

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CHAMBER OF COMMERCE OF THE)	
UNITED STATES OF AMERICA, et al.,)	
)	Case No. 1:15-cv-00009-ABJ
Plaintiffs,)	Judge Amy Berman Jackson
v.)	
)	
NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Defendant.)	
_____)	

EXHIBIT 6 IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**COMMENTS OF HR POLICY ASSOCIATION AND THE SOCIETY FOR HUMAN
RESOURCE MANAGEMENT REGARDING NOTICE OF PROPOSED RULEMAKING
REPRESENTATION—CASE PROCEDURES, 76 FED. REG. 36812 (JUNE 22, 2011)**

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On behalf of their members, a diverse and robust group of employers operating in the United States, HR Policy Association (“HR Policy” or the “Association”) and The Society for Human Resource Management (“SHRM” or the “Society”)¹ (collectively, the “Organizations”) submit the following comments in response to the National Labor Relations Board’s (“NLRB’s” or the “Board’s”) Notice of Proposed Rulemaking regarding Representation-Case Procedures (the “NPRM”). (76 Fed. Reg. 36812).

I. Overview of Comments

- **The Procedural Background – The Board is Requiring Comment to Its Proposed Extensive Election Rule Changes in an Unprecedented Short Period of Time.**

On June 22, 2011, pursuant to a 3-1 vote with Member Brian Hayes dissenting, the NLRB issued the NPRM regarding “rules and regulations governing the filing and processing of petitions relating to the representation of employees for collective bargaining with their employer.” 76 Fed. Reg. 36812 (June 22, 2011). The NPRM proposes to modify 29 C.F.R. §§ 102.60-102.114.² and includes proposed changes to modify over 100 sections and subsections of

¹ The following chapters and state councils of SHRM have specifically joined in this submission: Alabama SHRM State Council, Arkansas SHRM State Council, Baldwin County SHRM, Bay Area Human Resource Executives Council, Big Country SHRM, Butler-Warren Ohio SHRM Chapter, California SHRM State Council, Cedar Valley SHRM, Chattanooga SHRM, Delaware SHRM State Council, DelMarVa SHRM, Eastern Iowa Human Resources Association, Eastern Shore SHRM, Fond du Lac Area Human Resources Association, Four Rivers SHRM, Fox Valley Chapter of SHRM, Georgia SHRM State Council, Greater Madison Area SHRM, Greater Valdosta SHRM Chapter, Human Resource Association of Greater Detroit, Human Resources Association of Southern New Jersey, Human Resource Management Association of New Mexico, Human Resource Management Association of West Central Missouri, Illinois Fox Valley SHRM, Indiana SHRM State Council, Iowa SHRM State Council, Kalamazoo Human Resource Management Association, Kansas State Council of SHRM, Kentucky SHRM State Council, Lake Country Human Resources, Maryland SHRM State Council, Michigan SHRM State Council, Minnesota SHRM State Council, Missouri SHRM State Council, Mobile Alabama SHRM, North Carolina SHRM State Council, Northeast Tennessee Society of SHRM, Northwest Arkansas Human Resources Association, Northwest Georgia SHRM Chapter, Northstate SHRM, Pennsylvania SHRM State Council, Rhode Island SHRM Chapter, Rhode Island SHRM State Council, South Central Indiana Human Resources Association, Stateline SHRM, Tennessee Valley Chapter of SHRM, Texas SHRM State Council, Western Kansas Human Resource Management Association, Wyoming SHRM State Council, York SHRM.

² The NPRM also proposes to remove and reserve 29 C.F.R. §§ 101.17-101.30, 103.20 and to merge certain subject matter set forth in those sections into the revised 29 C.F.R. §§ 102.60-102.114.

the current Board regulations and span over 35 three column pages in the Federal Register. The Notice also required any party that desired to submit comments regarding such proposed rules to do so on or before August 22, 2011. The Board subsequently, on another 3-1 vote with Member Hayes again dissenting, denied the request of the Organizations and other interested parties to extend the comment period regarding such proposed rules and hold hearings after the filing of such comments. Accordingly, the Board majority is requiring all interested parties to fully submit their comments in a period of only 60 days -- an unprecedented short period of time, particularly given the proposed extensive modifications and changes to the Board's election procedures.³

Further, as Member Hayes indicated in his dissent to the proposed rules, the process utilized by the majority in adopting such rules may be in violation of the Government in the Sunshine Act. (5 U.S.C. § 552b). Unfortunately, sufficient information is not available to determine whether such a violation occurred. In addition, as other interested parties have noted, the Board majority may have violated the Regulatory Flexibility Act (5 U.S.C. §§ 601 *et seq.*) in certifying that the proposed rules would not have an adverse impact on small business entities.

Finally, the approach that the Board majority has taken with respect to the instant proposed rules is in stark contrast to the detailed and thorough approach the Board undertook in 1987 before adopting its healthcare unit rules. (52 Fed. Reg. 25142-49). Indeed, there the Board provided interested parties approximately four (4) months to provide comments with an initial due date of October 30, 1987. After four (4) public hearings, the Board extended the written

³ The Board did provide for interested parties to request to present oral testimony regarding the proposed rules. Oral testimony was received by the Board on July 18 and 19, 2011. Such testimony, however, was restricted to select presenters and then only five minutes was permitted for each presentation. The Organizations, at such hearing, presented testimony in opposition to the proposed rules, as did other employer organizations. Finally, the board has also provided a fourteen (14) day period for the parties to file comments replying to comments submitted during the initial comment period.

comment period and issued a second Notice of Proposed Rulemaking on September 1, 1988.

(See Second Notice of Proposed Rulemaking, 52 Fed. Reg. 33900-33935 (September 1, 1988)).

This notice was followed by another 6-week period for written comment. Ultimately, the Board promulgated the final rule on April 21, 1989 -- almost two (2) years after the initial notice. (29 C.F.R. §103.30).

- **The Board has Failed to Articulate and Document a Need for Its Proposed Rules, Especially in Light of Its Excellent Results in Timely Processing Election Petitions.**

The NLRB has a legitimate statutory responsibility to continuously evaluate its practices and procedures to assure that they serve the legitimate purposes of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended (“NLRA” or “Act”), and to take affirmative action to rectify legitimate problems with the administration of the Act. Such responsibility, however, is to be carried out on a fully informed and neutral basis. This statutory responsibility does not compel the conclusion, however, that existing rules need to be changed in the absence of a compelling justification and a fully documented record supporting such proposed changes.

According to the NLRB majority, the primary purpose for the proposed amendments to the procedural rules in representation cases is to “gain the efficiency and savings that would result from the streamlining of its procedures.” (76 Fed. Reg. 36829). Specifically, the Board majority in the NPRM provided three (3) reasons for its proposed new rules:

1. *First*, the NLRB claims that the amendments “would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation.”
2. *Second*, the Agency asserts that the amendments would “simplify representation case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors’ pre- and post-election determinations into a single, post-election request.”

3. *Third*, the Board maintains that the amendments would “allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.”

(76 Fed. Reg. 36812).

The Board majority failed to furnish, however, any factual support for its conclusions and apparently did not engage in any meaningful analysis of even its own considerable data before reaching the above stated assertions. Indeed, in a response to a Freedom of Information Act (“FOIA”) request filed by the Organizations and other interested parties, the Board failed to identify any analysis that it has undertaken to describe why the proposed rules are necessary -- including why certain cases are delayed beyond the Board’s standard time targets.⁴

Further, the above “justifications” are not borne out by the actual experiences of parties participating in representation case proceedings before the Board. Indeed, under the current procedural rules, the NLRB consistently meets or exceeds its representation case processing objectives. Moreover, while the NLRB claims that the amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, the NPRM fails to specifically identify those barriers and similarly fails to explain how the proposed amendments will ameliorate these alleged barriers. Finally, as more fully described below, many of the proposed amendments would violate the hearing requirement provided for in Section 9(c)

⁴ HR Policy, SHRM, and numerous other organizations submitted a FOIA request to the Board on July 15, 2011, seeking information in the Board’s possession to better educate themselves on the Board’s procedures and the alleged causes of delay in representation cases. However, much like the NPRM itself, the information produced by the Board fails to identify any specific causes of election delay, nor does it indicate how those delays would be remedied by the proposed rule. To the extent that the information produced does identify any particular cause of delay, it appears that cases involving blocking charges routinely take hundreds of days from petition to election, thus artificially increasing the Board’s average time from petition to election in all cases. If the Board has information, data, surveys, reports, analyses, or any other quantitative measure in its possession that supports the need for the proposed rule, we request that the Board identify and release such information so that interested parties may meaningfully comment.

of the NLRA, present due process issues, and complicate, rather than simplify, current representation case procedures.

- **The Board Failed to Seek Comments and Suggestions from Interested Parties Before Issuing Proposed Rules.**

Before embarking on wholesale revisions to existing procedures in representation cases, the NLRB should provide a comprehensive and inclusive process for all stakeholders to provide their views and experiences *before* issuing proposed regulations. In this regard, the NLRB's NPRM constitutes a significant departure from the historical practices. For instance, the NLRB made no effort to encourage any public discussion with respect to the content and scope of the NPRM before issuing it. In doing so, the Board summarily dismissed the possibility of any points of agreement among stakeholders whereby the Board could achieve improvements in election procedures through a consensual approach or negotiated rulemaking as opposed to one that simply adopts a skewed ideological approach. Such action is contrary to President Barack Obama's instructive (but not binding) Executive Order 13563, which specifically states that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." As Member Hayes noted in his dissent "at the very least" the proposals "should have been previewed for comment by the Board's standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association." (76 Fed. Reg. 36830).

- **The Board's Proposed Rules are Arbitrary and Capricious, Violate the Administrative Procedure Act, the Section 9 Hearing Requirement of the National Labor Relations Act, and also Fail to Provide Necessary Due Process Protections for Non-Petitioning Parties.**

Significantly, the NPRM, as drafted, is subject to plausible, if not compelling legal challenges. Pursuant to the requirements of Section 6 of the Act and Section 706(2)(A) of the

Administrative Procedure Act (“APA”) any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). The proposed revisions to the NLRB’s representation case procedures arguably do not meet this standard. Additionally, the provision of the NPRM that would allow the regional director or hearing officer to deny the non-petitioning party a pre-election hearing is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold “an appropriate hearing” prior to an election.⁵

Further, many of the proposed amendments are invalid because they are arbitrary and capricious. For example, the proposed regulations would improperly convert representation cases from investigatory to adversarial proceedings with the Board abdicating many of its investigatory functions in favor of a quasi-judicial role. In proposing such a radical change in representation case hearings, the Board has failed to recognize its concomitant duty to provide due process protections to all parties that participate in such adversarial administrative proceedings. Further, the Board’s attempt to analogize its new approach in representation proceedings to the Federal Rules of Civil Procedure is misguided, inaccurate and wholly lacking in legal support. Many of the proposed amendments would also place substantial burdens on non-petitioning parties, including employers, without placing any corresponding burdens on petitioners (primarily, labor unions). Moreover, the amendments would limit the ability of employers to communicate with their employees regarding union issues, erode due process rights, stifle the parties’ ability to create a legitimate hearing record, and eliminate opportunities for

⁵ The Board’s abdication of its statutory responsibility in this respect is wholly unjustified and is not sound public policy.

meaningful Board and appellate court review of contested election-related issues. In addition, the proposed amendments authorizing a regional director to direct an election without first resolving disputes regarding the appropriateness of the petitioned-for unit and unit placement issues would create confusion, adversely impact free speech rights of employers and other interested parties, and would likely result in increased unfair labor practice and election objection litigation.

Finally, the proposed rules attempt to move virtually all election-related disputed issues until after the election process has been completed. As noted above, not only will such a procedure increase litigation, but it also will place employers in potentially difficult legal and practical situations during the pendency of any potential appeal of Board rulings. Given the process an employer must go through to have a federal court of appeals review any disputed issue regarding an election -- including the configuration of the voting unit -- there is often considerable delay in the ultimate resolution of post-election issues. Specifically, employers must first refuse to bargain with the selected union, have the Board issue a complaint on a refusal to bargain basis and then, and only then, can the employer appeal disputed issues to the appropriate court of appeals. Such appeal process can take months, if not years. During the pendency of such appeals, the selected union is presumed to be the majority representative of unit employees and an employer proceeds, at its peril, if it makes unilateral changes in terms and conditions of employment that are mandatory subjects of bargaining. The proposed rules, as noted above, delay, if not attempt to remove all together, disputed election issues until after the election has been completed. The proposed rules increase the number and complexity of potential post-election disputes and therefore place employers in even greater peril during the post-election period if they desire to appeal any election related issue. Indeed, as a practical

matter, such rules will further complicate employer decision making particularly with respect to potential changes in health insurance and pension plan areas during the pendency of the appeal period. Any changes in the Board's election rules should reduce, rather than increase, uncertainty with respect to employer changes in terms and conditions of employment during the pendency of post-election appeals and reduce the number of disputed election issues.

- **The Proposed Rules Requiring Employers to Furnish Employee Personal Contact Information, Including E-mail Addresses, Presents Serious Employee Privacy and Employer Property Right Issues.**

The Board's proposed rules require that an employer furnish to the Board, and a petitioning party, employee contact information including personal telephone numbers and personal e-mail addresses of potential voting unit employees. Such a requirement appears with respect to multiple lists that an employer would be required to furnish in the pre-election time frame. It is unclear whether such confidential information include work addresses and work phone numbers or are personal e-mail addresses and personal phone numbers of employees. The Board at least noted the potential for abuse in the use of such information by asking for comment as to what remedies should be put in place if a party obtaining such information misuses same. (76 Fed. Reg. 36821). Notwithstanding such remedial concerns, the Board should clarify its position with respect to such requested information and further engage in additional analysis as to the need for the use of such private information of employees.

- **Electronic Signatures on Union Authorization Cards Should not be Permitted.**

The Board seeks comment from interested parties as to whether electronic signatures should be permitted on union authorization cards or on union petitions seeking a representation election. The potential for fraud, misuse and confusion regarding this approach is self-evident. Indeed, the National Mediation Board ("NMB"), by way of example, strictly prohibits such a

practice. Further, the often misleading and unreliable nature of union authorization cards makes such suggested approach ill advised. Accordingly, the Board should not proceed further in this area.

- **The Board Should Review Its Blocking Charge Procedure After Its Proposed Election Rules Have Been Withdrawn and in the Context of Any Potential New Review of Representation Processing.**

The Board majority also seeks comment from interested parties regarding whether its current blocking charge procedures should be modified or rescinded. The current blocking charge procedure is a significant contributor to cases and petitions that are processed beyond the Board's current time targets. While the Organizations commend the Board's concern regarding this area, this subject should be reviewed after the proposed rules have been withdrawn and in the context of a balanced and thorough review of all election-related issues.

- **If the Board Requires Employers to Furnish Confidential Employee Information, Strong Sanctions Should be Imposed Regarding any Improper Dissemination and Utilization of Such Confidential Information.**

The Board also has asked for comments regarding what sanctions, if any, should be imposed for the improper use and utilization of any confidential employee information it may require an employer to furnish to the Board and to petitioning parties in the pre-election process. While the Organizations believe that such information should not be required to be furnished -- rendering the Board's request for comments on this issue moot -- if such requirements for release of this confidential information are adopted by the Board, at a minimum, the following sanctions should be imposed:

- Any organization improperly utilizing or disseminating employee confidential information should be prohibited, for one year following the misuse of such information, from filing any petition for representation for any bargaining unit with the NLRB.

- Any organization improperly utilizing or disseminating such employee confidential information should be required to take all reasonable and appropriate steps to remedy the violation.
- Any organization improperly utilizing or disseminating such information should be required to send a letter of apology to each employee whose information has been improperly used and disseminated. Such letter should describe what steps have been taken to remedy the improper use of the information.

Finally, in addition to the significant employee property rights at issue, the Board should recognize the important *employer* property rights to such information. Indeed, among other concerns, the inappropriate release and utilization of such information could lead to potential improper recruiting of valuable company employees and other interference by third parties with the employer's workers.

- **As a Matter of Public Policy and Precedent, a Three Member Board (Only Two of Whom have been Confirmed by the Senate) Should not Proceed to Consider and Vote on the Proposed Rules.**

Finally, given the fact that Board Chairman Wilma Leibman's term expires on August 27, 2011, there, in all probability, will only be three (3) sitting Board Members involved in reviewing the numerous comments that are anticipated to be filed by parties regarding the proposed rules. Additionally, only two of such Members will have been confirmed by the United States Senate. As a matter of sound public policy, and precedent, the Board should not proceed to consider such important comprehensive changes to Board election policies and procedures until it has a full complement of confirmed members.

- **The Board Should Withdraw the Proposed Rules or Reject Such Rules.**

In summary, the NPRM seeks sweeping changes that are procedurally and substantively defective. Further, the Board's proposed election rules and its other pending initiatives clearly

raise questions as to the credibility and neutrality of the Agency.⁶ Given the NLRB's consistent success in processing representation cases, there is no legitimate justification for the proposed amendments, and the Board should withdraw the NPRM in its entirety. In the alternative, the Board should reject its proposed rules. If the Board, at a future point when it has a fully-confirmed complement of members, desires to reconsider this area, it should do so in a thoughtful and balanced manner and provide interested parties the appropriate opportunities to provide oral testimony and written comments before promulgating any final rules.

II. Statement of Interest

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively,

⁶ In addition to the Board's proposed rulemaking in the instant matter, the Board, within the last year, has: i) requested comment on rulemaking requiring employers to post a notice informing employees of their rights under the NLRA, 75 Fed. Reg. 80410 (Dec. 22, 2010); (ii) invited *amicus* briefs in *DR Horton, Inc.*, 12-CA-25764, regarding whether an employer violated Section 8(a)(1) by requiring employees to waive all rights to a judicial forum and denying the arbitrator the ability to consolidate claims or proceed to hear contested issues on a class or collective action; (iii) invited *amicus* briefs in *Hawaii Tribune-Herald*, 37-CA-7043 and related cases, regarding whether an employer has a duty to provide a union with statements provided to the employer in the course of its investigation into alleged employee misconduct; (iv) invited *amicus* briefs in *Chicago Mathematics & Science Academy Charter School, Inc.*, 13-RM-1768, addressing whether an Illinois charter school falls under the jurisdiction of the NLRB or an Illinois labor relations board; (v) invited *amicus* briefs in *Specialty Healthcare*, 356 N.L.R.B. No. 56, asking whether the Board should continue to adhere to *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), or whether there should be a presumption that employees in the "same job" make up an appropriate unit; (vi) invited *amicus* briefs in *Roundy's Inc.*, 30-CA-17185, addressing the appropriate standard to review allegations of unlawful employer discrimination in nonemployee access cases and specifically asking whether the Board should continue to adhere to *Sandusky Mall Co.*, 329 N.L.R.B. 618 and what bearing, if any, *Register Guard*, 351 N.L.R.B. 1110, has on the Board's standards for unlawful discrimination in nonemployee access cases; (vii) invited *amicus* briefs in *Lamons Gasket Co.*, 31-RD-1578, where the Board asked for *amici's* experience under *Dana Corp.*, 351 N.L.R.B. 434 (2007), which, after an employer voluntarily recognized a union, allowed employees 45 days' to file a decertification petition or to support another union, specifically asking whether, in light of the parties' experiences, *Dana Corp.* should be overturned; (viii) *amicus* briefs in *UGL-Unnico Service Co. & Grocery Haulers, Inc.* 355 N.L.R.B. No. 155, where the Board is considering overturning *MV Transportation*, 337 N.L.R.B. 770 (2002), and requiring a successor to bargain with an incumbent union for a reasonable period of time without any challenge to the union's majority status and asking for *amici's* views on whether *MV Transportation* applies in a "perfectly clear" successor situation.

these companies employ more than 10 million people in the United States, and their chief human resource officers are responsible for finding, hiring, and developing the talent needed to staff their organizations. Since its founding, one of HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace. The substantial majority of HR Policy's members are covered by the NLRA and have an interest in the Act and its administration, including representation case procedures.

The Association recently released its *Blueprint for Jobs in the 21st Century: A Vision for a Competitive Human Resource Policy for the American Workforce*,⁷ which represents nearly 18 months of work among the Association's members. The 125 page report paints a detailed picture of the new global economic, social, legal, and demographic forces influencing job growth in the United States, and then offers 20 specific recommendations in the fields of education, workforce development, immigration, regulatory reform, and health care to encourage job growth and employee retention in the United States. One of the key recommendations of the *Blueprint* is to move away from the adversarial formulation of employment policy that has characterized our employment regulatory scheme to an approach that seeks a consensus among the stakeholders, using mechanisms like negotiated rulemaking.⁸ The Association is very concerned that the approach being taken by the Board simply perpetuates the flawed, timeworn manner of formulating employment policy, making the United States a less desirable place to do business.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of

⁷ Available at <http://www.hrpolicy.org/downloads/blueprint/Blueprint%20for%20Jobs%20Report.pdf>.

⁸ *Cf. id.* at 45-70.

human resource professionals and advances the interests of the human resource profession.

Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. The substantial majority of SHRM's members are covered by the NLRA and have an interest in the Act and its administration, including representation case procedures.

III. Comments

A. *The NLRB has not Identified a Compelling Need for Revisions to its Existing Representation Case Procedures.*

The amendments to the NLRB's Regulations, (76 Fed. Reg. 36812 *et seq.* (to be codified at 29 C.F.R. Parts 101, 102, 103)), contemplated by the NPRM are substantial in their scope and impact. Yet, the NLRB has not articulated any persuasive or compelling justification for the proposed amendments.⁹ Since the NLRB already consistently meets, or exceeds, its own internal guidelines for processing representation cases, no changes to current procedures are necessary or desirable from a labor policy standpoint. Current NLRB procedures are effective in promptly resolving the substantial majority of representation cases filed with the NLRB. Indeed, the NLRB currently exceeds its internal guidelines for processing representation petitions and holding elections. Given the Board's continuing success in processing representation cases, no legitimate labor policy reason exists for completely re-writing the NLRB's procedural rules.

⁹ Contrary to the views of certain proponents of the NPRM at the July 18 and 19 hearings, "The Empirical Case for Streamlining the NLRB Certification Process" study by Professors Bronfrenbrenner and Warren does not demonstrate a need for the proposed regulations. The study apparently only looked at allegations of unfair labor practice violations, regardless of whether the allegation was meritorious or eventually dismissed. *Id.* at 3-4. Furthermore, the study relies on allegations of unfair labor practices occurring before the filing of a petition as support for modifications to post-petition procedures. *Id.* at 4. Moreover, the study is not premised on neutral sources, but rather relies heavily on the writings and opinions of union advocates and organizers. *Id.* at 9. Under such circumstances, the study is inherently unreliable and provides little, if any support, for the vast majority of the proposed revisions. The Comments submitted by the American Hospital Association (joined by the American Society for Healthcare Human Resources Association and the American Organization of Nurse Executives) set forth a more complete analysis of the many reasons that the Bronfrenbrenner and Warren Report should not be relied on in promulgating the Final Rule.

Moreover, before undertaking such substantial changes in its administrative procedures, the NLRB should proceed cautiously, taking all necessary steps to carefully analyze input from all interested parties.

1. The NLRB has Failed to Offer Sufficient Justification for the Substantial Revisions Contemplated by the NPRM, Particularly in Light of Its Continued Success in Resolving Questions Concerning Representation.

The NLRB has not offered sufficient justification for the substantial revisions proposed with respect to existing representation case procedures. Rather, in the NPRM, the Board merely sets forth unsupported assertions regarding the desirability of promptly resolving questions concerning representation and it ignores its considerable success in meeting or exceeding its current election processing time targets. Indeed, the Board's own performance statistics provide no support for the expedited representation procedures contemplated by the NPRM. The NLRB's internal objective in representation cases is to complete elections within 42 days of the filing of a petition. (NLRB GENERAL COUNSEL, SUMMARY OF OPERATIONS (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011)). In 2010, the regional offices exceeded this objective, completing initial elections in representation cases in a median of 38 days from the filing of the petition and conducting 95.1% of all initial representation elections within 56 days of the filing of the petition. (*Id.* at 5). Moreover, decisions or supplemental reports issued in cases involving post-election objections and/or challenges requiring a hearing were issued in a median of 70 days, exceeding the Board's goal by ten days. (*Id.*) Decisions or supplemental reports issued in cases addressing post-election objections and/or challenges not requiring a hearing were issued in a median of 22 days, also exceeding the Board's goal by ten days. (*Id.*) These statistics are not indicative of a systemic problem justifying sweeping changes to the extant administrative scheme. Nor does the evidence indicate that petitioners are put at any disadvantage by the current Board Rules and Regulations, given the fact that, during the past three years, unions have

won approximately two-thirds (2/3) of representation (RC) elections conducted by the Board.

“Number of NLRB Elections Held in 2010 Increased Substantially From Previous Year,” Daily Lab. Rep. (BNA) No. at B-1 (May 3, 2011).

In the NPRM, the NLRB majority does not explain how or why these time tables for resolving representation cases are inadequate. Instead, the Board dismisses existing time guidelines (and the agency’s performance against them) because “those time targets have been set in light of the agency’s current procedures, including their built-in inefficiencies.” (76 Fed. Reg. 36829). In the NPRM, the Board merely *presumes* that reducing the time for processing representation cases is preferable, without any reasoned consideration of the impact of reducing these timetables on interested parties. Indeed, the NLRB asserts that “Congress intended that the Board adopt procedures that permit questions concerning representation to be resolved both quickly and fairly.” (76 Fed. Reg. 36813). Citing the decision in *Tropicana Products, Inc.*, 122 N.L.R.B. 121, 123 (1958), the Board claims that “time is of the essence if Board processes are to be effective.” (76 Fed. Reg. 36813). However, *Tropicana Products, Inc.* involved a question of whether the NLRB could assert jurisdiction over an employer, not the time required to process representation petitions. *Tropicana Products, Inc.*, 122 N.L.R.B. at 122-23. Nothing in that decision suggests that the NLRB must consider decreasing the time required to process representation cases as the overriding statutory objective.

Given the Board’s performance in timely processing representation cases, the NLRB’s articulated reasons for the proposed rule changes are inconsistent with the actual experience of the Agency in processing representation cases under the current procedural scheme. (76 Fed. Reg. 36812). For instance, in the NPRM, the NLRB claims that “the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning

representation.” (*Id.*) However, the NPRM fails to specifically identify any such barriers and similarly fails to explain how the proposed amendments will ameliorate these alleged “barriers.”¹⁰ Although the NLRB majority claims that “[t]he history of congressional and administrative efforts in the representation-case area has consisted of a progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation....” (76 Fed. Reg. 36829), the NPRM majority does not offer any explanation or tangible proof to support the need to further expedite representation elections. (76 Fed. Reg. 36813). Moreover, there is no statutory imperative requiring that representation elections must be held in the minimum possible time.

Indeed, given the importance of the issues at stake in representation cases -- both for employers and employees -- a 38 day average length of time to an election is hardly unreasonable. Considering the substantial alterations to existing representation case procedures sought by the NPRM, and the enormous burdens associated with their implementation, the NLRB -- at a minimum -- should provide some rational justification supported by reliable evidence to support the Agency’s position that the proposed amendments are necessary and will advance the underlying objectives of the Act. *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1460 (D.C. Cir. 1997) (“[T]he Board, like every other administrative agency, must provide a logical explanation for what it has done.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data

¹⁰ In the NPRM (76 Fed. Reg. 36814), the NLRB asserts that “[t]he right to review of regional directors’ post-election decisions has caused extended delay of final certification of election results in many instances.” Significantly, none of the proposed revisions in the NPRM are designed to address this issue. Instead, the NLRB’s solution to its inability to timely resolve requests for review in representation cases is to decline to resolve them at all, except on a discretionary basis. (*See* 76 Fed. Reg. 36845).

and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (citations omitted). Here, the NLRB has failed to do so.

Despite the Board’s emphasis on the timeframes in representation cases in the NPRM, the NLRB does not identify any estimate of the time required to process representation cases under the proposed reforms.¹¹ Moreover, the NLRB posits no estimates of the target time period for holding representation elections. Instead, the entire explanation in the NPRM for re-writing decades of practice before the agency is the dubious maxim that “less is more” when it comes to deciding questions concerning representation. However, such truisms cannot substitute for real proof that there are serious problems with the existing administrative procedures. While the NLRB has a legitimate statutory responsibility to ensure that its practices and procedures serve the legitimate purposes of the NLRA, this statutory responsibility does not compel the conclusion that existing rules need to be changed in the absence of a compelling justification for such reforms. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”).

2. The Proposed Amendments Would Improperly Curtail the Free and Open Debate Regarding Union Representation Contemplated by the Act.

While the Organizations applaud the NLRB’s interest in promptly resolving questions concerning representation, any contraction of the time period between the filing of the representation petition and the holding of an election should not prejudice the rights of

¹¹ The NPRM explains that “[g]iven the variation in the number and complexity of the issues that may arise in a representation proceeding, the amendments do not establish inflexible time deadlines or mandate that elections be conducted within a set number of days after the filing of a petition.” (76 Fed. Reg. 36817). Obviously, if the Board was concerned about the “number and complexity of the issues that may arise in representation cases,” the Agency would not be substantially reducing the current time tables for resolving these issues. Abdicating its responsibilities for resolving these cases is clearly inconsistent with the Board’s responsibility to decide questions concerning representation. (*See* 29 U.S.C. § 159(c)).

employers, employees, or labor organizations, nor should they interfere with the Board's statutory responsibility to encourage a free and open debate regarding the merits of union membership and collective bargaining.¹² There are a myriad of legitimate statutory and policy reasons that mandate a reasonable period for informed debate between and among interested parties prior to the conduct of a representation election. The procedures outlined in the NPRM will clearly curtail such debate.

In order for the NLRB representation process to function properly, employees must have the benefit of hearing different views on the advantages and disadvantages of union representation prior to casting their ballots. The NLRB explained this principle in 1948 in its seminal decision in *General Shoe Co.*:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as ideal as possible, to determine the uninhibited desires of employees. It is our duty to establish those conditions; it is also our duty to see that they are fulfilled.

General Shoe Co., 77 N.L.R.B. at 126 (“An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.”); *see also J.J. Cassone Bakery*, 345 N.L.R.B. 1305, 1318 (2005) (“The procedures for the conduct of elections are designed to insure, as much as possible, that the outcome reflects a free and fair choice of the voters.”); *Clark Brothers Co., Inc.*, 70 N.L.R.B. 802, 805 (1946) (“The Board has long recognized that ‘the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment.’”) (*citing Harlan Fuel Company*, 8 N.L.R.B.

¹² In the NRPM, the NLRB claims that the proposed procedural amendments “do not impose any limitations on the election-related speech of any party” (76 Fed. Reg. 36829), and that the proposed amendments “do not in any manner alter existing regulation of parties’ campaign conduct or restrict any party’s freedom of speech.” (76 Fed. Reg. 36817).

25, 32 (1938)). Moreover, seven years before *General Shoe*, in its 1941 decision in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the Supreme Court specifically held that the NLRA does not prohibit employers from expressing their views about labor organizations. Indeed, in evaluating the Board's position at that time that required employers to remain neutral in the face of union organizing activity, the Supreme Court concluded that:

Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. *The employer in this case is as free now as ever to take any side it may choose on this controversial issue.*

Virginia Electric & Power Co., 314 U.S. at 477; *see also NLRB v. M. E. Blatt Co.*, 143 F.2d 268, 274 (3d Cir. 1944) (“[T]he Act does not enjoin the employer from expressing its views on labor policies or problems and does not impose a penalty upon it because of any utterances which it has made.”).

After the Supreme Court's decision in *Virginia Electric*, in the 1947 Taft-Hartley amendments to the NLRA, Congress enacted Section 8(c) of the Act to protect employer speech from improper regulation by the NLRB. (29 U.S.C. § 158(c)); *see also Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 66-67 (2008). Section 8(c) of the Act provides, in pertinent part, that “[t]he 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 ... if such expression contains no threat of reprisal or force or promise of benefit.” (29 U.S.C. § 158(c)); *see also Brown*, 554 U.S. at 67. Although Section 8(c) does not strictly apply to representation cases, both the Board and Supreme Court have recognized that Federal labor policy favors “uninhibited, robust, and wide-open debate in labor disputes” and that the enactment of Section 8(c) “manifested a congressional intent to encourage free debate on issues

dividing labor and management.” *See Brown*, 554 U.S. at 68 (citations omitted); *Franzia Bros. Winery*, 290 N.L.R.B. 927, 932 (1988).

While the NLRB dubiously suggests that “the proposed rules do not impose any limitations on the election-related speech of any party” (76 Fed. Reg. 36829), the practical effect of the reduction in processing times for representation elections will be to reduce or eliminate opportunities for employers to communicate with eligible voters prior to an election and, perhaps even more importantly, for employees to communicate with each other regarding the often numerous issues associated with union representation.

Significantly, certain of the arguments advanced in favor of so-called “quickie elections” all proceed from the clearly erroneous proposition that employers will engage in unlawful conduct if given the opportunity to communicate with their employees regarding union representation. *See, e.g., B. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 655, 666 (2010) (“Once the organizing campaign becomes public, employers — in nearly all cases — mount a campaign of their own designed to discourage employees from choosing unionization. ... [E]mployers have at their disposal a variety of mechanisms, both legal and illegal, for discouraging unionization, and they use these tools with some frequency.”); H. Shaiken, *Unions, the Economy, and Employee Free Choice*, p.2 (Economic Policy Institute 2007) (“Today, if workers seek to organize, the National Labor Relations Board (NLRB) sets a secret-ballot election generally a month or two following the formal request. This period winds up being an ‘interval of intimidation.’ The employer has the right of free speech, the right to hold unlimited mandatory meetings with employees, the right to ‘predict’ calamities if the union wins, and the right to bar union organizers from the premises. With these rules the playing field is not simply tilted against organizing, unions are shut out of

the stadium.”). Even if this were true -- which it clearly is not -- limiting the time period for debate prior to the representation elections will not deter employers who refuse to comply with extant law regarding permissible conduct and communications from committing objectionable conduct and unfair labor practices to chill unionization. If anything, denying opportunities for legitimate communication will encourage such questionable practices by recalcitrant employers well before any petition is filed or even before any signs of union organizing. Even law-abiding employers will have a strong incentive to engage in continuous, lawful messaging to their employees about the implications of forming a union. This would hardly seem to be the result the Board is seeking.

The real life business practices and experiences of some of HR Policy’s member companies underscore the substantial adverse impact of shortening the time between petition and election from the current median of 38 days, to an expedited time period of 10 to 21 days. Indeed, the expedited election period would deprive many of the Organizations’ members of their right to communicate with their employees regarding unionization issues. For instance, certain members of HR Policy provided these specific examples which underscore the practical problems that would result from the NPRM:

- “We are staffed very lean and we need the full time period to schedule the meetings and share the information with the employees. We have over 300 locations in the U.S. and many of those locations are a continuous operation. With the variety of shifts it may take more that 8 days to schedule time with all employees. The 10 day period would severely hamper our communication to our employees.”
- “This could have a material impact on our business. As a matter of course, many of our locations schedule or forecast the availability of our workforce 4 weeks or more in advance. For this reason, an election occurring less than 38 days from the filing of the petition would disrupt our business and ability to service customers on the day of the election. Additionally, notice to employees about the election would be limited and may impact their vacation plans or other plans to schedule time away from the workplace.”

- “The majority (52%) of our workforce is currently represented. Union organizers have almost 24 hour/7 day access to target employees populations, simply through the course of their daily interaction. As a company, we encourage open dialogue and we communicate broadly with non-represented groups so that they have basic information about the company’s views. However, organizers encourage employees to not openly discuss concerns. Usually, until a petition is filed, the only detailed information an employee has received about his rights or concerns has been delivered by union organizers – typically over the course of many months. A shorter time frame for elections would only serve to further limit the information an employee receives.”
- “We are a very geographically dispersed company so it takes time for us to mobilize resources to react to a petition. We believe we should have the right to talk to our employees, understand the issues and seek to communicate the company position on those issues before a vote. In this way employees have sufficient information to allow them to make an informed choice.”

While the Board and some commentators may argue that employers have the opportunity to campaign well in advance of a petition -- and thus do not need substantial time to communicate with employees after a petition is filed -- such arguments are specious. Most employers in the U.S. are not engaged in a perpetual union election campaign communication plan. To the contrary, most employers only communicate with their employees about issues associated with potential union representation, if at all, when their employees will be required to make a choice about representation in a secret ballot election. *How to Organize a Union*, available at http://www.cwa-union.org/pages/how_to_organize_a_union (“Most employers will launch their campaigns against your union” after the campaign becomes “public.”). Moreover, as explained in the examples below, in many cases employers have no advance notice that their employees are being organized until they are served with an election petition. *See, e.g., H. Kelber A New Game Plan For Union Organizing*, Part 8 pg. 2 (“For tactical reasons, [unions] should organize workers where they live and are more readily accessible, that where they work, under the watchful eye of their employer.”). Unions are not required to give employers advance

notice of organizing efforts and, in many cases, put tremendous effort into concealing organizing efforts until after the petition has been filed. B. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. at 671.

Again, specific real-life examples provided by certain members of HR Policy underscore the point that many employers do not have the opportunity to communicate with their employees regarding unions until after a petition has been filed:

- “At the [facility] in October, 20[redacted], the [union] filed a petition for an election and the [company’s] first knowledge of the organizing was when the NLRB sent the petition to the property.”
- “Most of the time we have not been aware of an organizing drive until we have been notified via a petition for recognition.”
- “In each of the three instances we found out about the campaign by receiving notification from the Board....”
- “[T]here have been instances where there has been limited to no knowledge prior to receiving either a request for voluntary recognition or a petition.”

These comments are typical of the experiences of most employers in NLRB representation cases.

In the NPRM, the NLRB makes no effort to balance the legitimate interests of employers in communication with employees about union membership and collective bargaining with the Board’s preferences for more expeditious elections. Indeed, the Board implicitly presumes that these interests are subservient to the interests of the Agency in processing representation cases as fast as possible. (76 Fed. Reg. 36829) (“The dissent also contends that the proposed amendments will ‘substantially shorten the time between the filing of the petition and the election date,’ and that the purpose is ‘to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining’ in order to increase the election success rate of unions. That accusation is unwarranted. The Board seeks to gain the efficiency and savings that would result from streamlining of its procedures.”). This is a questionable

policy judgment grounded more in ideology than actual experience. The experiences of the Organizations' members suggest that the impact of such a policy change would be that both employers and employees will be deprived of opportunities for legitimate discussion of the various issues often associated with union representation. Given that the Board already processes elections within its reasonable time objectives, the NLRB should not take any steps to shorten elections where the primary impact will be to deny employees of the right to communicate with their employers regarding union representation issues.

3. The NLRB's Process in Developing and Publishing the Proposed Rules Without First Soliciting Comments from the Public is Inconsistent with the Board's Past Practice.

Significantly, as Member Hayes observes in his dissent, the NLRB's development and publication of the NPRM without soliciting input from interested parties constitutes a significant departure from the Board's historical practices.¹³ (76 Fed. Reg. 36829-36830). In the past, when considering the promulgation of a significant rule, the NLRB has engaged in deliberate and thoughtful rulemaking, providing advance notice of the rule and sufficient time to submit comments or hold regional meetings. The NLRB has never promulgated a rule of even comparable significance to the changes contemplated by the NPRM. However, the NLRB's rulemaking efforts with respect to acute care bargaining units are most analogous in importance and scope to the proposed changes under the NPRM.

¹³ The majority wrongly asserts that because it believes the NPRM is procedural in nature that it is not subject to the Notice and Comment requirements of the APA. (76 Fed. Reg. 36818). However, the D.C. Circuit Court of Appeals has repeatedly held that procedural rules that have a substantial impact on interested parties are not exempt from the APA's Notice and Comment Provisions. *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982) (rule did not fall within the procedural exception because the rule substantially affected the rights and interests of certain parties); *James Hurson Assoc., Inc. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (noting that the "critical feature" of a rule that satisfies the procedural exception is that it covers agency actions that do not themselves alter the rights or interests of parties). Given that the NPRM will have a substantial impact on all parties to a representation cases and will place substantial compliance burdens on non-petitioning parties, it does not fall under the procedural exception to the APA.

On July 2, 1987, the NLRB proposed a rule specifying collective bargaining units for all acute care health care facilities. (52 Fed. Reg. 25142-49).¹⁴ Given the significance of the rule, the NLRB took steps to ensure that it fully explored the potential impact of the rule and provided stakeholders with adequate opportunity for discussion and debate before promulgating the rule. For instance, in its July 2, 1987 Notice of Proposed Rulemaking, the Board provided interested parties roughly four months to provide comments with an initial due date of October 30, 1987. The Board also invited interested parties to attend and be heard at four public hearings (the last one held over seven days), which were conducted across the U.S. in Washington, D.C., Chicago, and San Francisco. After the public hearings, the written comment period was extended to December 1, 1987-- five months after the initial Notice. In response to the vast and differing viewpoints expressed with respect to the proposed rule, the NLRB did not promulgate the rule as proposed, but rather issued a second Notice of Proposed Rulemaking on September 1, 1988. (*See* Second Notice of Proposed Rulemaking, 52 Fed. Reg. 33900-33935 (September 1, 1988)). This notice was followed by another 6-week period for written comment. In total, the Board heard from 144 witnesses and reviewed approximately 1,500 pages filed by 315 individuals and organizations. Over seven months after the second rulemaking notice, on April 21, 1989 -- almost two years after the initial notice -- the NLRB promulgated the rule (29 C.F.R. §103.30).

Significantly, in upholding the rule, the Supreme Court specifically noted the Board's deliberate and thoughtful rulemaking process and noted that the rule was supported by

¹⁴ While this rule was significant in scope, there is no real argument that its changes were as significant as the changes contemplated by the NPRM. Indeed, the acute care bargaining unit rule impacted only a small subsection of employers and impacted only bargaining unit determinations—one discrete, albeit significant component of the representation process and collective bargaining relationship. In contrast, the NPRM impacts all employers covered by the Act and would have a profound impact on many different aspects of the representation case process.

“substantial evidence and supported by a reasoned analysis.” *American Hospital Association v. NLRB*, 499 U.S. 606, 618-19 (1991). Specifically, the Court observed that:

Given the extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule, we would not be troubled even if there were inconsistencies between the current rule and prior NLRB pronouncements.

Id.

Here, even more than with the acute healthcare bargaining unit rulemaking, it is imperative that the Board proceed with caution and consider the views and experiences of all interested parties before implementing complex rules setting forth untested procedures that may result in unintended consequences and ultimately frustrate the Board’s objectives in promulgating the rule.¹⁵ Here, the Board’s rule changes span 35 3-column pages in the Federal Register and modify over 100 sections and subsections of the current regulations.

Yet, the Board’s approach to the rulemaking is hurried, abridged and clandestine. The Board provided less than a month’s notice before holding open meetings on the proposed procedural rules. (*See* 76 Fed. Reg. 36812). Moreover, the NLRB scheduled only two eight-hour days for public comment. (76 Fed. Reg. 37291). Obviously, given that the proposed amendments would impact all employers covered by the Act, two days is far too short for all interested parties to participate in the process and express their views. The Board recognized this fact, and required interested parties to request permission, in advance, in order to participate (or

¹⁵ On July 6, 2011, counsel for HR Policy and SHRM, along with six (6) other employer organizations filed a Request to Extend Time for Submission of Comments, Reschedule Existing Hearing and Schedule Additional Hearings. The Request sought extensions of time and opportunities to be heard that would have enabled interested parties to submit more thoughtful comments and have greater opportunities to exchange ideas. Notwithstanding the manifestly reasonable scope of the Request, the NLRB summarily denied it, instead opting to hold the July 18 and 19 public hearings mere weeks after the NPRM was issued, and to limit speakers to five (5) minutes of oral presentation. Moreover, as noted above, the NLRB refused to extend the comment period, instead requiring that written comments on the NPRM be provided by August 22, 2011.

even attend) the public hearings. (76 Fed. Reg. 37292). At the hearing, those selected to give an oral presentation were asked to limit their statements to five (5) minutes. Such truncated and exclusive processes stand in stark contrast to the NLRB's comprehensive and inclusive process pertaining to acute healthcare bargaining unit rules. What limited process the Board authorized confirmed the controversial and divisive nature of the proposed amendments. Indeed, the July 18-19 open meetings highlighted the differing views with respect to the proposed rules and highlighted the legitimate concerns of employer organizations, academics, and union advocates alike. National Labor Relations Board, PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES (July 18-19, 2011) (transcripts available at <http://www.nlr.gov/node/525>). If the open meetings did not persuade the Board that the proposed rules are improper and unnecessary, at the very least they should have persuaded the Board that the NPRM, as drafted, could lead to unintended adverse consequences and that further discussion and debate should be entertained before promulgation of the final rules.

4. The NLRB's Process in Publishing the NPRM Without First Soliciting Input from Interested Parties is Contrary to President Obama's Executive Order 13563.

Perhaps most significantly, the Board's proposed rule comes in a vastly different regulatory time when agencies of the Federal Government have been specifically instructed by the President of the United States that, when feasible, they should not promulgate rules without first seeking input from stakeholders. Indeed, the NLRB's minimal encouragement of public discussion with respect to the content and scope of the proposed procedural modification before issuing the NPRM is contrary to President Barack Obama's instructive Executive Order 13563 which states that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible

and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”¹⁶

The Board’s cursory explanation in footnote 34 of the proposed rules that such advance discussion was not provided in order for more “orderly” comments to be obtained defies common sense. Indeed, the process has been anything but orderly. Instead the NPRM process has been furtive, hasty and truncated. Moreover, significant stakeholders were excluded from the process. As Member Hayes noted in his dissent “at the very least” the proposals “should have been previewed for comment by the Board’s standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association.” (76 Fed. Reg. 36830).

While the majority of the NPRM sets forth proposed rules in finalized form, the NLRB did solicit public discussion with respect to certain topics, such as the blocking charges and electronic signatures, before developing and publishing specific rules. (*See* 76 Fed. Reg. 36819 (electronic signatures) and 76 Fed. Reg. 36827-36828 (blocking charges)). In order to comply with the President’s directives and undertake the most comprehensive analysis of any proposed amendments to the Regulations, the Board should use the same process for all of its election procedure rule changes that it is using with respect to blocking charges and electronic signatures. Accordingly, at a minimum, for the reasons stated above, the NLRB should extend the comment period and receive additional input before implementing the proposed revisions in their current form.

¹⁶ Other agencies have followed this directive. For instance, on August 9, 2011, the Labor Department’s Office of Federal Contract Compliance Programs (“OFCCP”) issued an advance notice of proposed rulemaking soliciting public comment on development of a compensation data collection tool. (76 Fed. Reg. 49398).

5. The Proposed Amendments Violate the Administrative Procedures Act Because they are Arbitrary and Capricious.

The proposed amendments set forth in the NPRM, if enacted, potentially violate the Administrative Procedures Act because many of the proposed rules are arbitrary and capricious. Section 6 of the NLRA provides that “[t]he 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 the [NLRA].” 29 U.S.C. § 156; *see also NLRB v. Lewis*, 249 F.2d 832, 837 (9th Cir. 1957) (noting that Section 6 of the Act vests the Board with rulemaking authority). But the Board’s rulemaking authority is not unlimited. To the contrary, pursuant to the requirements of Section 6 of the Act and the Section 706(2)(A) of the APA any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁷ 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A); *American Hospital Association v. NLRB*, 499 U.S. 606, 617-619 (1991); *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Automobiles Ins. Co.*, 463 U.S. 29, 41 (1983).

Pursuant to the Administrative Procedures Act, parties with proceedings before the Board and organizations have broad standing to challenge a Board’s rule in a United States District Court. *See Hunt v. Washington Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977); *American Hospital Association v. NLRB*, 131 L.R.R.M. 2751, 2752 (N.D. Ill. May 22, 1989). Accordingly, under *American Hospital Association*, the proposed amendments, if promulgated, would almost

¹⁷ Even if the NPRM is procedural in nature – as the majority contends -- such a description of the proposed amendments would not shield them from the APA’s requirements. Indeed, courts have repeatedly recognized that procedural rules promulgated by Federal agencies, just like substantive rules, are invalid if they are arbitrary and capricious. *See James Hurson Assoc., Inc. v. Glickman*, 229 F.3d 277, 284 (D.C. Cir. 2000); *Am. Trucking Assoc., Inc. v. U.S.*, 627 F.2d 1313, 1320-21 (D.C. Cir. 1980).

certainly provoke legal challenges from the employer community and, under applicable law, may very well be overturned by a court.

Indeed, the NPRM violates both prongs of this test set forth in *American Hospital Association*, 499 U.S. at 617-619. First, as discussed in more detail below, the provisions of the NPRM that would, in certain cases, deprive a party of the right to a pre-election hearing would directly violate Section 9(c) of the Act which provides that in cases where “it has reasonable cause to believe that a question or representation affecting commerce exists” the Board “shall provide for an appropriate hearing upon due notice.” 29 U.S.C. § 159(c)(1)(B). For this reason alone, the NPRM violates the Act. *See American Hospital Association* 499 U.S. at 613-615; *Health Care & Retirement Corp. of America*, 511 U.S. at 580 (“Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board’s decision, not the other way around.”); *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 811 (1974); *Packard Motor Car Co., v. NLRB*, 330 U.S. 485, 490 (1947).

Moreover, the proposed amendments, which would clearly and unduly prejudice the rights of employers, and other non-petitioning parties, are arbitrary and capricious and constitute an abuse of discretion. The NLRB has failed to offer sufficient justification for the rules, which would have a vast but unpredictable impact¹⁸ on the current representation case process – a process that has allowed the NLRB to consistently meet its own performance objectives. *Lee Lumber & Building Material Corp.*, 117 F.3d at 1460 (“[T]he Board, like every other administrative agency, must provide a logical explanation for what it has done. ... In this case the

¹⁸ The NLRB concedes that the potential impact of the proposed amendments is unpredictable. (*See* 76 Fed. Reg. 36829) (“What effect the proposed changes would have on the outcome of elections is both unpredictable and immaterial”). The NLRB’s failure to consider the impact of these proposed amendments on the ultimate questions at issue in representation cases is deeply troubling. Moreover, implementing new procedures without regard for whether they will enhance the fairness of the representation process appears both arbitrary and capricious.

Board failed to satisfy this basic obligation.”); *Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 309-10 (3d Cir. 1986).

The law is clear that any agency rule changes that lack a legitimate justification are arbitrary and capricious. *See Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 309-10 (3d Cir. 1986) (holding that the EPA's deletion of a provision of a previously promulgated rule "without any rational justification" must be deemed arbitrary and capricious). For example, in *Natural Resources Defense Council*, the Third Circuit emphatically rejected the Environmental Protection Agency's attempts to promulgate a rule establishing more lenient removal credit regulations under the Clean Water Act. *Id.* The Court rejected the rule not only because it violated the Clean Water Act, but because it was arbitrary and capricious since the EPA could not offer a rational justification for the modifications and the EPA had not discussed the likely results of the amendments to the regulation. *Id.* at 306-10.

Here, as in *Natural Resources Defense Council*, the NLRB majority has failed to articulate a legitimate justification for the significant changes set forth in the NPRM. Indeed, the majority's conclusory explanations regarding the desirability of promptly resolving questions concerning representation is hardly a rational justification given that the rule will likely adversely impact fairness and participation in representation cases, while placing substantial and unjustifiable burdens on non-petitioning parties. This is especially true given that the Board already consistently meets its internal objectives for processing representation cases. Moreover, the Board has utterly failed to provide any insight with regard to the likely impact of the proposed amendments. (*See* 76 Fed. Reg. 36829) (“What effect the proposed changes would have on the outcome of elections is both unpredictable and immaterial.”). The underlying purpose of the Board's representation case procedures is to allow employees to make a free and

informed choice regarding whether they want union representation. *General Shoe Co.*, 77 N.L.R.B. at 127; *J.J. Cassone Bakery*, 345 N.L.R.B. at 1318. Given the Board's lack of any analysis or study regarding the potential impact of the proposed amendments on the potential results in representation cases (other than to expedite their resolution),¹⁹ the NLRB has not adequately considered the potential adverse or unintended consequences of the proposed amendments. For this reason alone, the NPRM is arbitrary and capricious.

In addition, as explained in more detail below, the proposed amendments are arbitrary, capricious, or constitute an abuse of discretion for each of the following reasons:

- The proposed amendments would improperly convert representation cases, which have historically been investigatory in nature, into adversarial proceedings. Indeed, the NPRM repeatedly justifies the proposed amendments by comparing them to the procedures set forth in the Federal Rules of Civil Procedure. For example, the Board compares its proposals pertaining to Statements of Position to Rule 26 disclosures and likens the “20% rule” to the Rule 56 summary judgment standard. (76 Fed. Reg. 36821, 36823).
- The proposed amendments are partisan and favor petitioning parties (largely unions). Indeed, the proposed amendments pertaining to Statements of Position would place substantial and unjustifiable additional burdens on non-petitioning parties, including employers, without placing any corresponding burdens onto petitioners (primarily, labor unions). (76 Fed. Reg. 36821). Moreover, the proposed amendments are contrary to the Act and its purposes in that they would substantially limit an employer's ability to communicate with its employees regarding union issues. Additionally, the proposed amendments could be construed to require employers to provide personal information regarding their employees that could be used by union organizers to gain greater access to employees. Taken together, these proposed changes appear to directly adopt the position of many union advocates that representation proceedings should be modified to limit employer participation and facilitate union organizing.
- The proposed amendments would create confusion and limit First Amendment rights by inexplicably allowing elections before unit placement issues are resolved.

¹⁹ Over the past three (3) years, unions have consistently won approximately 2/3 of all representation elections. “Number of NLRB Elections Held in 2010 Increased Substantially From Previous Year,” Daily Lab. Rep. (BNA) No. at B-1 (May 3, 2011). Indeed, in 2010, unions won 67.6% of all representation elections. (*Id.*) Given the success of unions in representation elections under current NLRB procedures, there is no argument that employees are being denied their statutory right to organize under the current regulatory scheme.

These proposed amendments will create confusion regarding whether individuals are employees or supervisors under the Act. The ultimate result will likely be to limit the roles of certain borderline individuals in representation cases, and to unnecessarily create additional unfair labor practice charges.

- The proposed amendments would erode due process rights by limiting the rights of the parties to a representation proceeding to develop a complete factual record and by limiting, if not eliminating, any meaningful process for appealing a hearing officer's determination.

Taken together, the proposed regulations are arbitrary and capricious because they are one-sided and impose new and unprecedented burdens on non-petitioning parties (predominantly employers). The testimony at the NLRB's July 18-19 public hearings underscored this point. Employer groups uniformly opposed the regulations, while pro-labor speakers supported them (although many would have the Board go even farther). Courts have repeatedly criticized and rejected the NLRB's attempts to ignore precedent to reach results-oriented conclusions that favor unions. *See NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378, 1387 (8th Cir. 1994) ("We fail to understand how the Board majority could have all but ignored the strong and uncontroverted evidence of virtual joint activity"); *Blakeship and Assoc., Inc. v. NLRB*, 999 F.2d 248, 252 (7th Cir. 1993) ("The Board's failure to discuss the jurisdictional issue and its casual attitude toward questionable evidence illustrate once again that the Board is not a model for the administrative process to emulate."). As the Second Circuit Court of Appeals noted in *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311 (2d Cir. 1998):

[D]eferential judicial review is a thing that the Board earns, and can forfeit. We recently observed that the Board has so often manipulated the definition of "supervisor" to favor unions that diminished deference to the Board's fact-finding as to supervisory status is now appropriate. Accordingly, we now apply a "more probing" standard of review.

Id. at 320-21 (internal citations omitted). Similarly, the Fourth Circuit Court of Appeals raised a similar criticism in *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503,519 (4th Cir. 1998), holding as follows:

The Board did not examine all of the reasonable inferences that should be drawn from the evidence. ... Rather, the Board interpreted the evidence in the light most favorable to the Union. The Board is not at liberty to accept only those evidentiary inferences that support the Union's position and reject all of those that support the employer. ... Based upon the evidence before the Board, no reasonable person could have concluded that the membership of the Union was motivated to vindicate the NLRA-protected right to be free from an employer's coercion or intimidation.

Id. (citations omitted); *see also NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) (criticizing the Board's interpretation of the Section 2(11) term "independent judgment" and refusing to enforce Board's order).

The same principles apply to rulemaking. The NLRB cannot make wholesale changes to its procedural rules solely to advance the interests of organized labor. The Administrative Procedures Act requires the Board to proceed with equanimity and fundamental fairness when it exercises its rulemaking authority. The law does not authorize the NLRB to twist its procedures into a tactical advantage for one side in representation proceedings that are intended to be free and fair.

B. The NLRB's Proposed Modifications to Pre-Hearing Procedures Would Impose Unreasonable Requirements on Employers and Convert an Investigatory Process into an Adversarial one.

Although the NLRB claims that the proposed procedural amendments "are intended to simplify the procedures... and provide parties with clearer guidance concerning representation procedure" (76 Fed. Reg. 36817), the NPRM would impose arcane and cumbersome new pre-hearing requirements on non-petitioning parties that will complicate rather than simplify pre-

hearing procedures. *First*, the NPRM would require non-petitioning parties to file a pre-hearing “Statement of Position,”²⁰ articulating the party’s position with respect to the appropriateness of the petitioned-for bargaining unit and identify potential unit placement issues or risk waiving objections to the scope of the unit. (76 Fed. Reg. 36838-36839 (*to be codified* at 29 C.F.R. § 102.63(b)(1))). In the event that a dispute exists with respect to the appropriateness of the petitioned for unit, the non-petitioning party would also be required to identify the “most similar unit that it concedes is appropriate.” (*Id.* at 36838). *Second*, as part of the mandatory Statement of Position, the NPRM would require the non-petitioning party to file employee lists prior to the representation hearing setting forth the names and other personal information regarding employees in the petitioned-for unit and any alternative units advocated by the non-petitioning party. (*Id.*) Each of these substantial departures from the current practice would place substantial and unfair burdens on non-petitioning parties. Significantly, petitioners (most frequently labor unions) are saddled with no new pre-hearing procedural requirements.

1. The Proposed Amendments Regarding Statements of Position Impose Unfair and Unduly Burdensome Requirements on Non-Petitioning Parties.

The requirement that non-petitioning parties raise all issues in a pre-hearing Statement of Position filed prior to the representation hearing at the risk of waiving any opportunity to present such arguments or defenses at a hearing raises significant due process concerns, violates Section 9(c) of the NLRA and would in all probability ultimately lengthen, rather than shorten, representation case proceedings. (76 Fed. Reg. 36838-36839 (*to be codified* at 29 C.F.R. § 102.63)). The NPRM would require, for the first time, that prior to the commencement of a pre-

²⁰ In the NPRM, the NLRB suggests that the Statement of Position “would be mandatory only insofar as failure to state a position would preclude a party from raising certain issues and participating in their litigation.” (76 Fed. Reg. 36821). In other words, non-petitioning parties who fail to timely file a Statement of Position would be denied the right to a hearing. *Id.*

election hearing, non-petitioning parties must file a Statement of Position in a form to be established by the NLRB.²¹ The NPRM does not provide a copy of the form or a description of the content set forth in the form.²² However, the NPRM states that the Statement of Position would solicit the parties' position with respect to (a) the Board's jurisdiction to process the petition; (b) the appropriateness of the petitioned-for unit; (c) any proposed exclusions from the petitioned-for unit; (d) the existence of any bar to the election; (e) the type, dates, times, and location of the election; and (f) any other issues that a party intends to raise at hearing. (76 Fed. Reg. 36821). This framework, as noted above, not only violates the Section 9(c) hearing requirement of the Act, and raises significant due process concerns, but also is unworkable and unnecessary for a number of reasons.

a. The Proposed Rules Requiring Pre-Hearing Statements of Position Impose Unfair Burdens on Non-Petitioning Parties.

As an initial matter, the new procedural framework advocated by the Board in the NPRM would radically change the character of pre-election hearings in representation cases. Historically, such hearings have been investigatory, not adversarial.²³ The new procedures outlined in the NPRM would place the entire burden of "investigation" on non-petitioning parties, and require one-sided pre-hearing "discovery" in the form of arguments, alternative

²¹ The NPRM does not provide a copy of the form or a description of the content set forth in the form. In the event that the NLRB ultimately issues a revised notice of proposed rulemaking or extends the comment period, it should make a copy of the proposed form available for analysis and comment.

²² In the NPRM, the NLRB suggests that "[t]he Statement of Position form would replace NLRB Form 5081, the Questionnaire on Commerce Information." (76 Fed. Reg. 36821).

²³ According to the NLRB General Counsel's OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, ¶ 3-820 (August 2008), the hearing officer in a representation case has an affirmative obligation to develop a full and complete record and may, if necessary to achieve this purpose, call and question witnesses, cross-examine, and require the introduction of all relevant documents. (*citing Mariah, Inc.*, 322 N.L.R.B. 586 fn. 1 (1996)).

positions and employee lists that must be included with the Statement of Position.²⁴ Petitioners would enjoy the benefits of receiving this information in advance without any corresponding requirement to disclose evidence supporting their position on the appropriateness of the unit and/or unit placement issues. Such a one-sided process is arbitrary and capricious, and would create potentially devastating pitfalls for unsophisticated employers.

The law is well-settled that pre-election hearings in representation cases are investigatory, not adversarial in nature. *See Marian Manor for the Aged & Infirm, Inc.*, 333 N.L.R.B. 1084, 1084 (2001) (noting that pre-election hearings are investigatory in nature). The Board's CASE HANDLING MANUAL (CHM) pertaining to representation procedures further supports the non-adversarial nature of representation proceedings. Indeed, Section 11181 (Nature and Objective of Hearing) of the CHM provides, in pertinent part, that

The R case hearing is a formal proceeding the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record and nonadversarial.

(emphasis added). Similarly, Section 3-810 (Nature and Objective) of the NLRB General Counsel's OUTLINE ON LAW AND PROCEDURE IN REPRESENTATION CASES (August 2008)²⁵ provides, in pertinent part, as follows:

²⁴ The Board's intention to convert the pre-election hearing into an adversarial process is evident from its explanation of the proposed rule changes in the NPRM. With respect to the Statement of Position, the NLRB majority observed in the NPRM that "[t]he current regulations do not provide for any form of responsive pleading, in the nature of an answer, through which non-petitioning parties are required to give notice of the issues they intend to raise at a hearing." (76 Fed. Reg. 36814). However, the Statement of Position contemplated by the NPRM goes far beyond a responsive pleading since the non-petitioning party (in most cases, the employer) must also provide the "basis of [its] contention[s], and describe the most similar unit that the employer concedes is appropriate." (76 Fed. Reg. 36838). In addition, the employer is not only required to plead unit placement issues but must also "identify any individuals ... whose eligibility to vote the employer intends to contest" and provide lists of employees to both the petitioner and the agency identifying all employees in the petitioned-for unit as well as any alternative unit proposed by the employer. (*Id.*)

²⁵ The OUTLINE ON LAW AND PROCEDURE IN REPRESENTATION CASES is available on the NLRB's website (www.nlr.gov).

The hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination under Section 9 of the Act. The hearing is investigatory, not adversary. Parties have a right to present relevant evidence on the issues presented by the petition and the Board has ruled that it was an error to refuse the introduction of evidence in those circumstances.

(emphasis added) (*citing Barre National, Inc., supra* and *North Manchester Foundry, Inc., 328 N.L.R.B. 372 (1999)*) (holding that it was improper for a hearing officer to exclude testimony about a group of contested employees because of the small size of the group).

While it is clear that representation cases have always been, and are intended to be, investigatory -- not adversarial -- the NPRM would completely change the character of these proceedings in favor of a “litigation style” adversarial proceeding. The NPRM concedes this fact on its face. Indeed, the NPRM specifically states that “[t]he statement of position requirement is modeled on the mandatory disclosures described in Fed. R. Civ. P. 26(a) as well as on contention interrogatories commonly propounded in civil litigation.” (76 Fed. Reg. 36821). The NPRM provides no further explanation with respect to why the agency should adopt these adversarial quasi-litigation procedures in lieu of its current investigatory practices. Moreover, unlike the Rule 26 disclosures (which are mutual and must be submitted by all parties), the Statement of Position would unfairly burden only non-petitioning parties by requiring them to file statements of position while placing no corresponding burden on petitioners. Accordingly, the Board’s reliance on Fed. R. Civ. P. 26(a) for its novel procedural changes is misguided and inappropriate.

There can be little doubt that the hearing officer’s role in the investigatory proceedings is that of a fact finder, not of a judge or arbitrator resolving an adversarial dispute. NLRB CASEHANDLING MANUAL, Part Two, Representation Proceedings (CHM) Sections 11185 (“The hearing officer’s role is to guide, direct, and control the presentation of evidence at the hearing. . . . The hearing officer does not make any recommendations or participate in any phase of the

decisional process.”). Yet the proposed regulations change the role of the hearing officer from fact finder to judge and transfer the investigatory burden entirely to non-petitioning parties. Indeed, not only will the non-petitioning party (most commonly, the employer) be required to articulate its position with respect to the appropriateness of the petitioned-for unit, the NPRM would impose the unprecedented requirement that the non-petitioning party to identify the “most similar unit” that the party concedes is appropriate. (76 Fed. Reg. 36838).²⁶

The proposed rules in this area will trample the due process rights of non-petitioning parties. There is simply no justification for implementing such a requirement and then enforcing it with the draconian sanction of issue preclusion for parties that fail to comply. Indeed, it is difficult to imagine how such a one-sided bureaucratic process advances the NPRM’s articulated interest in “simplify[ing] the procedures.” The Board suggests that its change in the nature of the representation hearing process is modeled in part after the Federal Rules of Civil Procedure. This assumption is clearly wrong. Indeed, as rights and obligations of the parties are decreased in administrative proceedings there is an enhanced requirement for additional due process protection. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’”) (internal citation omitted).

- b. There is no Rational Basis for the Proposed Seven Day Statement of Position Rule.

Finally, the short time frames contemplated for the filing of the mandatory Statement of Position compound the burdens on non-petitioning parties. The NPRM would require that the

²⁶ At no point in the pre-election process is the petitioner required to provide any support for its position regarding the appropriateness of the petitioned-for unit nor is the petitioner required to identify potential unit placement issues.

Statement of Position be filed at the commencement of the representation hearing *or before* in the discretion of the Regional Director, at a time when the employer has little or no information with respect to the evidence supporting the petition. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63)). Given that the hearing must be scheduled within 7 days after the filing of the petition, the mandatory Statement of Position will be due in seven (7) days *or less*. (*Id.*) Such a short timeline is unreasonable and unfair -- especially where the failure to file a Statement of Position or raise any issue in the Statement of Position would result in the waiver of any arguments and denial of the right to participate in the pre-election hearing. (*Id.* at 36839). Seven (7) days or less simply is not enough time for a non-petitioning party to identify and research all unit definition and unit placement issues and prepare multiple employee lists. This is particularly true for small employers who may have no experience with NLRB proceedings and those who lack the wherewithal to retain experienced counsel to advise them in such matters. Adding this level of complexity to the process will make the representation case process virtually inaccessible to laymen. While this may be a potential boon for labor lawyers, requiring layer upon layer of paperwork does nothing to simplify and streamline NLRB procedures. The Board should not risk prejudicing the rights of small businesses in its zeal to expedite resolution of representation cases.

In the NPRM, the NLRB asserts that the new procedures will “eliminate unnecessary litigation.” (76 Fed. Reg. 36817). It is difficult to understand how the rules outlined in the NPRM will achieve this result. To the contrary, by raising the stakes for non-petitioning parties at the pre-hearing stage of the proceeding, the proposed rules may, in fact, have the opposite effect. Considering the extremely tight turn-around times for the mandatory Statement of Position coupled with the draconian effect of the exclusionary rule, non-petitioning parties will

be incentivized to raise all possible arguments, defenses and unit placement issues in their Statements of Position in order to avoid potential waiver of any issues not yet apparent. Such a result would obviously undermine the NLRB's declared purpose to simplify representation case procedures. (76 Fed. Reg. 36829).

c. The Substantive Requirements of the Statement of Position Are Unfair and May Create Significant Due Process Issues.

Although the NLRB can, and does, require employers and other interested parties to articulate their positions with respect to the appropriateness of the petitioned-for unit, the proposed procedural regulations go too far by requiring employers and other interested parties to take firm positions on these issues in the pre-hearing Statement of Position with potential preclusion of evidence or arguments on issues not included.²⁷ (76 Fed. Reg. 36838-36839 (*to be codified at* 29 C.F.R. § 102.63)). Admittedly, a handful of Board cases have denied parties the right to litigate unit issues when the party obstinately refused to take any position with respect to these issues as an obstructionist tactic to frustrate the investigative process. *See, e.g., Bennett Industries*, 313 N.L.R.B. 1363 (1994); *Seattle Opera Ass'n*, 323 N.L.R.B. 641 (1997); *Mariah, Inc.*, 322 N.L.R.B. 586 fn.1 (1996). However, this handful of cases does not justify wholesale revision of the process. Existing procedures provide ample sanctions for such obstreperous parties.

²⁷ In the NPRM, the NLRB majority cites *Bennett Industries, Inc.*, 313 N.L.R.B. 1363 (1994) and *Allen Health Care Services*, 332 N.L.R.B. 1308 (2000) in support of its proposed preclusion rule. In both cases, the employers refused to take any position with respect to unit determination issues. While such practices should not be condoned, the NLRB should not deny employers that are properly participating in the pre-election hearing the right to present and cross-examine witnesses based upon perceived omissions from their pre-hearing submissions.

(1) *The Preclusion Rule Raises Due Process Concerns and Could Unnecessarily Complicate Representation Cases.*

As noted above, under the proposed rules, parties who fail or refuse to file a pre-hearing Statement of Position will be precluded from raising unit composition and unit placement issues and may be precluded altogether from even participating in the hearing. (76 Fed. Reg. 36838-36839 (*to be codified at* 29 C.F.R. § 102.63)). Given that the petitioner has no obligation to provide any support for the petitioned-for unit and no obligation to disclose those individuals that the petitioner believes are included within the petitioned for unit, non-petitioning parties will be required to anticipate potential issues without being fully informed of the other party's position. Even worse, the penalty for failing to anticipate all issues associated with the petition will result in a waiver of the right to present arguments on issues not raised in the Statement of Position. Such an onerous procedure does little to make the representation process more accessible or understandable for non-petitioning parties -- and raises significant due process concerns.

The requirement that non-petitioning parties preserve all contested issues in their Statements of Position or risk waiving their arguments further serves to convert what was once an investigatory proceeding into an adversarial one. Moreover, as previously noted, the greater potential for harm to the parties in administrative proceedings, the greater attention the administrative agency must give to providing necessary due process rights. Further, given that only non-petitioning parties risk waiving their arguments, and that most unit definition and unit placement issues arise in RC petitions (as opposed to RM or RD cases), the proposed rule creates an adversarial process that unfairly favors unions over employers. In other words, employers will be deprived of much of the procedural protections provided under current NLRB rules and unions will get the benefit of pre-hearing discovery. Tilting the balance in favor of petitioners in this manner is unlikely to encourage voluntary resolution of these issues, and most likely will

result in litigation of issues that are typically resolved by mutual agreement under current NLRB procedures. Indeed, with limited time to respond and without necessary information to adequately analyze all potential issues covered in the Statement of Position, non-petitioning parties will be compelled to adopt a “kitchen sink” approach and raise all possible issues that could possibly arise. Such a result would undermine the NLRB’s stated purpose in issuing the NPRM -- streamlining representation case procedures. (76 Fed. Reg. 36829).

(2) *A Non-Petitioning Party Objecting to the Petitioned-for Unit Should Not Be Required to Identify the Most Similar Unit it Concedes is Appropriate.*

Significantly, in those cases in which a party takes the position that the proposed unit is not an appropriate unit, the non-petitioning party would also be required to state the basis of the contention and identify the “most similar unit” that the party concedes is appropriate. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(i))).²⁸ Non-petitioning parties have never been required by a Board rule to define an appropriate bargaining unit and they certainly have never been required to identify the “most similar” appropriate bargaining unit. At most, current NLRB representation case procedures require non-petitioning parties to take a position with respect to the appropriateness of the petitioned for unit. *See, e.g., Mariah, Inc.*, 322 N.L.R.B. 586 fn. 1 (1996) (upholding regional director’s determination regarding the scope of the unit where employer “declined to take a position on the appropriateness of the unit, a unit that [was] presumptively relevant”).

Such a requirement would be patently unfair and nearly impossible to consistently enforce, especially given the NLRB’s rules on appropriate units which hold that a myriad of

²⁸ The proposed rules do not clarify whether the non-petitioning party will be required to identify all potentially appropriate alternative units or else risk waiver of any arguments regarding alternative unit descriptions at the hearing. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(i))). Such a requirement would be far too onerous and should be explicitly excluded from any final rule.

different units may be deemed to be “appropriate” in any given industry or facility. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–23 (4th Cir. 1963), *cert. denied*, 375 U.S. 966 (1964) (upholding NLRB’s unit determination creating distinct bargaining units for technical and professional engineers, while noting that a unit combining the two groups also would have been proper); *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). As such, the requirement that non-petitioning parties take a position regarding the appropriateness of the unit and, if contesting the petitioned for unit, to identify the “most similar unit” should be eliminated from any final rule.

Imposing a requirement on non-petitioning parties to identify the “most similar” appropriate unit improperly transfers the burden of investigation from the agency to the employer. “The selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, if not final, is rarely to be disturbed.” *Southern Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976); *see also NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (U.S. 1985); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947).

Current procedures for determining appropriate units require the hearing officer to first evaluate the unit requested by the petitioner. If that unit is appropriate, the investigation ends and the regional director will direct an election in the petitioned for unit. *Boeing Co.*, 337 N.L.R.B. 152, 153 (2001). If the petitioned-for unit is not appropriate, the hearing officer *may* examine potential alternative units suggested by the parties but the regional director has the discretion to direct an election in an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co.*, 331 N.L.R.B. 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

Normally, the regional director will only rule on the appropriateness of units that have been advocated by the parties to the proceeding. *See e.g., Acme Markets, Inc.*, 328 N.L.R.B. 1208 (1999) (holding that Board could only consider employer-wide unit proposed by employer because it was the only appropriate unit “argued for on the record.”).

Given these well-tested procedures, the NPRM does not explain the need for any change in current process, nor does the NPRM identify any statutory authority to require non-petitioning parties to define the “*most similar*” appropriate bargaining unit. Under current rules, parties are free to propose any alternative units that may be appropriate under the particular circumstances. *PJ Dick Contracting*, 290 N.L.R.B. 150, 151 (1988) (accepting the alternative unit proposal and finding it appropriate for the circumstances); *Overnight Transportation Co.*, 322 N.L.R.B. 723, 724 (1996) (holding that multiple proposed units could have been appropriate under the circumstances).

Further, the requirement in the NPRM that the “most similar” unit be articulated by non-petitioning parties effectively limits the many possible alternative units that could also be appropriate in any given situation. The NPRM is silent with respect to the rights of non-petitioners to argue for multiple alternative units -- regardless of their similarity to unit described in the petition -- if alternative units would afford employees “the fullest freedom in exercising the rights guaranteed by this Act.” *Bartlett Collins Co.*, 334 N.L.R.B. at 484; *see also Overnite Transportation Co.*, 322 N.L.R.B. 723, 725 (1996) (where petitioner and employer propose different but appropriate units, the Board considers all of the appropriate units); *Dezcon, Inc.*, 295 N.L.R.B. 109, 111 (1989). As the Board explained in *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962):

Because the scope or the unit is basic to and permeates the whole of the collective-bargaining relationship, each determination, in

order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

See also Gustave Fischer, Inc., 256 N.L.R.B. 1069 (1981) (“[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination.”) (citations omitted). Under current procedural rules, unit determinations are resolved by weighing all relevant factors to determine whether and to what extent the employees at issues share a “community of interest.” *See, e.g., Publix Super Markets*, 343 N.L.R.B. 1023 (2004) (fluid processing employees had a separate “community of interest” apart from the distribution employees where fluid processing operation was “sufficiently distinct from the distribution operation”); *Trumbull Memorial Hospital*, 338 N.L.R.B. 900, 900 (2003); *Hotel Services Group*, 328 N.L.R.B. 116, 117 (1999). Given the importance of the unit determination, any procedural rule that narrows the scope of potential units that may be presented by non-petitioning parties in representation hearings would raise serious due process concerns.

Additionally, requiring non-petitioning parties to make judgments about the appropriate unit that is “most similar” to the unit sought in the petition is untenable and unfair. As noted above, in any facility or facilities, there may be many alternative units that could be deemed “appropriate” under extant Board law. *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950) (noting that 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). Given the large number of potentially appropriate

bargaining units, it may be extremely difficult for non-petitioning parties -- particularly unsophisticated small businesses and parties not represented by counsel -- to determine which possible alternative unit would be the “*most similar*.” This is especially true with respect to employers in industries where the NLRB has adopted special rules regarding appropriate units, such as healthcare institutions, colleges and universities, utilities and the postal service. Additionally, there is no legal framework under which the Board can resolve issues with respect to whether any alternative units are, in fact, the “most similar” to the unit described in the petition. Indeed, such a determination would necessarily be entirely subjective, if not arbitrary.

Because the unit set forth in the petition is frequently selected by the petitioner (typically a labor union) based upon the extent of organization,²⁹ there is no legitimate legal basis for requiring non-petitioning parties to identify the “most similar” unit to whatever the petitioner has proposed. Instead, the NLRB should retain the current practice of allowing full investigation of the appropriate unit based upon the facts and circumstances of the case rather than placing the burden on non-petitioning parties to narrow the scope of potential appropriate units before the first witness is sworn. Indeed, the process advocated by the NLRB majority in the NPRM would turn the unit definition process on its head, requiring non-petitioning parties to argue their position regarding the appropriateness of the petitioned-for unit before -- rather than after -- development of the evidentiary record. Moreover, as more fully described below, the NPRM compounds this problem by authorizing the hearing officer to resolve the unit issue based solely

²⁹ The petitioner’s preference for a particular unit described in its petition is always a relevant consideration in representation cases but is not dispositive. *See Airco, Inc.*, 273 N.L.R.B. 348, 348 (1984) (petitioner’s desires alone [do not] determine the placement of truckdrivers in or separate from a production and maintenance unit.... [T]here are no per se rules to include or exclude any classification of employees in any unit. Rather, we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer’s organization and supervision, and bargaining history, if any, but no one factor has controlling weight); *Overnite Transportation Co.*, 322 N.L.R.B. 723, 724 (1996) (“If the petitioner’s unit is not appropriate, the Board may consider an alternative proposal for an appropriate unit.”)

upon the Statements of Position and perfunctory offers of proof submitted by the parties. (76 Fed. Reg. 36841). These formalistic processes are a poor substitute for a full evidentiary hearing and certainly are not conducive to thoughtful and reasoned decision-making by the agency. Indeed, if there is a legal challenge to rulings made by a hearing officer regarding unit composition issues, and such challenge is before a federal court of appeals, it is doubtful that the appellate court would have any record on which to make a ruling. In such instances, either the case would be remanded to the Board for further consideration or a party pursuing such an appeal faces the risk of having a court of appeals reject such appeal in its entirety, due to the lack of a sufficient record.

(3) *The Standards Articulated in the NPRM for Contesting Eligibility of Employees in the Proposed Unit Are Unworkable.*

For similar reasons, the procedures in the NPRM for contesting unit placement issues should not be included in the final rule.³⁰ Under the NPRM, in those cases in which a non-petitioning party contests the inclusion of specific individuals or job classifications in the 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). (76 Fed. Reg. 36821 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(i))). Such a requirement is untenable and unfair given that the non-petitioning party may not be able to identify all such issues based upon the limited information provided on the petition form.

³⁰ In its procedural rules, the NLRB draws a distinction between issues involving the scope of the unit and those involving its composition. Unit scope issues involve questions regarding the definition of the unit (e.g., whether the appropriate unit should be limited to a discrete craft, department or subdivision or include the entire facility). In contrast, unit placement issues involve question about the inclusion or exclusion of particular employees or categories of employees in the defined unit. *See generally* OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, ¶ 12-100.

For example, if the petition describes a facially appropriate unit (*e.g.*, a single facility unit) and includes a standard exclusion for “supervisors,” non-petitioning parties may not be able to discern whether there are any unit placement issues. Many employers employ persons in quasi-managerial positions (*e.g.*, leadmen and working foremen) who may be on the margins of whether they qualify for Section 2(11) supervisory status of the NLRA. Further, in certain industries such as healthcare, supervisory or managerial status of individuals in the same job classification may vary from department to department depending on such individuals’ actual job duties in their assigned department. Issues also may be present as to whether certain employees qualify to be Section 2(11) supervisors based on their status as relief supervisors or rotating supervisors. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006). The Board’s jurisprudence with respect to such positions demonstrates that making supervisory determinations with respect to such employees is difficult and fact-specific. *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006) (lead persons in a manufacturing facility were not statutory supervisors); *Loparex LLC v. NLRB*, 591 F.3d 540 (7th Cir. 2009) (affirming Board’s finding that the shift leaders’ method of assigning work was routine and clerical in nature and did not meet the requisite “independent judgment” standard). More importantly, non-petitioning parties may not be able to determine whether such employees are included within the unit described in the petition. A unit description found in most petitions will, in all likelihood, not state with precision which job classifications -- and various employees within such classifications -- are supervisory, managerial or confidential.³¹ Requiring non-petitioning parties to identify these issues prior to receiving notice

³¹ Admittedly, in small units, an employer may be able to make an educated guess regarding whether the petitioner believes these kinds of employees should be included in the putative based upon the total number of employees that the petitioner claims are in the unit. However, in the case of small units, non-petitioning parties will be required to anticipate these issues without the benefit of any information regarding the position of the petitioner. For this reason, such issues are better identified at the pre-election hearing.

regarding the petitioner's position with respect to the inclusion or exclusion of particular employees from the unit described in the petition imposes an unreasonable burden on non-petitioning parties. In addition, this requirement will undoubtedly result in more pre-election disputes regarding eligibility since non-petitioning parties will be required to identify *all potential unit placement issues* in their pre-hearing Statements of Position and, like answers to complaints in federal court proceedings, will no doubt result in non-petitioning parties listing numerous defenses and alternative positions to protect their interests.

2. The Proposed Rules Regarding Submission of Employee Lists in Connection with the Statement of Position are Unduly Burdensome and Duplicative of the Voter Eligibility List.

The provisions of the NPRM that would require a non-petitioning party to submit pre-hearing employee lists also place unreasonable and unnecessary burdens on non-petitioning parties and should be stricken from the final rule. (76 Fed. Reg. 36838 (*to be codified at 29 C.F.R. § 102.63(b)(1)*)). Under the proposed amendments, as part of the Statement of Position in representation cases, an employer would be required to provide at least two lists of individuals employed by the employer in the petitioned-for unit. (*Id.*) One version of the list would be filed by the employer with the regional director (but not served on other parties) along with its Statement of Position filing. Such initial list from the employer must include each employee's work location, shift and classification as well as "available telephone numbers, available e-mail addresses, and home addresses" 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. (76 Fed. Reg. 36838 (*to be codified at 29 C.F.R. § 102.63(b)(1)(iv)*)). A second employer list, which is filed with the regional director, and served on the other parties, lists each employee with details with respect to the employee's work location, shift and classification. (76 Fed. Reg. 36838 (*to be codified at 29 C.F.R. § 102.63(b)(1)(iii)*)). The proposed amendments further provide that, if the

employer contends that the petitioned-for unit is not appropriate, the employer must file another list in which it “describe[s] the most similar unit that the employer concedes is appropriate.” This list would also include names, work locations, shifts and job classifications, including information pertaining to employees not included in the petitioned-for unit. (*Id.*) If an employer takes a position that there are *multiple* other units that also arguably fit in the definition of the “most similar unit,” it is not clear whether the employer must file employee information as noted above for each “most similar unit.” If in fact this is the intent of the proposed rules, such a requirement would be extremely onerous, and it would be difficult to comply with the seven day Statement of Position filing cut-off rule.

As an initial matter, there is no real need for requiring multiple employee lists to be compiled and filed before the representation hearing. Even if the Board has a legitimate reason to require non-petitioning parties to file a responsive pleading identifying any potential issues prior to the pre-election hearing, there is no basis for requiring the filing of multiple lists. Compelling the production of such lists shifts the burden of investigation from the agency to the employer and provides unilateral pre-hearing discovery to the petitioner without any reciprocal obligation to provide information prior to the hearing.³² Further, the requirement that the employer compile two different lists -- one for the use of the NLRB (which includes home addresses, telephone numbers and e-mail addresses) and one for the use of the petitioner (which includes full names, work locations, shifts and job classifications) -- is particularly cumbersome.

³² In the NPRM, the NLRB candidly admits that the purpose of requiring the pre-hearing lists is to provide discovery to the petitioner. Specifically, the Board asserts that “the central purpose of requiring the employer to prepare and file an eligibility list is to ensure that all parties have access to the information they need to evaluate whether individuals should be in the unit and are otherwise eligible to vote.” (76 Fed. Reg. 36822). If the Board were interested in making sure that all parties had access to sufficient information, the pre-hearing disclosure requirements would apply to all parties, not just the employer.

The Board presumes that the compilation of multiple lists is a simple matter given the availability of modern technological tools. (*See* 76 Fed. Reg. 36821). However, not all employers have access to sophisticated electronic systems for such purposes. Moreover, given the scope of information that must be produced (in seven days or less), larger employers may find compliance with these requirements difficult if the petitioned-for unit or any alternative unit includes a large number of employees. Further, in the event that the employer takes the position that a multi-site unit is appropriate, the employer may be required to compile and share substantial amounts of information regarding its workforce at facilities that are outside the scope of the petitioned-for unit. *Pickering & Co., Inc.*, 248 N.L.R.B. 772 (1980) (reversing the regional director's decision where a multi-site unit was more appropriate than the single-site unit proposed in the union's petition and directing the regional director not to proceed with the election until determining that the petitioner had an adequate showing of interest among the employees in the multi-site unit). This would be true even if the petitioner made no effort to organize employees at these other facilities. Indeed, labor unions could manipulate these rules by petitioning for clearly inappropriate units in order to get access to information regarding a broader unit that they hope to organize.³³

³³ The impracticality of requiring pre-hearing employee lists could be exacerbated by the NLRB's anticipated decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 N.L.R.B. No. 56 (2010), in which the Board issued a Notice and Invitation to File Briefs with respect to the question of whether a unit composed of all employees performing the same job at a single facility is a presumptively appropriate bargaining unit. If the NLRB were to adopt a presumption in favor of single job "micro-units" in *Specialty Healthcare*, employers and other interested parties likely would contest such "single job" petitions by seeking a facility-wide unit (which is also presumptively appropriate). *See Hegin Corp.*, 255 N.L.R.B. 1236 (1981) (noting presumption that single location unit is appropriate). In such cases, under the proposed rules, the employer would be required to produce a list of all employees in the facility-wide unit as part of its Statement of Position, which the employer would be required to serve on the petitioning union. By requiring the employer to provide a list with respect to the entire facility in response to a petition seeking to represent only one job, the petitioning union would thus gain access to information about all of the other employees in the facility. Such practices would encourage piece-meal organizing of single facilities and potentially increase the number of representation cases processed by the NLRB.

Filing employee lists would be even more problematic in situations where non-petitioning parties plan to advocate multiple alternative units at the pre-election hearing. The NLRB's proposed rules do not address such situations. If non-petitioning parties contend that any one of several alternative units may be appropriate, the NPRM does not clarify whether the employer will be required to provide separate lists for each possible unit. As more fully described above, the proposed rules appear to contemplate a truncated hearing process where the only issue to be resolved is whether to direct an election in the petitioned-for unit or the "most similar" unit identified by the non-petitioning party. (*See* 76 Fed. Reg. 36838). However, assuming that the Board does not intend to foreclose parties from arguing for multiple alternative appropriate units, the proposed regulations would be rendered even more burdensome and unfair if the employer is required to produce even more lists as a condition precedent to making such arguments at the hearing.

The limited time permitted for the preparation and filing of the pre-hearing lists is also potentially problematic. As noted above, because they must be filed at or before the commencement of the pre-election hearing, employers will have, at most, seven days to prepare the compulsory employee lists. In most cases, the employer will have less than seven days. The short turnaround time to compile multiple lists raises substantial and unnecessary compliance challenges. Given that none of the lists may ultimately reflect the universe of eligible voters (depending upon the regional director's ultimate determination) and that an accurate list will have to be provided after the regional director makes a unit determination (*see* 76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.62(d))), there is little reason to mandate expedited disclosure of employee lists. Indeed, the primary impact of requiring such lists will be to provide pre-hearing discovery to the petitioner. However, as more fully described above, such a one-

sided process is both unfair and arbitrary. Finally, given the extremely short turn-around period for filing the above lists, the potential for errors is significantly enhanced. Indeed, litigation already occurs today regarding errors in employee voting eligibility lists pursuant to the Board's seven days *Excelsior* list rule filing requirement. For these reasons, the proposed regulations in the NPRM, requiring the filing of multiple employee lists prior to the pre-election hearing, should not be included in any final regulations issued by the Board.

C. ***The Board's Proposed Rules Would Move Virtually All Election Related Disputes to Either a Post-Election Proceeding or Negate Any Such Challenge Altogether and Would Erode Due Process Protections and, In Many Cases, Authorize Elections Before the Resolution of Significant Threshold Issues.***

In the NPRM, the NLRB proposes numerous changes that are designed to move virtually all election related issues for resolution after the election has been held or to preclude challenges in their entirety to the election process. This approach is not only inconstant with sound administrative law procedures but poses a number of due process concerns. For example, the proposed regulations would implement a formalistic offer of proof process that would deny many parties the right to a full and fair hearing on unit issues. The proposed regulations would also authorize the hearing officer to adjourn the hearing if he or she determines that less than 20% of the total unit is in issue. Finally, the proposed regulations would eliminate the rights of parties to file pre-election requests for review with the NLRB. The cumulative effect of these changes is to substantially undermine the effectiveness of the hearing process and deny non-petitioning parties a full and fair pre-election hearing in many representation cases.

1. **The Proposed Revisions to the NLRB's Pre-Hearing Procedures in Representation Cases Will Likely Discourage Non-Petitioning Parties from Entering Into Election Agreements.**

Under current NLRB procedural rules in representation cases, the substantial majority of petitions are processed without the need for any pre-election hearing. Indeed, most parties to

NLRB representation cases waive pre-election hearings by entering into election agreements.

The propensity of parties in representation cases to enter into stipulated and consent agreements has facilitated the NLRB's success in consistently processing representation cases faster than required by internal guidelines. Current Board procedures resulted in election agreements in approximately 90% of cases. (NLRB GENERAL COUNSEL, SUMMARY OF OPERATIONS (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011)).

Given the relatively small number of contested proceedings, the NLRB majority has not made a persuasive case that any modifications to pre-election hearing procedures are necessary to expedite elections in the overwhelming majority of cases. To be sure, the NLRB asserts in the NPRM that the new procedures are intended to further encourage voluntary resolution of pre-election disputes. (76 Fed. Reg. 36819-36820) (“[T]he Board anticipates that the proposed amendments would facilitate parties’ entry into ... election agreements through an earlier and more complete identification of disputes and disclosure of relevant information.”). However, for the reasons outlined above -- including the extremely short seven day Statement of Position filing deadline requirement -- imposing substantial burdens on non-petitioning parties likely would have a chilling effect and result in more, rather than fewer, pre-election disputes. Indeed, in many cases, it is the experience of the Organizations that stipulated election agreements are negotiated over a period of time after a petition has been filed and indeed may even occur at the hearing or at a point shortly thereafter. If the effect of procedural changes is that non-petitioning parties will raise more potential issues at the pre-election phase of the proceeding, the Board’s proposed rules could easily result in fewer election agreements, more hearings, and thus more delays in actually holding elections. Accordingly, a plausible, if not probable, result of the

NPRM would be to unnecessarily delay the resolution of many representation cases by discouraging stipulated election agreements.

2. The Proposed “20% Rule” Violates Section 9(c)(1) of the Act and Would Deny Due Process Rights to Non-Petitioning Parties.

Another troubling aspect of the proposed procedural modifications pertaining to pre-election hearings are the novel provisions that would authorize regional directors and/or hearing officers to deny non-petitioning parties any hearing if the pre-election unit issues do not involve at least 20% of employees in the putative unit. Such a rule is plainly inconsistent with the requirements of Section 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1), and, accordingly, exceeds the scope of the NLRB’s rulemaking authority. Further, the proposed rule is inconsistent with the Board’s own jurisprudence in this area. The NLRB previously held that Section 9(c)(1) of the NLRA, requires the Board to hold “an appropriate hearing” *prior* to the election to ensure that a question concerning representation exists. *See Allen Health Care Services*, 332 N.L.R.B. 1308, 1309 (2000) (“Absent a stipulated agreement, presumption, or rule, the Board must be able to find--based on some record evidence--that the proposed unit is an appropriate one for bargaining before directing an election in that unit.”); *Angelica Healthcare Service Group, Inc.*, 315 N.L.R.B. 1320 (1995) (“We find that the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s Rules required the Acting Regional Director to provide 'an appropriate hearing' prior to finding that a question concerning representation existed and directing an election.”); *Barre National, Inc.*, 316 N.L.R.B. 877, 880-81 (1995).³⁴ As such, to the extent

³⁴ The cases cited by the Board in support of this proposed amendment -- *Morgan Manor Nursing and Rehabilitation Center*, 319 N.L.R.B. 552 (1995) and *Toledo Hospital*, 315 N.L.R.B. 594 (1994) -- are clearly distinguishable. As noted in the NPRM, in both cases, the Board held that an approximate 20% post-election change in the scope of the previously defined unit was not sufficient to set aside the election results. However, in both of these cases, the composition of the bargaining unit was still considered in a pre-election proceeding rather than deferring all such matters to the post-election process.

these rules would deny non-petitioning parties a pre-hearing election with respect to *bona fide* disputes with respect to the definition or composition of the unit, the NPRM is in clear violation of Section 6 of the NLRA, 29 U.S.C. § 156, which grants the NLRB rulemaking authority but confines that authority to rules that do not conflict with other provisions of the Act.

Further, how and when would the 20% test be applied? It would seem that such test could not be utilized until the exact scope of the unit was determined including a resolution of all unit composition and unit placement issues. However, if such issues are deferred, there would be no determination as to the total number of eligible employees from which to do the 20% mathematical calculation. Indeed, this type of calculation may prolong the representation process, not shorten it.

The provisions in the NPRM that authorize the Regional Director to direct an election without first resolving disputes regarding the appropriateness of the petitioned-for unit and unit placement issues would adversely impact the due process rights of employers and other interested parties. Presumably, if unit definition issues are not litigated prior to the election and challenged ballots are insufficient to affect the outcome of the vote, the regional director would certify the petitioned-for unit. In the event the regional director certifies the petitioned-for unit without resolving issues raised by non-petitioning parties, then the non-petitioning parties will be denied any opportunity to litigate the unit definition or unit placement issues. Such a result would clearly violate Section 9(c)(1) of the Act and create due process concerns. *See NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826-27 (4th Cir. 1967) (“So long as the objecting party (and its election adversaries) is given the opportunity to be heard, to call and cross-examine those who are the source of Board evidence, and to present pertinent evidence of its own [sic] the hearing is fundamentally fair and satisfies the requirements of due process.”).

Significantly, the failure to resolve unit issues prior to the election will create confusion among the eligible voters regarding the composition of the employee group at issue. In the NPRM, the NLRB explains that the regional director will “advise employees that [] individuals [whose eligibility or inclusion remains in dispute] are neither included in, nor excluded from, the bargaining unit....” (76 Fed. Reg. 36842). Failure to inform employees whether they will be included in the bargaining unit if the petitioner is certified would create an untenable situation for both the employer and employees. Indeed, it is difficult to imagine how an employee could make a free and informed choice about whether they want to engage in collective bargaining in situations where they do not know which of the other employees would be included in their bargaining unit. *Beverly Health and Rehabilitation Services, Inc.*, No. 96–2195, 1997 WL 457524, at *4 (4th Cir. 1997). Indeed, collective bargaining agreements cover not only wages and benefits, but also many terms and conditions that govern relationships between and among the employees themselves, such as seniority, bumping rights and promotions. Thus, the composition of the unit is a significant and material concern for employees who will be voting on union representation.

Moreover, if there are disputes regarding the supervisory status of certain individuals, the failure to determine their status prior to the election will create uncertainty on the part of both the employer and the employees regarding the permissible scope of their pre-election activities. For employers, the failure to resolve supervisory determinations would create confusion with respect to whether the employer will be responsible for the statements and conduct of disputed employees who could later be found to be supervisors or agents. Moreover, the failure to distinguish supervisors from employees could lead to attorney-client privilege issues. For employees, they will be confused about whether and to what extent they can participate in

pre-election activities such as union meetings and home visits. Interested parties cannot be expected to make these judgments without the benefit of an evidentiary hearing. Indeed, the determination of supervisory status requires careful assessments in order to ensure compliance with the Act and the Board's fact-intensive tests for determining supervisory status. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006).

Significantly, the failure to resolve supervisory determinations could lead to otherwise avoidable post-election objections and unfair labor practice charges. See *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906 (2004) (holding that if an employee who solicits authorization cards is later deemed to be a supervisor, a valid objection would exist and the election could be overturned). For example, if an employer trains an individual on what he or she can and cannot say during a campaign, believing that the individual is a supervisor, when the employee is later determined not to be a supervisor, the employer may have committed both objectionable election conduct and an unfair labor practice. *Circuit City Stores, Inc.*, 324 N.L.R.B. 147 (1997) (finding a violation of the Act where supervisor solicited employees to wear antiunion paraphernalia in support of the company's position). Likewise, if the employer assumes that the individual is not a supervisor and such individual, for example, makes unlawful promises to co-workers and is thereafter is determined to be a section 2(11) supervisor, again, objectionable election conduct and an unfair labor practice may have occurred. See *Harborside Healthcare*, 343 N.L.R.B. at 911. Accordingly, the ultimate impact of the proposed regulation could be to substantially increase the NLRB's workload by creating additional election objection hearings and an increased number of unfair labor practice charge proceedings.

And the risks with respect to misclassification of supervisors would be borne by the union as well as the employers. For example, if the union asks an individual to hand out

authorization cards under the mistaken belief that the individual is a unit member, when the individual is actually a supervisor, such activities would almost certainly be objectionable conduct that could result in the election results being overturned. *See e.g., Southeastern Newspapers*, 129 N.L.R.B. 311 (1961) (petition dismissed where supervisor participated in obtaining signatures).

Similar issues to those noted above could arise with respect to unit placement issues involving managerial employees, individuals that may or may not be independent contractors, and to a lesser extent confidential employees.

Most importantly, the failure to resolve supervisory issues will have a substantial impact on the rights of employees, including their First Amendment and associational rights. Indeed, an employee who believes that he or she could be a supervisor might be reluctant to attend union meetings or to discuss the merits of unionization with other employees. Such a result would chill the rights by such employees and prevent a full and free discussion regarding union issues. *See Brown*, 554 U.S. at 68 (citations omitted); *Franzia Bros. Winery*, 290 N.L.R.B. 927, 932 (1988). Accordingly, if the Board is to proceed with rulemaking in this area, it should require regional directors to proceed to an election only after resolving legitimate disputes regarding unit definition and unit placement.

3. The Formalistic “Summary Judgment” Process Would Improperly Limit the Rights of Interested Parties.

The procedural amendments in the NPRM would substantially undermine the effectiveness of the hearing process in representation cases. Under current NLRB procedural rules, a party is guaranteed the right to submit evidence in support of its position at the hearing. *See, e.g., Barre-National Inc.*, 316 N.L.R.B. 877, 877 (1995) (“For the reasons set out below, we find that the Regional Director erred in refusing to permit the Employer to introduce the

testimony of his witnesses at the scheduled pre-election hearing.”). Contrary to existing rules, the proposed amendments describe a process whereby the hearing officer would identify the issues in dispute prior to receiving any evidence -- and determines if there are genuine disputes as to facts material to those issues -- based upon the Statements of Position and offers of proof proffered by the parties. For obvious reasons, this formalistic “summary judgment” process is a poor substitute for contested case hearings, live testimony, and cross-examination of witnesses which afford parties a full opportunity to develop the record.

As an initial matter, the NLRB majority’s assertion that the proposed “summary judgment” standard “simply import[s] the norms of modern civil procedure from the federal judicial system and appl[ies] them to adjudication of representation case issues” is inaccurate. (76 Fed. Reg. 36829). Indeed, at the beginning of the pre-election hearing, the parties have not had the opportunity to take discovery (as they would in a civil proceeding), nor have they had access to the other party’s evidence. Neither the Board nor any court has ever utilized a summary judgment standard to determine whether to evaluate evidence. Rather, summary judgment is a standard utilized to resolve legal questions *after* the facts have been established to the point where material facts are no longer in dispute. Indeed, Federal Rule of Civil Procedure 56(c) requires summary judgment when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). As such, in the absence of a full record or at least access to all of the relevant evidence, non-petitioning parties cannot reasonably be expected to articulate and substantiate their positions through an informal summary judgment process in representation hearings. Accordingly, the imposition of a summary judgment standard by the Board is entirely inappropriate.

Moreover, the NLRB provides no guidance as to how the hearing officer would identify material fact issues in dispute based upon Statement of Position forms or offers of proof rather than admissible evidence. Further, without the rigors of cross examination, hearing officers will not be able to discern whether the assertions in the Statement of Position and/or offers of proof are accurate and reliable. Given that NLRB hearing officers have never been assigned responsibility for making such judgments in the past, the effectiveness of this novel procedure is highly doubtful and could lead to inequitable results. This is particularly true where, as here, the Board has provided no standards or guidelines for hearing officers to follow in rendering such judgments.

In any event, granting hearing officers -- many of whom are not attorneys -- the unprecedented authority to issue summary judgments with respect to unit issues based upon perfunctory offers of proof undermines the due process protections afforded to parties in representation cases. (*See* 29 C.F.R. § 101.20) (“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.*”) (emphasis added). The NPRM makes no attempt to explain how non-attorneys are qualified to render spot judgments about what, if any, disputed issues constitute genuine issues of material fact. If the Board intends to give such significant responsibility to hearing officers, the NLRB must address these legitimate concerns.

Further, as noted previously, such *sua sponte* rulings by hearing officers no doubt will be based on little or no record evidence and will significantly deprive courts of appeal of any record to review contested bargaining unit composition and unit placement issues. In such instances, the appellate court, in all likelihood, will merely remand such matters to the Board for appropriate administrative processing and resolution. Certainly, if this pattern develops, the

Board will not have streamlined its election procedures. In the alternative, a party pursuing such an appeal may find no relief in the appellate courts if such courts merely reject an appeal based on the insufficiency of the record below. Such a result, of course, would totally eliminate due process protections for such parties.

Representation cases are significant events with a substantial impact not only on employers and unions, but especially on the impacted workforce. The drafters of the NLRA recognized this fact and built in an explicit requirement for a pre-election hearing in the text of the statute. 29 U.S.C. § 159(c)(1)(B). Given the statutory imperative, parties in representation cases must be offered the opportunity to offer evidence (and to evaluate the other party's evidence) and to cross-examine witnesses. Denying parties the right to fully participate in the investigation of evidence and examination of witnesses substantially undermines the fairness and effectiveness of the hearing process. *See Barre-National Inc.*, 316 N.L.R.B. at 877. The NLRB should not promulgate a rule that obviates these fundamental rights.

4. The Elimination of Post-Hearing Briefs as a Matter of Right Will Erode the Efficacy of the Hearing Process by Limiting the Parties' Ability to Articulate Their Positions and Explain Applicable Authority.

The proposed amendments that would eliminate post-hearing briefs as a matter of right would have a substantial negative impact on the resolution of pre-election disputes. Under the proposed amendments, at the close of the hearing, parties would be permitted to file briefs *only* with the permission of the hearing officer and within the time permitted by and subject to any other limitations imposed by the hearing officer. Under current rules, parties are typically afforded the opportunity to file post-hearing briefs within seven days after the hearing, or later with special permission. *See* 29 C.F.R. § 102.67(a).

The elimination of post-hearing briefs would further erode the efficacy of the hearing process by denying the hearing officer and/or regional director the benefit of the parties'

summation of the record evidence and legal authorities that support their respective positions with respect to critical and often complex unit issues. Parties would also have no opportunity to do post-hearing legal research or to cite legal authorities regarding complex issues raised at the hearing. Indeed, the parties will not even have the opportunity to review the transcript of hearing testimony prior to making oral arguments on these issues. (76 Fed. Reg. 36842 (*to be codified at* 29 C.F.R. § 102.66(h))). Given that many hearing officers are not lawyers and do not have a thorough working knowledge of the NLRB's past decisions, there is no rational basis for requiring them to make decisions about complex disputes without the benefit of the parties' legal research and arguments. Accordingly, the final rule promulgated by the Board on this point should either be withdrawn or rejected.

5. The Final Rule Should Not Allow the Petitioner or Any Other Parties Whose Names Appear on the Ballot to Waive the Ten (10) Day Period Between the Eligibility List and the Election.

The NPRM provides that an election shall not be scheduled for a date earlier than ten (10) days after the date by which the eligibility list must be filed and served, *unless this requirement is waived by the petitioner and any other parties whose names will appear on the ballot.* (76 Fed. Reg. 36826) (emphasis added). Although the NPRM states that the proposed amendments to 29 C.F.R. § 102.67 would authorize such waivers, no corresponding language appears in the text of the proposed regulation. Adopting a rule that would authorize the petitioner and other parties whose names appear on the ballot to waive the ten (10) day requirement without the consent of the employer further shorten the timeframe between the filing of a petition and the election, therefore depriving full and complete discussion particularly among employees as to the issues

presented by such petition.³⁵

Significantly curtailing the time for debate would reduce the amount of information available to eligible voters prior to the vote and deny employees the right to hear competing views about the advantages and disadvantages of union representation before casting their ballots.

Indeed, as the Board expressly stated in its seminal *Excelsior Underwear* decision:

[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 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.

Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1240 (1966). Of course, there is little doubt that organized labor and pro-labor academics support the curtailment of employer participation during the pre-election period. See C. Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 586-87 (1993) (“[E]mployers should have no right to be heard in either a representation case or an unfair labor practice case, even though Board rulings might indirectly affect their duty to bargain.”).

However, the real detrimental impact would fall hardest on employees. Indeed, adopting a rule that would allow the petitioner to waive the ten (10) day waiting period would unfairly limit the ability of employees to educate themselves about the issues and communicate with each other

³⁵ In the NPRM, the Board cites *Mod Interiors, Inc.*, 324 N.L.R.B. 164 (1997) and Casehandling Manual Section 11302.1 as support for the proposition that the petitioning party can waive the ten (10) day period under current rules. (76 Fed Reg. 36826). However, neither the decision in *Mod Interiors, Inc.* nor the Casehandling Manual states that a party may waive the ten (10) day period.

regarding whether unionization would be beneficial. Such a result would not enhance the fairness of the election process.

Finally, if the Board proceeds with such ten (10) day waiver procedure, any party requesting such a waiver should concurrently also be required to waive the right to file any election objections based on alleged deficiencies of the *Excelsior* or voting list, any failure of the employer to properly post election notices in the workplace, and any other potential procedural objection to the holding of the election.

6. The Proposed Modifications Regarding Voter Eligibility Lists Impose Unfair Burdens on Employers and Impinge upon the Privacy Rights of Employees.

Throughout the NPRM, the NLRB proposes new and unprecedented procedures that will increase the burden on non-petitioning parties and enhance the rights of petitioners. A primary example of this dynamic can be found in the Board's proposed changes to the timing and content of the mandatory voter eligibility lists that must be filed by employers. The proposed amendments would require employers to file voter eligibility lists setting forth work locations, shift assignments, telephone numbers and, where available, e-mail addresses within two (2) days after signing an election agreement or issuance of a regional director's decision and direction of election. The short two day time limit, on its own, raises significant compliance challenges, especially for larger bargaining units. Even more troubling are the proposed amendments that mandate the hand over of personal information about each voter, including phone numbers and e-mail addresses. While it is not clear from the proposed regulations whether the requirements for the disclosure of telephone numbers and e-mail addresses apply to home or work telephone numbers (or even mobile phone numbers), or to personal or work e-mail addresses, the NLRB should not implement any rule that would require employers to disclose personal information

regarding their workforces to union organizers absent the express consent of each individual employee.

- a. The Proposal to Require Voter Eligibility Lists Within Two Days Will Create Substantial Compliance Challenges.

The proposed amendments regarding expedited voter eligibility lists could, in some cases, create practical compliance problems in cases involving large units. Under the proposed regulations, voter eligibility lists must be filed (and served on other parties) within two (2) days after the Regional Director's decision and direction of election or the approval of an election agreement. This is a substantial decrease from the current seven (7) day period and given the breadth of these new disclosure requirements, preparation of employee lists could, in many cases, require time-consuming research regarding putative voters that cannot reasonably be completed within the time proposed. This is particularly true with respect to multi-site units or units with large numbers of employees.³⁶ The NLRB presumes that technological tools available to employers justify these short time frames. (76 Fed. Reg. 36816) (“since *Excelsior* was decided, almost 50 years ago, the Board has not significantly altered its requirements despite significant changes in communications technology. . .”) However, the Board's judgment regarding the reasonableness of the proposed rule is based upon speculation – not any actual study of whether the new requirements are feasible for most employers. Further, the Board's proposed rules fail to consider the severe consequences that befall employers who submit incorrect eligibility lists. *Acme Industrial Co.*, 227 N.L.R.B. 249 (1976) (setting aside the election because the eligibility list was inaccurate).

³⁶The NLRB justifies this significant reduction in the timing for submission of voter eligibility lists, in part, by noting that between 2001 and 2010 the median election involved bargaining units of only 23-26 employees. (76 Fed. Reg. 36821). While this may be true, the Board should keep in mind that focusing solely on the median number of employers ignores the fact that certain employers have potential bargaining units numbering in the thousands.

Accurate and complete voter eligibility lists are extremely important to all parties for an accurate and orderly election to be held. There is no legitimate policy reason for requiring such a short time period for filing the voter eligibility list. Accordingly, the Organizations urge the Board to retain the current 7-day filing deadline for voter eligibility lists.

b. The Final Rule Should Not Require Disclosure of Personal Information in the Voter Eligibility Lists.

The Organizations and their members are particularly concerned about the provisions in the NPRM that would require, for the first time, that employers disclose the telephone numbers and e-mail addresses of employees. Specifically, the NPRM proposes changes to 29 C.F.R. § 102.62(d) and 29 C.F.R. § 102.67(j) that would mandate that voter eligibility lists include not only the current names and addresses of eligible voters but also their “available telephone numbers, available e-mail addresses, work locations, shifts and job classifications” (76 Fed. Reg. 36838 (*to be codified at 29 CFR § 102.62(d)*)). The NPRM does not clarify whether these requirements apply to both work and personal telephone numbers. Regardless of the intended scope, however, these proposed disclosures are clearly unnecessary for the intended purpose of the voter eligibility list. Moreover, the proposed amendments to compel disclosure of employees’ personal information are contrary to current law, and infringe on legitimate privacy interests.

In the NPRM, the Board attempts to justify the broad disclosure requirements by asserting that “[t]he provision of only a physical address no longer serves the primary purpose of the *Excelsior* list. Communications have evolved far beyond the face-to-face conversation at the doorstep.” (76 Fed. Reg. 36820). Moreover, the NLRB observes that “employers are, with increasing frequency, using e-mail to communicate with employees about the vote.” (*Id.*) However, the NPRM makes no effort to differentiate between employers that use such communication tools during election campaigns and those that do not. By applying a blanket

rule in all cases, the NLRB is effectively encouraging the parties to wage campaign disputes by e-mail and telephone, and infringing upon the personal lives of employees. Even more troubling is that employees will have no ability to object to the disclosure if their telephone numbers and e-mail addresses are disclosed to labor unions.

To the extent the NPRM would require employers to provide work e-mail addresses, such a rule is directly contrary to current law. *Trustees of Columbia University*, 350 N.L.R.B. 574, 576 (2007) (noting potential privacy concerns in requiring employer to provide employee e-mail addresses).³⁷ The Board offers no explanation for why the *Trustees of Columbia University* decision should be overruled. Indeed, the Board's only statement about the decision is that the holding was based upon the employer's compliance with extant law. (76 Fed. Reg. 36820 n.45). Further, requiring the employer to disclose work e-mail addresses conflicts with the NLRB's decision in *Register Guard*, 351 N.L.R.B. 1110 (2007). In that case, the Board upheld an employer's right to maintain a policy that prohibits employees from using a company's e-mail system for any "non-job related solicitations," including union solicitation. *Id.* Requiring the employer to disclose work telephone numbers creates a similar conflict. *See Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000) (stating there is no statutory right of an employee to use an employer's equipment, such as a telephone, for personal or nonbusiness purposes, such as union organizing matters); *Union Carbide Corp.*, 259 N.L.R.B. 974, 980 (1981), *enfd* in relevant part 714 F.2d 657 (6th. Cir. 1983). To the extent that an employer does not use its own e-mail systems or telephones to communicate with employees regarding unionization issues, there is absolutely no reason why a union should be allowed to do so. Under such circumstances, there

³⁷ In *Trustees of Columbia University*, the majority noted that the Board was not in a position to extend the *Excelsior* rule to require the employer to provide the e-mail addresses without briefing and a full record on the technological issues involved. *Trustees of Columbia University*, 350 N.L.R.B. at 576.

is no reason why the NLRB should require employers that do not communicate with employees about union issues to provide its employees' work e-mail addresses to a petitioning party or union.

Any requirement that employers provide non-work-related home or mobile telephone numbers or personal e-mail accounts for employees raises significant employee privacy concerns and may reduce the likelihood that employees will voluntarily provide such information to their employers. (76 Fed. Reg. 36843 (*to be codified at* 29 C.F.R. § 102.67(j))). There is a substantial body of case law addressing the issue of the privacy of personal e-mail under the federal Freedom of Information Act. These cases clearly articulate that there is a substantial privacy interest with respect to the disclosure of personal e-mail addresses in the context of an information request under FOIA. *Electronic Frontier Foundation v. the Office of the Director of National Intelligence*, No. 09-17235, 2010 WL 1407955 at *10 (9th Cir. Apr. 9, 2010) (in upholding the redaction of personal e-mail addresses in response to an information request, the court stated that it could “easily envision possible privacy invasions resulting from public disclosure of the e-mail addresses” and that disclosure of personal e-mail addresses “may add to the risk of privacy invasion with little additional benefit to the public interest.”); *Government Accountability Project v. U.S. Department of State*, No. CIV.08-1295, 2010 WL 1222156 at *6-7 (D.D.C. Mar. 29, 2011) (“[P]rivate individuals mentioned in these records have a clear privacy interest in avoiding the disclosure of their personal e-mail addresses . . .”).

Moreover, specific examples provided by certain members of HR Policy underscore concerns inherent in requiring employers to provide telephone numbers and e-mail addresses of employees to the union:

- “The union (including pro union employees) at times harass and intimidate and threaten employees. We have had a number of employees leave the Company because of the pressure tactics of pro-union supports.”
- “Employees expect us, as the employer, to protect this private information from those who are not authorized expressly by the employee to receive it. If we were to do so, we would violate this key tenet of our organization’s culture and practices.”
- Multiple HR Policy members expressed concerns that requiring disclosure of employee e-mail addresses and phone numbers would directly contradict the Company’s privacy policies requiring strict confidentiality of such information.

These examples are not isolated occurrences. To the contrary, union coercion and intimidation in the context of an organizing campaign is rampant and well-documented. *See, e.g.,* J. Sherk, “The Truth About Improper Findings and Union Intimidation (Heritage Foundation, March 12, 2007) (“In fact, union coercion and intimidation are not as rare as labor activists contend.”); C. Stewart, “How Will the Proposed Employee Free Choice Act Affect Labor Relations in the United States.” p. 7 (2009) (available at www.uri.edu/research/papers/Stewart-EFCA) (“Clearly, the current system lends to abuses by organizers in the form of misrepresentation or coercion.”). Since January 1, 2009 alone, over 408 unfair labor practices have been filed against unions for coercive statements, 186 have been filed for harassment, 298 have been filed for threatening statements, and 94 have been filed for violence and assaults.³⁸ Moreover, there have been many well-documented cases of union organizers illegally obtaining and utilizing personal information with the purpose of harassing and coercing employees outside of the workplace in an attempt to pressure employees to join their unions.³⁹ Under such circumstances, the NLRB should not adopt new rules that will

³⁸ Statistics compiled through analysis of 8(b)(1)(a) unfair labor practices filed against unions as reflected on the National Labor Relations Board’s Electronic Case Information System.

³⁹ In *Pichler v. Unite*, Case No. 2:04-cv-02841 (E.D. Pa 2011), for example, a group of Cintas Corporation employees filed suit against UNITE alleging that the union violated the Driver’s Privacy Protection Act by

provide new avenues for aggressive union organizers to further intrude into the private lives of employees without their consent.

D. *The Proposed Revisions to Post-Election Procedures Substantially Curtail the Rights of Parties to Develop Evidence to Support Objections and Present their Evidence in a Contested Hearing.*

To compound the substantial erosion of due process protections during the pre-election period described above, the NPRM would effect a similar degradation of legal processes in the post-election period by compressing timetables, truncating hearings and denying meaningful review of regional decisions.

1. The NLRB's Proposal to Reduce the Timetables for Post-Election Proceedings.

In particular, the proposed revisions would significantly reduce the time period for parties filing objections to investigate and present evidence supporting their objections. Moreover, the NPRM would adopt a post-election summary judgment process pertaining to challenges and objections that potentially raises additional due process issues. Given that the NPRM would defer many significant unit issues until after the election, at a minimum, the Board must provide comprehensive post-election hearing procedures that will facilitate the accurate resolution of outstanding issues and ensure that due process rights of all parties are protected and provided. Moreover, the NLRB must allow aggrieved parties the right to appeal regional decisions to the Board in order to provide meaningful review.

(continued...)

surveilling the parking lots at Cintas facilities to obtain the license plate numbers of Cintas's employees in order to obtain unlawful access to non-public motor vehicle records setting forth their home addresses and telephone numbers. Union representatives then visited plaintiffs' homes and called their home telephone numbers in an attempt to discuss union representation. The lawsuit was filed as a class action after plaintiffs discovered that the union had engaged in similar activities throughout the United States (including, but not limited to Alabama, Ohio, Illinois, Arkansas and Michigan. UNITE ultimately to settle the case for approximately \$4 million. The Court also approved Class Counsel's request for \$1 million in fees and expenses.

At the same time the Board proposes to postpone many unit definition and unit placement issues until after the election, the NLRB is halving the time available to parties to gather evidence and prepare for post-election hearings. The NLRB's proposal to reduce the amount of time permitted for the investigation and presentation of evidence supporting post-election challenges and objections from fourteen (14) to seven (7) days will not afford aggrieved parties sufficient time to gather evidence to support objections and prepare for post-election hearings on challenges or objections -- as well as any pre-election issues that were deferred by the regional director. (29 C.F.R. § 102.69(a)). The current rules provide a filing party with seven (7) days to file objections to an election and an additional seven (7) days to file an offer of proof. (*Id.*) While the seven (7) day period for the filing of post-election objections would remain the same, the proposed amendments would require the objecting party to submit an offer of proof outlining the evidence supporting the objections contemporaneously with the objections. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. § 102.69(a))). Elimination of the seven (7) day period to submit the offer of proof would significantly decrease the time parties have to develop evidence in support of challenges and objections.

If there are potentially determinative ballot challenges or the regional director determines that the offer of proof supporting objections raises a genuine issue of material fact, the proposed amendments would require that the regional director serve a notice of hearing setting the matters for hearing within fourteen (14) days of the tally of ballots or as soon thereafter as practicable. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. § 102.69(d)(1)(ii))). Given that the objections and offer of proof must be submitted within seven (7) days, this time limit will provide the parties little time to prepare for a post-election hearing on challenges or objections.

Most significantly, if the hearing officer or regional director deferred any issue with respect to the appropriate unit because less than twenty percent (20%) of the potential voters were in issue, the NPRM does not make clear whether the proper definition of the unit may be litigated in post-election proceedings where challenged ballots are not determinative. The NPRM suggests that unit placement issues may not be resolved *at all* if the ballot challenges are not determinative. (*See* 76 Fed. Reg. 36824). The NLRB majority dismisses these problems in the NPRM, asserting that “parties are often able to resolve the resulting unit placement issues in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.” (*Id.*) However, placing the burden on the parties to resolve these issues through bargaining is an abdication of the Agency’s duty to determine the appropriate unit under Section 9(b) of the Act. (29 U.S.C. § 159(b)). Further, bargaining regarding unit placement issues is an unacceptable solution which is legally deficient given that unit scope is a non-mandatory subject of bargaining. *Douds v. International Longshoremen’s Association*, 241 F.2d 278, 282 (2d Cir. 1957). Even less persuasive is the Board’s suggestion that parties can later file a unit clarification petition. (76 Fed. Reg. 36824). There can be little doubt that requiring parties to file after-the-fact unit clarification petitions will not streamline representation case processing and will create additional work for the NLRB. Accordingly, to the extent that the final rule defers unit determination issues until after the election -- which it should not -- the rule must, at a minimum, provide a mechanism to resolve such issues during post-hearing proceedings.

2. The Proposed Modifications to Post-Election Hearings Will Erode Due Process Protections.

The proposed regulations outlined in the NPRM would incorporate the same “summary judgment” process -- detailed above pertaining to pre-election hearings -- for post-election

proceedings pertaining to challenges and objections. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. § 102.69)). Under this process, the parties would submit offers of proof, and the hearing officer would make a preliminary judgment regarding whether there are genuine issues of material fact in dispute before holding a post-election hearing. (*Id.*) This proposal pertaining to challenges and objections could potentially deny aggrieved parties the opportunity to develop a complete and thorough record with respect to voter eligibility and/or objectionable conduct. Given the substantial number of significant issues that are deferred until after the hearing, the final rule should provide meaningful post-hearing procedures that will afford all parties due process rights and facilitate the accurate resolution of significant issues.

Further, as noted previously, this approach places hearing officers in an inappropriate position to make complicated procedural and legal decisions based on little or no record evidence. As noted above, further, such hearing officers are often not attorneys and do not have the experience or training necessary to make informed decisions regarding issues that would be before them in such proceedings. Additionally, as discussed below, such proceeding would result in virtually no record being available for appellate review.

E. ***The NLRB's Proposed Revisions to its Procedures in Representation Proceedings Improperly Curtail the Appeal Rights of Parties with Respect to Regional Determinations on Unit Scope Issues, Voter Eligibility and Objectionable Conduct.***

1. Pre-Election Review.

In the NPRM, the NLRB proposes to eliminate the current procedures that authorize parties in representation cases to file pre-election requests for review. Under the current regulations, parties may file a request for review of a regional director's determination with respect to the scope of the appropriate unit with the Board within 14 days of such determination. (29 C.F.R. §102.67(b)). The Board grants requests for review only where compelling reasons

exist to do so. (*Id.*) Such compelling reasons include substantial questions of law or policy, substantial factual issues that prejudice the rights of parties, prejudicial error caused by the regional director's ruling, or compelling reasons to reconsider an important Board rule or policy. Moreover, under the current regulations, either party may, within 14 days, file exceptions to the regional director's report resolving and disposing of open issues which may be resolved by the regional director or the Board depending on agreements entered into by the parties. (29 C.F.R. §102.69(d)). In contrast to the current procedures, the proposed amendments eliminate the pre-election request for review and the accompanying 25-30 day waiting period. (76 Fed. Reg. 36844 (*to be codified at 29 C.F.R. § 102.69(b)*)). If the regional director directs an election, the proposed amendments would defer all parties' right to request review by the Board until after the election. (*Id.*) All pre-election rulings would remain subject to post-election review if they have not been rendered moot. (76 Fed. Reg. 36826).

The proposed elimination of pre-election requests for review will likely result in unnecessary elections that will subsequently have to be re-run after unit issues are resolved. For example, the elimination of the right to request review of the regional director's decision and direction of election could result in unnecessary elections in situations where a legal bar precludes an election but the region erroneously fails to apply the appropriate legal rule. (76 Fed. Reg. 36842 (*to be codified at 29 C.F.R. § 102.67(b)*)). Under such circumstances, the ultimate impact of the proposed amendments could be to create additional work for the regions and to unduly lengthen representation disputes.

2. Post-Election Review.

a. Denying Meaningful Post-Election Review.

In the NPRM, the NLRB also proposes to eliminate the right of parties to file exceptions to regional decisions, and make all appeals processes discretionary. Under the current

procedures, employers have a right to file exceptions to regional decisions unless that right is waived. (29 C.F.R. § 102.62(b)). The proposed amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections. In the NPRM, the Board asserts that

Finally, consistent with the proposed changes described above in relation to § 102.62, the proposed amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections. The Board anticipates that this proposed change would leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service.

(76 Fed. Reg. 36827).

The Board should not abdicate its statutory responsibilities by denying parties the right to file exceptions to regional determinations. Such discretion is especially problematic given the hearing officer's broad discretion and the absence of Board review prior to the election. If not an outright violation of due process, this aspect of the Board's rule change raises serious procedural fairness issues. Making Board review of regional decisions discretionary opens the door for unchecked regional error. *Copps Food Center*, 301 N.L.R.B. 398 (1991) (where a case sat for over two years while the Board considered the regional director's decision and direction of election; the Board ultimately reversed the regional director's finding that a separate department of meat department employees was appropriate and dismissed the petition). Because hearing officers report directly to regional directors, appeal to the regional director, as provided under the NPRM, does not constitute meaningful review. Moreover, denying aggrieved parties the right to appeal adverse determinations to the Board clearly undermines due process protections. Further, as a matter of public policy, the Board should not be abdicating its statutory responsibility to "career civil servants." Board members are nominated by the President with the advice and

consent of the United States Senate. Board members have the duty to carry out their responsibilities under the NLRA, including reviewing appeals from any party regarding significant election dispute issues. Simply handing such responsibilities to “career civil servants” -- no matter how qualified such civil servants may be -- is yet another indication of the deficiencies of the proposed rules and an indication of the Board majority’s apparent acceptance of any “shortcut” that will expedite the holding of elections and curtail the meaningful review of same.

Additionally, it is interesting to note that the proposed rules approach in this area, of essentially adopting the consent election procedure format, is inconsistent with the prevailing practice of employers and unions with respect to election composition and election processing matters. Presently, parties have the opportunity to elect to either enter into a Consent Election Agreement (Form NLRB-651) or proceed to an election pursuant to a Stipulated Election Agreement (Form NLRB-652). As described in Section 11084.1 of the NLRB Casehandling Manual: “[t]he basic difference between the consent election agreement and the stipulated election agreement is that questions that arise after the election are decided by the regional director in a consent election and by the Board in a stipulated election.” Parties, under the current regulations are far more likely to enter into a stipulated election agreement than a consent election agreement.⁴⁰ The NPRM, however, would eliminate stipulated election agreements and adopt the review procedures currently applicable to rarely used consent election agreements. (76 Fed. Reg. 36,837 (*to be codified at* 29 C.F.R. § 102.62(b))). As noted above, not only does this approach deprive parties of basic due process appeal rights to the Board, and in all likelihood

⁴⁰ See, e.g., NLRB Annual Report for Fiscal Year 2009 at Table 10 (2009), available at <http://www.nlr.gov/sites/default/files/documents/119/nlr2009.pdf> (showing that 1.5% of representation cases, or 41 elections, involved consent elections, while 51.6%, or 1,370 cases, involved stipulated elections.)

federal courts of appeals, such approach is also poor administrative law procedure and poor public policy. Indeed, in cases where the regional director determines that there are genuine issues of material fact that must be resolved, the proposed amendments would provide that, in such cases, the regional director will provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations to the regional director as to the disposition of the issues. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. §102.69(d)(1)(iii))). The regional director thereafter would have the final authority with respect to any contested election issues, with presumably no appeal rights of any type to the Board. This portion of the proposed rules clearly is prejudicial to any party who presents genuine issues of material fact and desires to pursue an appeal of such disputed issues. The proposed rules in this area should be withdrawn or rejected.

b. Legal and Practical Compliance Problems During the Pendency of Unit Composition and Unit Placement Appeals.

Finally, deferring important bargaining unit composition and unit placement issues to the post-election period presents significant legal and practical issues for an employer. If a union is selected by a majority of bargaining unit employees, and the employer desires to contest the unit composition decision of the Board or unit placement decisions made by the Board, it must first refuse to bargain with the selected union. Then, the employer must wait until the Board issues a complaint alleging a failure to bargain with the selected union before it can file an appeal in the appropriate federal court of appeals. Such process can take months -- if not years -- before a final resolution of the contested issues are decided. During such timeframe, the selected union is presumed to be the bargaining representative of the unit employees. Accordingly, if the employer makes unilateral changes in terms and conditions of employment during such timeframe, it proceeds at its peril. *O'Connor Chevrolet*, 209 N.L.R.B. 701, 703 (1974) (“The

Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made.”). If the employer is unsuccessful in its appeal, and has made unilateral changes in terms and conditions of employment that are mandatory subjects of bargaining, the employer, in all likelihood, would be charged with unfair labor practices and be unsuccessful in defending against same.

Accordingly, an employer may be faced with remedies that are difficult to implement. This is particularly true in the fringe benefit area when an employer may have made changes during such time period with respect to its health insurance and pension plans. Therefore, it is highly desirable to have as many potential contested issues with respect to bargaining unit configuration and unit placement decided pre-election, not post election. The proposed rules are entirely contrary to such objective.

IV. **Subjects on Which the Board has Requested Comment but not Proposed Rules**

A. ***Electronic Signatures Should not be Accepted for Purposes of the Mandatory Showing of Interest.***

In the NPRM, the Board requested comments, without setting forth any specific proposed amendments, regarding whether to accept electronic signatures in support of a showing of interest. While the Board did not provide any guidance with respect to the scope or type of electronic signatures it would consider accepting, the Organizations strenuously oppose any amendment that would allow petitioners to offer any “electronic signatures” to establish the requisite showing of interest. Electronic signatures are not subject to the same authentication processes to which hand written signatures may be subjected.

For one thing, the NPRM provides no guidance regarding the kinds of “electronic signatures” that the NLRB is considering for purposes of establishing the mandatory showing of interest. Electronic signatures could take many different forms, including:

- a name typed at the end of an e-mail message by the sender;
- a digitized image of a handwritten signature that is attached to an electronic document (sometimes created via a biometrics-based technology called signature dynamics);
- a secret code or PIN (such as that used with ATM cards and credit cards) to identify the sender to the recipient;
- a code or ‘handle’ that the sender of a message uses to identify himself;
- a unique biometrics-based identifier, such as a fingerprint or a retinal scan; and a digital signature (created through the use of public key cryptography).

See Thomas J. Smedinghoff and Ruth Hill Bro, *Electronic Signature Legislation*

(<http://library.findlaw.com/1999/Jan/1/241481.html>) (internal citations omitted). While each type of electronic signature presents its own set of practical and administrative problems, all present similar concerns. Indeed, “the indicia of reliability that usually accompany paper-based communications (such as a paper document signed with ink signatures and delivered by trusted third parties such as the U.S. Postal Service) are missing in electronic transactions.” (*Id.*)⁴¹

Under the current regulations, employee signatures in support of a showing of interest receive little scrutiny. Section 11027 of the NLRB Casehandling Manual provides:

Although authorizations should be examined on their face (to check, for example, for signatures which appear to be in the same handwriting), their validity should be presumed unless called into question by the presentation of objective evidence. W-4 forms or

⁴¹ See also Holden Lewis, *Digital Signatures Become Law -- Can E-Forgers Ruin Your Hood Name?*, <http://www.bankrate.com/brm/news/ob/20000630.asp> (“You need to involve human beings to be sure that a signature is valid.”)

other documents should not be accepted routinely for checking against signatures on the authorizations, absent objective evidence that provides a reasonable basis for challenging the showing of interest.

Reducing these already minimal safeguards by accepting electronic signatures -- thereby eliminating the ability of the agency to compare handwriting on an authorization card to a handwriting sample -- would make it even more difficult to determine whether a petitioner's showing of interest is valid. Given the potential risks involved, and the substantial safeguards that would have to be established to assure even minimal scrutiny of electronic signatures, the NLRB should not accept electronic signatures as evidence to support the mandatory showing of interest in representation cases.

While the process for examining authorizations under existing law may be cursory, an obligation nonetheless still exists. *Perdue Farms v. NLRB*, 935 F. Supp. 713, 725 (E.D.N.C. 1996) (NLRB disregarded clear and specific mandate in Section 9 to investigate union's election petition and determine whether question concerning representation exists in light of allegations that union used forged authorization cards to establish showing of interest). And it is a significant obligation in that it is the only procedural safeguard in place to deter a petitioning party from submitting fraudulent signatures in support of a showing of interest. Simply put, there is no reason to complicate the current processes pertaining to showings of interest given their relative simplicity and importance.

The NMB's policies regarding similar issues further support the Organizations' view that electronic signatures not be accepted for purposes of the showing of interest. For instance, notwithstanding the fact that the NMB has taken steps to increase the use of electronic communications during its representation procedure--including to allow electronic voting--the NMB does not allow electronic signatures for purposes of the showing of interest. *See* 29 C.F.R.

§ 1206.3 (requiring that authorization cards be signed and dated in the employee's own handwriting); NATIONAL MEDIATION BOARD REPRESENTATION MANUAL, s. 1.02 (Mar. 21, 2011) (requiring original signatures on all applications for services of the NMB); *Id.*, s. 3.1 (requiring that authorizations be signed and dated in the employee's own handwriting). The explicit requirement that signatures in support of a showing of interest be in writing in the employee's own handwriting clearly was enacted to prevent fraud and abuse. The same risks exist here. Accordingly, electronic signatures should not be accepted for purposes of the mandatory showing of interest in representation cases.

B. *Given That Blocking Charges are One of the Most Significant Causes of Delay in Election Proceedings, the Board Should Revise its Blocking Charge Rule to Limit Those Charges that can be Used to Delay Elections.*

While the NPRM is devoid of any specific proposal regarding blocking charges, there is little question that substantially revising the blocking charge rule could significantly curtail frequent and unnecessary delays in representation cases. The NLRB does not publish meaningful or complete information pertaining to blocking charges. However, in response to the July 15, 2011 FOIA request, from the Organizations and other parties, the Board indicated that 233 blocking charges were filed in 2010, resulting in an average of 199 days and a median of 113 days between the filing of the petition and the election. Moreover, an article by Professor Samuel Estreicher in the ABA Journal of Labor & Employment Law (Fall 2009) sets forth certain instructive data pertaining to blocking charges in 2008. According to the article, which relies on NLRB data on file with the author, in 2008 there were 2,024 "petitions that proceeded to election." Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 ABA J. LAB. & EMP. L. 1, p. 10 (2009). In 284 of those 2,024 cases, or 14%, unions filed blocking charges delaying the holding of the election. *Id.* In the 1,740 cases where no blocking charge was filed, elections were held in a median of 38 days

after the petition was filed. *Id.* In the 284 cases in which blocking charges were filed, the median number of days between petition to election was 139 days. *Id.* Accordingly, blocking charges increased the average time to an election, on average, by 100 days. Moreover, according to Professor Estreicher's article, in 2008, blocking charges raised the mean number of days from petition to election from 39 days in cases where no blocking charge is filed, to 57 days for all cases. Thus, the evidence demonstrates that the delay caused by blocking charges is greater than the delay caused by contested elections.

Procedural modifications should be made to the scope and application of the blocking charge rule in representation and decertification cases given that blocking charges result in some of the longest and most unjustified delays in representation cases (76 Fed. Reg. 36827-36828). Based on the NLRB's own statistics, union blocking charges comprise one of the most significant -- if not the most significant -- cause of delay in representation cases. To the extent the information requested of the Board in the FOIA request is in line with the numbers cited in Professor Estreicher's paper, compelling evidence exists that elections could be expedited by eliminating the use of blocking charges to delay elections. Indeed, modifying the blocking charge rules -- even without any additional procedural changes -- will significantly decrease the average length of representation cases. Given that the blocking charge rule could be modified without causing significant and unpredictable changes to other aspects of the representation process, the NLRB should strongly consider substantially curtailing or eliminating the rights of parties to file blocking charges.

In most cases, the blocking charge rule should be eliminated in its entirety. Pre-election misconduct that improperly affects the laboratory conditions for the election can be appropriately adjudicated in post-election objections. Only in situations where serious unfair labor practices

have been committed that prevent the holding of a free and fair election, should the regional director have discretion to delay processing of a representation petition but this should be reserved for extraordinary cases rather than applied as the normal practice. *Dadco Fashions, Inc.*, 243 N.L.R.B. 1193, 1193 (1979) (company's actions were "sufficiently serious, pervasive, egregious, and substantial to prevent the holding of a fair election."); *General Cinema Corp.*, 228 N.L.R.B. 377, 383 (1977) (finding that "the factual situation here reveals 'egregious' unfair labor practices of a lingering nature which prevent the possibility of a fair election"). The Organizations appreciate the Board's consideration of potential changes in the Board's current blocking charge procedures, but submit that the proposed rules should first be withdrawn and any potential changes in the blocking charge procedure be considered thereafter.

C. *Sanctions for Improper Use and Dissemination of Employee Confidential Information.*

The Board also requests comments from interested parties regarding what sanctions, if any, should be imposed on organizations that impermissibly utilize or disseminate employee confidential information that would be required in the lists to be furnished to such organizations in the pre-election period. (76 Fed. Reg. 36821). Specifically the Board states, in pertinent part, as follows:

Finally, the proposed amendments would also impose a restriction on the use of the eligibility list, barring parties from using it for any purposes other than the representation proceeding and related proceedings. The Board specifically seeks comments regarding what, if any, the appropriate sanction should be for a party's noncompliance with the restriction.

(*Id.*)

Initially, the Organizations submit that such requests for comment in this area should be moot, and as noted above, such personal and confidential employee information -- such as employee personal telephone numbers and personal e-mail addresses -- should not have to be

submitted by an employer to either the Board or a petitioning party. However, if the Board should ultimately implement any rule requiring dissemination of such information, the Organizations submit that, in addition to available state and federal legal remedies, the following sanctions should be imposed:

- Any organization improperly utilizing or disseminating employee confidential information should be prohibited, for one year following the misuse of such information, from filing any petition for representation for any bargaining unit with the NLRB.
- Any organization improperly utilizing or disseminating such employee confidential information should be required to take all reasonable and appropriate steps to remedy the violation.
- Any organization improperly utilizing or disseminating such information should be required to send, to each employee whose information has been improperly used and disseminated, a letter of apology. Such letter should describe what steps have been taken to remedy the improper use of the information.

The potential information that an employer may be required to furnish to the Board and petitioning parties regarding its employees, however, is not just information of great importance to employees. Such information also constitutes important *employer* property. Indeed, the inappropriate release and utilization of such information could lead to improper recruiting of valuable company employees not to mention other interference by third parties with the employer's workers. As such, petitioning organizations should be required to treat such employer property with the utmost care.

V. **Conclusion**

As noted above, such rules are seriously defective for numerous procedural, legal and administrative reasons. Accordingly, such rules should be withdrawn in their entirety. In the alternative, if the Board does not withdraw such proposed rules, it should reject adopting such rules.

In addition, as a matter of public policy and precedent, such rules should also either be withdrawn or rejected. The term of current Board Chair Liebman expires August 27, 2011. Accordingly, in all likelihood Chair Liebman will have very little time to review the expected considerable number of comments from various interested parties regarding the proposed rules. Further, her term will have expired before September 6, 2011, the date by which rebuttal comments must be received by the Board. Accordingly, any further consideration by the Board of its proposed rules will rest with the remaining three sitting Board members, only two of whom have been confirmed by the United States Senate. The instant rulemaking process, which seeks to modify over 100 sections and subsections of current Board regulations and spans over 35 three column pages in the Federal Register, involves one of the most important missions of the Board and touches upon virtually all aspects of the election process. Such rulemaking should only be undertaken with the greatest care and caution and conducted in a fair and balanced manner. If the Board is truly committed to engaging in a thoughtful nonpartisan review of its election rules, it should undertake such process only after having a fully confirmed complement of its statutorily authorized members and only after consulting with all stakeholders.

Respectfully submitted,

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Dated: August 22, 2011

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