated at the hearing. The hearing officer may require parties to make offers of proof. If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence is not received. In most cases a substantial number of the relevant facts are undisputed and stipulated.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection is waived by further participation in the hearing. A party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the hearing.

Before the hearing closes, the hearing officer solicits the parties' positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period, but does not permit litigation of these issues. The hearing officer also advises the parties what their obligations will be if an election is directed, and solicits the name and contact

information of the employer's on-site representative to whom the regional director should transmit the Notice of Election. At the close of the hearing, parties are permitted to make oral arguments on the record. Parties are permitted to file post-hearing briefs only with special permission of the regional director. The regional director specifies the time for filing such briefs, and may limit the subjects to be addressed in post-hearing briefs.

Upon the close of the hearing, the entire record in the case is forwarded to the regional director for decision. The hearing officer also transmits an analysis of the record, but makes no recommendations in regard to resolution of the issues.

E. Regional Director Pre-Election Determinations; Directions of Election; Notice of Election; Voter List; Requests for Review

1. Pre-Election Determinations; Direction of Election; Notice of Election

After the pre-election hearing closes, the regional director proceeds to review the record of the hearing and any post-hearing briefs to determine whether a question of representation affecting commerce exists concerning a unit appropriate for the purposes of collective bargaining or, in the decertification context, concerning a unit with an incumbent representative. The regional director may decide either to direct an election, dismiss the petition, or reopen the hearing.

The regional director's direction of election ordinarily specifies the type, date(s), time(s), and location(s) of the election and the eligibility period. The regional director sets the election for the earliest date practicable consistent with the Board's rules. The election is not scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served unless the parties entitled to the list (for example, unions and decertification petitioners) waive the right to use the list for some or all of the 10-day

period. The regional director directs (and conducts) the election where appropriate notwithstanding the pendency of an unfair labor practice charge covering the unit at issue and a request that the charge block the election if the regional director determines that the charging party's offer of proof in support of its charge does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself.

The regional director promptly transmits the direction of election to the parties and their designated representatives, and ordinarily will simultaneously transmit the Board's Notice of Election, which publicizes the holding of the election. This notice reproduces a sample ballot and outlines such election details as the date(s) of the election, location(s) of polls, time of voting, and the eligibility rules. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election so states, and advises employees that such individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice further advises employees that the eligibility or inclusion of such individuals will be resolved, if necessary, following the election.

The employer must post paper copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the date of the election. The employer must also distribute the notice electronically if it customarily communicates with employees in the unit electronically. The employer's failure properly to post or distribute the Notice of Election is grounds for setting aside the election whenever proper and

timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

2. Voter List

Within 2 business days after issuance of the direction of election, the employer must provide the regional director and the parties named in the direction with an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in order to allow the nonemployer parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the nonemployer parties' lack of knowledge of voters' identities. The employer must also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the direction of election within 2 business days after issuance of the direction of election, unless the direction specified a longer time for filing and service of the list. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties. The list must be in an approved electronic format, unless the employer certifies that it does not have the capacity to produce the list in the required format. The employer's failure to file or serve the list within the specified time or in the proper format

is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure. The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

3. Requests for Review

Any party may request that the Board review any action of a regional director delegated to the director under Section 3(b) of the Act unless the Board's rules provide otherwise. However, neither the filing of such a request nor the grant of such a request will operate as a stay of any action taken by the regional director, unless the Board orders otherwise. Any party may file with the Board a statement in opposition to the request for review. The Board will grant a request for review only where there are compelling reasons to do so. The regional director's actions are final unless the Board grants a request for review. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any related subsequent unfair labor practice proceeding. If the Board grants review, the Board shall make such disposition of the matter as it deems appropriate.

A party requesting review may also request expedited consideration. A party may also request that the Board stay some or all of its proceedings, including the election, or segregate and/or impound some or all of the ballots. Relief will be granted only upon a

clear showing that it is necessary under the particular circumstances of the case. However, the pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

The request for review may be filed at any time following the regional director's action until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review of a decision and direction of election before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal, and a party may combine a request for review of the decision and direction of election with a request for review of the regional director's resolution of objections and challenged ballots, if the party has not previously requested review of the direction of election.

F. Election Procedure; Challenges and Election Objections; Processing of Challenges and Objections; Hearings; Regional Director Dispositions of Challenges and Objections; Appeals

1. Election Procedure; Challenges

Unless otherwise directed by the Board, all elections are conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. A Board agent usually arranges a pre-election conference at which the parties check the list of voters and attempt to resolve any questions of eligibility. When an election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe, and the ballots are marked in the secrecy of a voting booth.

Ballots cast by individuals whom the parties agree may vote subject to challenge, or whom the decision and direction of election permits to vote subject to challenge, are segregated and impounded. The parties' authorized observers and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. For example, the Board agent challenges anyone whose name is not on the list. If such a person is permitted to vote, his or her ballot is segregated, and, if the challenge is not resolved before the tally, impounded. Board agents, in the presence and with the assistance of the parties' authorized representatives, ordinarily count and tabulate the ballots promptly after the closing of the polls. Elections are decided by a majority of the valid votes cast. Voter challenges may be resolved by agreement. A complete tally of the ballots is made available to the parties upon the conclusion of the count. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which an individual or labor organization is certified, the unit placement of any such individuals may be resolved by the parties in the course of collective bargaining or may be determined by the Board if a timely unit clarification petition is filed.

2. Objections

Within 7 days after the tally of ballots has been prepared, a party may file with the regional director objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. The party filing objections must simultaneously serve a copy of its objections, including the short statement of the reasons therefor, on all other parties to the representation case. The party filing objections must also simultaneously file a written offer of proof in support of its objections, but the offer of proof need not be served on the other parties. A party must

timely file objections and the offer of proof even if there are determinative challenges. The regional director may grant additional time to file the offer of proof in support of election objections upon a showing of good cause.

3. Regional Director Action In Absence of Objections, Determinative Challenges and Runoff Elections

If no timely objections are filed, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held, the regional director issues to the parties a certification of the results of the election, including certification of representative where appropriate.

4. Processing and Disposition of Objections and Determinative Challenges

The initial procedures for handling objections to the conduct of the election or to conduct affecting the results of the election, as well as determinative challenges, are the same regardless of whether the election was directed by a regional director or held pursuant to the parties' agreement. The regional director has discretion to conduct an investigation or set the matters for a hearing without an investigation.

If timely objections are filed and the regional director determines that the evidence described in the party's offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director issues a decision disposing of the objections and challenges and a certification of the results of the election, including certification of representative where appropriate.

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election and the regional director determines that the evidence described

in the party's offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director transmits to the parties' and their designated representatives a notice of hearing before a hearing officer, unless the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

If the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to one of the two types of consent agreements, the administrative law judge, upon issuing a decision, severs the representation case and transfers it to the regional director for further processing. If, however, the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to a stipulated election agreement or a decision and direction of election, the provisions of § 102.46 of the Board's Rules and Regulations govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

If, on the other hand, the regional director issues a notice of hearing before a hearing officer, the hearing opens 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date. The post-election hearing

continues day to day until completed absent extraordinary circumstances. The hearing officer issues a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues following the hearing. Within 14 days after issuance of the hearing officer's report, any party may file exceptions to it with the regional director. A party opposing the exceptions may file an answering brief.

The regional director then decides the matter. The decision may include a certification of the results of the election, including certification of representatives where appropriate. The parties' appeal rights with respect to the regional director's decision on challenged ballots and/or objections depend upon whether the parties agreed to waive any appeal prior to the election. In cases where the election was conducted pursuant to either of the two types of consent election agreements, the regional director's decision regarding the election objections and determinative challenges is not subject to Board review.

If the election has been held pursuant to a stipulated election agreement or a direction of election, a party may request Board review, and may combine it with a request for review of the regional director's decision to direct the election if the party has not previously requested review of that decision. The request for review may be filed at any time after the regional director's decision on challenged ballots and/or objections until 14 days after a final disposition of the proceeding by the regional director. Any party may file with the Board a statement in opposition to the request for review. The Board will grant a request for review only where there are compelling reasons to do so. The regional director's actions are final unless the Board grants a request for review. The parties may, at any time, waive their right to request review. Failure to request review

precludes such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any related subsequent unfair labor practice proceeding. If the Board grants review, the Board shall make such disposition of the matter as it deems appropriate.

G. Runoff Elections

If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

29 CFR Part 103

Labor management relations.

In consideration of the foregoing, the National Labor Relations Board amends Chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

1. The authority citation for part 101 continues to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section

101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

Subpart C—[Removed and Reserved]

2. Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

3. Revise § 101.23 to read as follows:

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition[1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

(1) The employer's operations affect commerce within the meaning of the Act;

(2) Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

(3) Subparagraph (C) of that section of the Act is applicable to the picketing; and

(4) The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the regional director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

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[1] The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, insofar as they are applicable, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

(b) If, based on such investigation, the regional director determines that an election is warranted, the director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If it is determined that an election is not warranted, the director dismisses the petition or makes other disposition of the matter. Should the regional director conclude that an election is warranted, the director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR 102.69 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, except that the regional director's rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants such party special permission to appeal from the regional director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the regional director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other

appropriate action.

(c) If the regional director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the director may order a hearing on the issues. This hearing is followed by regional director decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in 29 CFR 102.63, 102.64, 102.65, 102.66, 102.67, 102.68, and 102.69, and the statement of the general course.

(d) Should the parties so desire, they may, with the approval of the regional director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in 29 CFR 102.62(a) and the statement of the general course.

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the regional director may process it under the procedures set forth in subpart C of 29 CFR part 102 and the statement of the general course.

4. Revise § 101.25 to read as follows:

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the regional director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the

regional director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR part 102 and the statement of the general course. In either event, the regional director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

5. Revise § 101.26 to read as follows:

§ 101.26 Initiation of rescission of authority cases.

The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the Region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. The blank form,

which is supplied by the Regional Office upon request or is available online, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, the names of any other labor organizations which claim to represent the employees, the petitioner's position on the type, date(s), time(s), and location(s) of the election sought, and the name of, and contact information for, the individual who will serve as the petitioner's representative. The petition may be filed by facsimile or electronically. The petitioner must supply with the petition evidence of authorization from the employees.

6. Revise § 101.28 to read as follows:

§ 101.28 Consent agreements providing for election.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are the consent election agreement with final regional director determinations of post-election disputes, the stipulated election agreement with discretionary Board review, and the full consent election agreement with final regional director determinations of pre- and post-election disputes. Forms for use in these informal procedures are available in the Regional Offices.

(b) The procedures to be used in connection with a consent-election agreement with final regional director determinations of post-election disputes, a stipulated election agreement with discretionary Board review, and a full consent-election agreement with final regional director determinations of pre- and post-election disputes are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under Section 9(c) of the

Act, except that no provision is made for runoff elections.

7. Revise § 101.29 to read as follows:

§ 101.29 Procedure respecting election conducted without hearing.

If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR part 102 and the statement of the general course in connection with the postelection procedures in representation cases under Section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the regional director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

8. Revise § 101.30 to read as follows:

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course respecting representation cases arising under Section 9(c) of the Act insofar as applicable. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance

of a notice of hearing on the issues which, after hearing, is followed by regional director decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the regional director, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under Section 9(c) of the Act.

PART 102—RULES AND REGULATIONS, SERIES 8

9. The authority citation for part 102 continues to read as follows:

Authority: Sections. 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees[2] And for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

10. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) Petition for certification or decertification. A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the

[2] Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.114(i) need not file an original. Except as provided in § 102.72, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the regional director when the petition is filed. Along with the petition, the petitioner shall serve the Agency’s description of procedures in representation cases and the Agency’s Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal

of any petition, the case shall be closed.

(b) Petition for clarification of bargaining unit or petition for amendment of certification. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

11. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with

the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

(b) RM Petitions. A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive

representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the regional director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(9) The type, date(s), time(s) and location(s) of the election sought.

(c) RD Petitions. Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(11) The type, date(s), time(s) and location(s) of the election sought.

(d) UC Petitions. A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) AC Petitions. A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) Provision of original signatures. Evidence filed pursuant to paragraphs (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

12. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list; Notice of Election.

(a) Consent election agreements with final regional director determinations of

post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Stipulated election agreements with discretionary Board review. Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also

include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70.

(c) Full consent election agreements with final regional director determinations of pre- and post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that

rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) Voter list. Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 2 business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the

agreement or direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) Notice of election. Upon approval of the election agreement pursuant to paragraphs (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the regional director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with § 102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

13. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of notice of hearing.

(a) Investigation; notice of hearing; Notice of Petition for Election. (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the regional director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening federal holidays, but if the 8th day is a weekend or federal holiday, the regional director shall set the hearing for the following business day. The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a "Notice of Petition for Election", and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director's own motion.

(2) Within 2 business days after service of the notice of hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted**,** and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b)(1) Statement of Position in RC cases. If a petition has been filed under § 102.61(a) and the regional director has issued a notice of hearing, the employer shall file with the regional director and serve on the parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the

notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(2) Statement of Position in RM cases. If a petition has been filed under § 102.61(b) and the regional director has issued a notice of hearing, each individual or labor organization named in the petition shall file with the regional director and serve on the other parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for

filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) Individual or labor organization's Statement of Position. Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) Identification of representative for service of papers. Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) Employer's Statement of Position. Within the time permitted for filing the Statement of Position, the employer shall file with the regional director and serve on the

parties named in the petition a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The regional director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) Statement of Position in RD cases. If a petition has been filed under § 102.61(c) and the regional director has issued a notice of hearing, the employer and the certified or recognized representative of employees shall file with the regional director and serve on the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition by the date and time specified in the notice of hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The regional director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The regional

director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The regional director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The regional director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(i) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications**,** locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(c) UC or AC cases. After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on the director's own motion. All hearing and posthearing procedure under this

paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

14. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. Subject to the provisions of § 102.66, it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the

regional director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. The regional director may, in the director's discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

15. Revise § 102.65 to read as follows:

§ 102.65 Motions; intervention; appeals of hearing officer's rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The regional director may rule upon all motions filed with him, causing a copy of the ruling to be served on the parties, or may refer the motion to the hearing officer, except that if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the hearing officer as hereinabove provided, except that

the hearing officer shall rule on motions to intervene and to amend the petition only as directed by the regional director, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the regional director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the hearing officer shall not be appealed directly to the regional director, except by special permission of the regional director, but shall be considered by the regional director when the director reviews the entire record. Requests to the regional director for special permission to appeal from a ruling of the hearing officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the

regional director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the regional director grants the request for special permission to appeal, the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the regional director. As stated in § 102.67, the parties may request Board review of regional director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e) (1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo*, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence

which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

16. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Response to Statement of Position. Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The regional director may permit the Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall respond to each amended position. The regional director may also permit responses to be amended in a timely manner for good cause. The hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

(c) Offers of proof. The regional director shall direct the hearing officer concerning the issues to be litigated at the hearing. The hearing officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony**.** If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

(d) Preclusion. A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to

timely furnish the lists of employees described in §§ 102.63(b)(1)(iii),(b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and 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.

(e) Objections. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) Subpoenas. The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may

either rule upon it or refer it for ruling to the hearing officer, except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) Election details. Prior to the close of the hearing, the hearing officer will:

(1) Solicit the parties' positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election in the event the regional director directs an election;

(3) Inform the parties that the regional director will issue a decision as soon as

practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these rules if the director directs an election and of the time for complying with such obligations.

(h) Oral argument and briefs. Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special permission of the regional director.

(i) Hearing officer analysis. The hearing officer may submit an analysis of the record to the regional director but shall make no recommendations.

(j) Witness fees. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

17. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) Proceedings before regional director. The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of

representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the regional director upon the record shall set forth the director's findings, conclusions, and order or direction.

(b) Directions of elections. If the regional director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) Requests for Board review of regional director actions. Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under Section 3(b) of the Act except as the

Board's rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

(d) Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) Contents of request. A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other

grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the regional director.

(f) Opposition to request. Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition.

(g) Finality; waiver; denial of request. The regional director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) Grant of review; briefs. The grant of a request for review shall not stay the regional director's action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board may provide for oral argument or

further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(i)(1) Format of request. All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited. A party may combine a request for review of the regional director's decision and direction of election with a request for review of a regional director's post-election decision, if the party has not previously filed a request for review of the pre-election decision. Repetitive requests will not be considered.

(2) Service. The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A certificate of service shall be filed with the Board together with the document.

(3) Extensions. Requests for extensions of time to file requests for review,

statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

(j) Requests for extraordinary relief. (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;

(ii) A stay of some or all of the proceedings, including the election; or

(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

(k) Notice of election. The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer’s failure properly to post or distribute

the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(l) Voter list. Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 business days after issuance of the direction, provide to the regional director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge, including, for example, individuals in the classifications or other groupings that will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the regional director and the parties named in the direction respectively within 2 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the regional director when the voter list is filed. The employer's

failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

18. Revise § 102.68 to read as follows:

§ 102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

19. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.

(a) Election procedure; tally; objections. Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two

or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification, the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the regional director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the

objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i). The regional director will transmit a copy of the objections to each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) Certification in the absence of objections, determinative challenges and runoff elections. If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

(c)(1)(i) Decisions resolving objections and challenges without a hearing. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where

appropriate.

(ii) Notices of hearing on objections and challenges. If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein. The regional director shall set the hearing for a date 21 days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the regional director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing a decision, sever the representation case and transfer it to the regional director for further processing.

(iii) Hearings; hearing officer reports; exceptions to regional director. The hearing on objections and challenges shall continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to

appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. Extra copies of electronically-filed papers need not be filed. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) Regional director decisions and Board review. The decision of the regional director may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the regional director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision, and a request for review of the regional director's decision and direction of election shall be due at the same time as the exceptions to the administrative law judge's decision are due.

(d)(1)(i) Record in case with hearing. In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii) Record in case with no hearing. In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) Revised tally of ballots. In any case under this section in which the regional

director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate with the same force and effect as if issued by the Board.

(f) Format of filings with regional director. All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8 1⁄2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) Extensions of time. Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

20. Revise § 102.71(c) to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

* * * * *

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the regional director and copies served on all the other parties within 14 days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall be submitted in eight copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. The request shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, DC, and a certificate of service shall accompany the requests.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

21. Revise § 102.76 to read as follows:

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§ 102.60 and 102.61, insofar as applicable, except that if a charge under § 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the

labor organization is currently recognized but desires certification under the Act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

22. Revise § 102.77(b) to read as follows:

§ 102.77 Investigation of petition by regional director; directed election.

* * * * *

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to § 102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, the regional director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, the director may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following shall be governed insofar as applicable by §§ 102.63 through 102.68 inclusive.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

23. Revise § 102.83 to read as follows:

§ 102.83 Petition for referendum under Section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.114(i) need not file an original. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

24. Amend § 102.84 by revising paragraph (i), redesignating paragraph (j) as paragraph (k), and adding new paragraphs (j), (l), (m), and (n) to read as follows:

§ 102.84 Contents of petition to rescind authority.

* * * * *

(i) The name and address of the petitioner, and the name, title, address, telephone

number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

* * * * *

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to Section 8(a)(3) of the Act. Such evidence shall be filed together with the petition, but shall not be served on any other party.

(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

(n) The type, date(s), time(s) and location(s) of the election sought.

25. Revise § 102.85 to read as follows:

§ 102.85 Investigation of petition by regional director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83, and it appears to the

regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, the director shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer, except that in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, the director may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

26. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing shall be governed, insofar as applicable, by §§ 102.63 through 102.68 inclusive.

Subpart I—Service and Filing of Papers

27. Revise § 102.112 to read as follows:

§ 102.112 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

28. Revise § 102.113(d) to read as follows:

§ 102.113 Methods of service of process and papers by the Agency; proof of service.

* * * * *

(d) Service of other documents. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail, electronic mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

* * * * *

29. Revise § 102.114(a), (d), and (g) to read as follows:

§ 102.114 Filing and service of papers by parties; form of papers; manner and proof of filing or service; electronic filings.

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile

transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.113(a) or (c) provide otherwise.

* * * * *

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8 1/2- by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency's discretion, be rejected.

* * * * *

(g) Facsimile transmissions of the following documents will not be accepted for filing: Answers to Complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Default Judgment; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the

Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

* * * * *

PART 103—OTHER RULES

30. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart B—Election Procedures

31. Revise § 103.20 to read as follows:

§ 103.20 Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses.

Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof. If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

By direction of the Board.

Dated: Washington, DC, December 4, 2014.

William B. Cowen, Solicitor.

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