

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

**RESPONSE OF COALITION FOR A DEMOCRATIC WORKPLACE TO REQUEST  
FOR INFORMATION REGARDING REPRESENTATION—CASE PROCEDURES, 29  
CFR PARTS 101 AND 102 (RIN 3142-AA12)**

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## I. Introduction.

On behalf of its members, the Coalition for a Democratic Workplace (“CDW” or “the Coalition”) submits these comments in response to the National Labor Relations Board’s (“NLRB” or the “Board”) Request for Information regarding the representation election procedures, with particular focus on the 2014 amendments to the Representation—Case Procedures, 29 CFR parts 101 and 102 (the “Amended Rules”). The CDW encompasses hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes and employ tens of millions of individuals working in every industry and every region of the United States.<sup>1</sup> Appendix 1 identifies the CDW member organizations which join in the filing of these comments.<sup>2</sup>

The Board should rescind the Amended Rules because they have accomplished nothing but speeding up, by about two weeks, the time period within which employees vote on whether to be represented by a union. The Board has elevated speed above Congress’ express desire for full and lively debate during union organizing campaigns.<sup>3</sup> Nothing in the text of the National Labor Relations Act (“Act”) directs the Board to conduct elections at the earliest possible moment unions might desire. But the Amended Rules do not merely shorten the time for the debate Congress sought to foster – they limit employers’ ability to know and identify who their statutory representatives are *before the election* by eliminating almost all pre-election representation hearings where, consistent with the dictates of the Act, such issues historically have been resolved. The Amended Rules’ single-minded focus on speed also precludes employees from knowing, before votes are cast in the election, with which of their co-workers they will ultimately be grouped for collective bargaining purposes. Moreover, the Amended Rules stifle full and robust debate by imposing onerous requirements on employers on unreasonably expedited schedules and occupying their resources during the crucial campaign period. Employers, unlike unions, have businesses to run and employees whose livelihoods depend on them doing so in an efficient and profitable manner.

Damage to the robust debate Congress sought to foster is not merely an inadvertent byproduct of the Amended Rules. It is the reason the Board adopted them. Although the Board majority refused to acknowledge their true motive, then-Member Hayes spotlighted that fact when he dissented to the Board’s first proposed iteration of the Amended Rules in 2011: “[m]ake no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about

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<sup>1</sup> CDW and its members have a unique and significant interest in the Board’s election procedure regulations: CDW filed comments and presented oral testimony in both 2011 and 2014 when changes to the election procedures were proposed, and was also a named plaintiff in the 2015 legal challenge to the rule in the United States District Court for the District of Columbia. CDW incorporates, by reference, the hearing position statements, testimony, and comments which they previously submitted in response to the Board’s 2011 Notice of Proposed Rulemaking, Representation-Case Procedures, 76 Fed. Reg. 36,812, as well as the Board’s 2014 Notice of Proposed Rulemaking, Representation-Case Procedures, 79 Fed. Reg. 7,318.

<sup>2</sup> Some of the CDW members identified in Appendix 1 have filed separate comments. All of the listed organizations support the positions expressed in these comments and join in their submission.

<sup>3</sup> See *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (NLRA reflects policy judgment of Congress “favoring uninhibited, robust, and wide-open debate in labor disputes,” stressing that “freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.” (citing *Letter Carriers v. Austin*, 418 U. S. 264, 272–273 (1974))).

collective bargaining.”<sup>4</sup> By curtailing employees’ opportunity to hear their employers’ perspective and gather information from sources other than the unions attempting to represent them, the Board majority, like most every observer at the time, expected the Amended Rules to reverse the year after year, decades-long decline that unions have experienced in representing American workers. Not surprisingly, that decline began shortly after Congress adopted Section 8(c) of the Act in the 1947 Taft-Hartley amendments and employees began to be exposed to something other than one-sided campaigns. The obvious but unstated motivation for the Amended Rules was to reverse that decline, and because the Board could not remove Section 8(c) from the Act, it adopted the Amended Rules to eviscerate it.

In short, the Amended Rules’ focus on speed – putting elections on a three-week clock – does not advance industrial democracy. Rather, they undermine employers’ statutorily-protected 8(c) rights, unnecessarily strain resources of all stakeholders (including the Board), confuse voters on election day, and result in post-election uncertainties and litigation. Indeed, since the Amended Rules have been in place, CDW members have reported:

- Limitations on their abilities to effectively communicate with employees regarding the pros and cons of unionization.
- Significant difficulty in filing a thoughtful, comprehensive Statement of Position within the rigid seven day time frame.
- Application of the Amended Rules to favor unions for the purpose of limiting employees’ rights to refrain from organizing.
- Too much discretion granted to Regional Directors with little or no guidance leading to inconsistent application of the Amended Rules.
- Considerable confusion as to the composition of the bargaining unit on election day.
- Employee complaints concerning dissemination of their private contact and work-related information.

All of these burdens have been accompanied by no benefit in terms of improved communications with employees or elections conducted more fairly. Therefore, the Board should rescind the Amended Rules, or make significant changes to them in order to make them fairer and consistent with Congressional intent.

## **II. The Board Should Rescind The Amended Rules Because The Burdens And Limitations They Impose Are Not Justified, Or It Should Modify The Amended Rules To Better Effectuate The Act’s Policies.**

The Board adopted the Amended Rules on the unsupported premise that elections needed to be expedited. However, before the Board adopted the Amended Rules, the median time between

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<sup>4</sup> 76 Fed. Reg. 36,812, 36,831 (2011).

the filing of a petition and the election was 37 days, just slightly more than five weeks.<sup>5</sup> Given what logistically needed to be accomplished to ensure the election proceeded on schedule, and the importance of full and robust debate, 37 days was an eminently reasonable time following the filing of a petition to the election itself. But by limiting employers' time at every step in the process, precluding the resolution of most issues during a representation hearing, and precluding any Board review before the election, the NLRB has unnecessarily reduced that time period from 37 days to just 23 days to the detriment of employers, employees, the election process and the goal of creating stable bargaining relationships.

The Board never provided a compelling rationale for why reducing election campaigns to approximately three weeks was an important policy objective. Although the Board highlighted the unusual cases that took far longer than the median 37 days to resolve, it never clearly articulated why elections should be held in less time. As Member Hayes commented in 2011, the Board's *real* reason for adopting the Amended Rules was to eviscerate employers' Section 8(c) rights and help unions win more elections.<sup>6</sup>

Yet, the burdens and restrictions the Amended Rules impose remain. These burdens and restrictions exist largely to trap employers who cannot meet the Board's unrealistic timeframes. In one Board case, an employer's technical problems that delayed the filing of its Statement of Position by 10 minutes resulted in the Board finding that the employer had waived the issues it attempted to raise. The Board's approach demonstrates that it cares far more about speed and imposing burdens on employers than on discharging its obligation under the Act to certify *appropriate* bargaining units to ensure meaningful collective bargaining can occur. Placing speed above establishing appropriate bargaining units, which are crucial for meaningful bargaining, does great harm to the Act.

As *UPS Ground Freight* demonstrates, the Board's focus on speed has been counterproductive: although the election was hastily held on the Board's expedited time frame and employees *voted* quickly, the case lingered and the employees' votes were not certified for nearly 18 months.<sup>7</sup> It is meaningless to have the right to vote on an expedited basis when that vote is not counted for over a year. Similarly, it is meaningless for employees to have the right to vote three weeks after a petition is filed if they do not have the opportunity to participate in a full and robust debate and become educated about *how* they vote.

Indeed, in *UPS Ground Freight*, then-Chairman Miscimarra described some examples of the Amended Rules' unfair and inappropriate consequences:

- (i) dramatically accelerating litigation timetables;
- (ii) denying reasonable requests for modest extensions of time;
- (iii) giving the party a mere 7 days (extended here by one business day) to prepare a comprehensive Statement of Position;
- (iv) giving the party a mere 8 days (also extended here by one business day) to prepare and present testimony and documentary evidence in a hearing;
- (v) requiring a party to participate in the hearing for an

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<sup>5</sup> 77 Fed. Reg. 25,548, 25,565 (2012).

<sup>6</sup> 76 Fed. Reg. 36,812, 36,8231 (2011).

<sup>7</sup> *UPS Ground Freight, Inc. & Teamsters Local 773*, 365 NLRB No. 113 (2017).

extended period of time, on a single day, beyond normal business hours; (vi) denying a party's request to adjourn the hearing, at roughly 7 p.m., in order to permit the party to prepare its oral argument overnight; and (vii) giving a party a mere 30 minutes, at the end of a long hearing day, to prepare its oral argument.<sup>8</sup>

The Amended rules have imposed incredible costs and burdens on employers and have done damage to the full and robust debate regarding unionization that Congress sought to foster.

#### **A. The Board Should Change The Statement Of Position Requirements.**

1. The Board Should Rescind The Amended Rules' Statement Of Position Requirements Because They Unjustifiably Require Employers To Locate, Compile, And Analyze Substantial Amounts Of Information In An Unreasonably And Unnecessarily Short Time.

The Board should rescind the Amended Rules' Statement of Position requirements. These requirements shorten the time after an election petition is filed and a representation hearing is held and simultaneously impose substantial notice and pleading requirements on employers. Moreover, beyond imposing pleading obligations in unreasonable timeframes, the Amended Rules are draconian in punishing any employer shortcoming or violation. Before the Board adopted the Amended Rules, its longstanding practice generally provided employers eight or nine days – the full time between the petition filing and the scheduled representation hearing – to gather information necessary to evaluate and raise issues regarding the petition at the representation hearing. Employers had no pre-hearing pleading obligations.

The Amended Rules changed that practice by requiring employers to file a comprehensive Statement of Position within seven days of the Board's Notice of Petition for Election (in the absence of a stipulated election agreement).<sup>9</sup> The employer's Statement of Position must address a litany of topics, including all questions of statutory and discretionary jurisdiction, labor organization status, contract bar and other election bars, the appropriate unit, multi-facility and multi-employer unit scope, the statutory employee status of individuals constituting more than 20 percent of the petitioned-for unit, the use of eligibility standards other than the normal standard, whether the employer's business is about to close or whether it is expanding and does not yet have a substantial and representative employee complement, whether the employer is a seasonal operation, and whether there are any professional employees in the unit who must be given their statutory electoral option.<sup>10</sup> The Statement of Position must also address the employer's position on any contested eligibility and inclusion issues, include an initial employee list, and state preferences on election details.<sup>11</sup> The failure to raise an issue in the Statement of Position results in waiver, precluding employers from later raising or litigating that issue at the representation hearing or at any other stage in the pre-election process.<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> 79 Fed. Reg. 74,308, 74,361 (2014).

<sup>10</sup> *Id.* at 74,442.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 74,442-74,443.

Based on nearly three years of experience with the Amended Rules, many of CDW's member employers who have received representation petitions report that these added obligations have imposed substantial burdens on them to locate, compile, and analyze significant amounts of information in an unreasonably and unnecessarily short time. Errors are common, as reasonable people would expect when there is inadequate time to complete required tasks. Such errors and incomplete work do a disservice to the election process and all stakeholders, simply for the sake of rushing to an election.

Unlike unions, which exist and are staffed specifically to organize and represent employees, employers staff their operations to efficiently provide goods or services to customers, not in anticipation of running union campaigns. Gathering and analyzing the information required to prepare the Statement of Position requires work that supervisors must do in addition to fulfilling their regular job responsibilities.

Moreover, CDW members have reported on the difficulties associated with *when* the election petition is filed. When a representation petition is served on a Friday afternoon, it may not actually be received and reviewed until Monday (or later in the week if Monday is a holiday or a day the supervisor on whom it is served is off work due to vacation, illness or other personal reasons). In such a case, the employer has less than five full days to retain counsel, gather the information necessary to evaluate the issues presented by the petition, and prepare its Statement of Position. Relatively few employers have experience responding to representation petitions and even fewer have the available resources ready to dedicate to representation proceedings. Rather, most employers lack experience with representation proceedings. Often employers do not have established relationships with labor counsel and need time to identify and retain labor counsel to educate and help guide them through the complicated election process. Regardless of their experience in responding to representation petitions and their resources, however, all employers face significant challenges in attempting to prepare a complete Statement of Position within the limited time required by the Amended Rules.

Although the Board exists to effectuate the purposes of the Act, and administration of the Act depends upon correct representation and unit determinations, the Amended Rules are drafted to give unions every opportunity to win representation elections rather than give the Board the opportunity to correctly resolve important representation and unit issues. In fact, the Amended Rules changed the nature of representation hearings from neutral fact-finding to litigated adverse proceedings. For example, rather than fostering the Board's role in establishing appropriate units, the Amended Rules treat unit issues as litigation positions, which presume that units proposed by unions are appropriate, and preclude employers from ever raising legitimate unit issues (or any other issues) that were not raised in the Statement of Position.<sup>13</sup> The Board undermines its important role and does terrible disservice to the Act when it elevates speed over accuracy and the fundamental policies of the Act.

For several years following *Specialty Healthcare*, the Board had so limited employers' ability to challenge proposed units because most any unit a union proposed was deemed

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<sup>13</sup> *Id.*

appropriate.<sup>14</sup> However, the Board's recent return to its longstanding community-of-interest standard in *PCC Structural*s moves the focus from the extent of the union's organizational efforts (i.e., the unit it proposed in the petition) to the myriad of community-of-interest factors the Board has identified in hundreds of cases over dozens of years.<sup>15</sup> There is no legitimate reason that employers should be required to conduct that analysis – which is crucial to ensure that the unit that votes in the election and will be certified if the union prevails is appropriate – on the unrealistic timeline required by the Amended Rules to prepare a Statement of Position. Moreover, the penalty the Amended Rules impose on employers for failing to raise an issue in the Statement of Position is waiver, which might benefit unions in their effort to craft a unit that will vote for union representation, but undermines the Act's purpose of establishing appropriate units.

Furthermore, as discussed below, the Amended Rules place the obligation of filing a pre-hearing Statement of Position on the wrong party: it should fall on a *petitioning union* to establish that the unit it seeks to represent is an appropriate one, not on the responding employer to prove that unit is inappropriate. The extent of the unfairness of the Amended Rules is underscored by the comparatively meager amount of information that unions must submit before the representation hearing. Unions often campaign for months before filing a petition and have an indefinite amount of time to gather support and communicate with employees. When unions are ready for the Board to hold an election, they are only required to file a one-page petition that provides a short description of the proposed unit, a statement that the unit is appropriate, some minimal election preferences, and an address and agent information. During the eight days prior to the hearing, the unions' sole obligation is to (continue to) prepare for the representation hearing. Meanwhile, during that same time period, employers must negotiate the possibility of a stipulated election agreement with the assigned Board agent, draft and file a burdensome Statement of Position, attempt to communicate with employees, *and* prepare for the representation hearing. There is no convincing reason why employers should have to submit substantially more information than unions and in such an arbitrarily short time period.

It is truly difficult to hypothesize a more egregious example of the Amended Rules' unfair and unequal treatment of unions and employers than its imposition of a preclusive penalty on issues not raised prior to the hearing on employers but not on unions. The Amended Rules strictly preclude employers from raising issues at the hearing that they do not address in the Statement of Position. Fairness and neutrality would seemingly demand that the same broad preclusive penalty be imposed on unions for issues they do not address in the petition. Yet the Rule permits unions to amend the petition *sua sponte* **during the representation hearing** without any showing of good cause.<sup>16</sup> This means unions, but not employers, can raise issues at the representation hearing that they did not raise in their pre-hearing paperwork. It is a blatant violation of employers' due process rights for the Board to arbitrarily give unions the right to raise new issues during the hearing while denying employers that same right.

The Statement of Position requirements also impose consequential damage that is devastating to employee free choice: they so preoccupy employers and strain their resources that they cannot adequately mount effective educational campaigns to communicate information to

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<sup>14</sup> See *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011).

<sup>15</sup> See *PCC Structural*s, 365 NLRB No. 160 (2017).

<sup>16</sup> See 79 Fed. Reg. at 74,443.

employees. Employers have the right to engage in protected speech prior to an election, but that right is meaningless if they do not have sufficient time to exercise it.<sup>17</sup>

The short time the Amended Rules provide for employers to gather, evaluate, and submit all of the information necessary to identify and raise issues regarding the petition is needlessly short and inflexible. Employers do not have indefinite resources and manpower. The Board cannot reasonably expect employers to retain counsel, become educated about the Board's election process, identify their supervisors, gather, evaluate and submit a detailed Statement of Position, prepare for the representation hearing, spend time negotiating a potential stipulated election agreement, and jumpstart an educational campaign in eight days. Requiring employers to do so places them at a significant disadvantage in the election process and deprives them of their free speech rights under Section 8(c) of the Act. It also deprives employees of their right to hear both sides of the issues and to ultimately make an informed decision as to whether the union should be their bargaining representative.<sup>18</sup>

## 2. Unions, Not Employers, Should Be Required To Submit A Statement Of Position.

The CDW proposes that, should the Board choose to retain the Statement of Position requirement, it should be assigned to the petitioning union, not employers. The Board should require unions, as the petitioners, to serve a Statement of Position on the applicable region and all parties along with the petition and showing of interest. It is appropriate for the Board to place the burden of submitting a Statement of Position on unions because they are the petitioning parties and the proponents of the petitioned-for bargaining unit, its inclusions, and its exclusions.

Requiring a petitioning union to file a Statement of Position is further warranted by the Board's recent decision in *PCC Structural's*. In *PCC Structural's*, the Board overruled *Specialty Healthcare* and reverted to the traditional community-of-interest standard for determining the appropriateness of a petitioned-for bargaining unit. Under this standard, the Board determines "whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit."<sup>19</sup> It is the union's initial burden to propose a bargaining unit and establish its appropriateness, particularly if the proposed unit in any way deviates from traditional bargaining unit principles. If the employer challenges the petitioned-for unit, the Board applies the community-of-interest standard to resolve the dispute and determine the proper bargaining unit.

Requiring unions to file a Statement of Position along with the petition and showing of interest will provide employers with more information from the outset, which will allow employers to respond to the union's contentions more quickly and effectively than they can under the Amended Rules. This will benefit unions, employers, and, ultimately, employees. With more information, employers are more likely to enter into stipulated election agreements and fewer

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<sup>17</sup> See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008) (explaining that Section 8(c) reflects "a policy judgment, which suffuses the NLRA as a whole, [of] favoring uninhibited, robust, and wide-open debate in labor disputes") (internal quotations omitted).

<sup>18</sup> See *NLRB v. Lorimar Prods.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (noting that while it is important to avoid unnecessary delay in the electoral process, "it is at least of equal importance that employees be afforded the opportunity to cast informed votes on the unit certified")

<sup>19</sup> *PCC Structural's*, 365 NLRB No. 160, slip op. at \*9.

representation hearings will need to be held. This is a more practical and efficient allocation of governmental resources.

In the Statement of Position, unions should be required to elaborate on the information provided in the petition, particularly if unions propose a bargaining unit and/or election arrangements that deviate from standard, reasonable practice. For example, because thirty (30) days is a reasonable time period from petition to election, the Board should require unions to explain why the Board should hold an election any sooner than 30 days after the filing of the petition. Similarly, because it is standard practice to hold an election at an employer's place of business, the Board should require unions to explain why the Board should hold the election in any other location. Finally, in addition to bearing the burden of proposing a bargaining unit (as reaffirmed in *PCC Structural*s), unions should bear the burden of asserting all arguments and alleged facts in support of the petitioned-for unit, including individuals or classifications that are allegedly subject to statutory exclusion.

A union's failure to comply with the above requirements should result in immediate dismissal of the petition. This is a fair consequence for a union's non-compliance because a petitioning union has unlimited time to gather and prepare the required arguments, facts, and information before filing a petition and Statement of Position.

### 3. Employers Should Be Required To File A Counter Statement Of Position.

The CDW also proposes that the Board require employers to file a Counter Statement of Position on the day before the noticed hearing, stating whether they agree or disagree with the petitioned-for bargaining unit configuration (inclusions and exclusions), the election arrangements the union proposed in its petition and Statement of Position, and any other material matters. For example, employers should be entitled to raise arguments regarding possible supervisory exclusion and subsequently insist on a binding determination as to supervisory status. In the event an employer does not believe it is subject to the jurisdiction of the Act, it should so state.

The Board should also require employers to include in the Counter Statement of Position the number of eligible voters in the unit as proposed by the union (but not their names or other identifying information), along with the number of eligible voters in any alternative unit(s) it proposes. Doing so would allow the region to assess the unions' showing of interest before commencing a representation hearing.

## **B. The Board Should Modify The Rules Regarding Notice And Scheduling Of Hearing.**

### 1. The Board Should Rescind And Modify The Requirement That All Hearings Must Occur Eight Days After Receipt Of The Notice Of Hearing.

The Board should rescind and modify its rule setting the representation hearing exactly eight days after the notice of hearing. As a preliminary matter, as discussed above, the Amended Rules unduly burden employers by requiring them, despite being non-petitioning parties, to gather, evaluate and produce substantial written information before the hearing. It is counterintuitive for the Board to impose a uniform, eight-day timeline from the date the petition is filed to the date the

representation hearing is held, while at the same time requiring substantially more information from employers than the union.

CDW also urges the Board to modify the Amended Rules to enable the regional directors to manage their dockets and schedule pre-election hearings based on the complexity of the issues contained in each petition, as well as on the practical realities of the particular situation. In the Amended Rules, the Board claimed that scheduling hearings eight days from the notice of hearing “largely codifie[d] best practices in some regions...”<sup>20</sup> The Board also gave regional directors discretion to “postpone the opening of the hearing up to 2 business days upon request of a party showing special circumstances.”<sup>21</sup> Except for the potential two-day extension for “special circumstances,” regional directors cannot further postpone the hearing absent “extraordinary circumstances.”<sup>22</sup> Yet the Board failed to define what constitutes “special” or “extraordinary” circumstances.

The Amended Rules fail to recognize that the eight-day timeframe may not be workable in every situation. For example, they do not allow for consideration of how complicated the legal issues are or how many witnesses are involved. As then-members Miscimarra and Johnson explained in their dissent to the Amended Rules, “concepts of appropriate unit or statutory supervisory status are not readily understood by laypersons and in any event may require significant factual investigation before the required position can be taken. In such situations, the majority is wrong to assert that employers ‘already know[] all those things.’”<sup>23</sup> Significantly, the Board adopted the Amended Rules before returning, in *PCC Structural*s, to the traditional methodology for determining whether a bargaining unit is appropriate.<sup>24</sup> The Board should consider the impact of *PCC Structural*s on scheduling representation hearings before imposing a rigid uniform timeline.

The Amended Rules also give no consideration to practical realities. For example, crucial witnesses may be unavailable to prepare for the hearing or appear at the hearing during the eight-day period. As the dissenters to the Amended Rules opined, “it is predictable that employers in other circumstances—not falling within the [Amended] Rule’s ambiguous category of ‘special’ or ‘exceptional’—will legitimately require more time.”<sup>25</sup> Failing to analyze the complexity in each petition before setting the hearing date creates unnecessary burdens and potentially unnecessary delay. The Board should set the hearing date only after considering the complexity of the issues raised in the petition.

The requirement to set the hearing eight days after the notice of the hearing should be the minimum, not the maximum. At the very least, regional directors should grant a two-day extension as a matter of course and not only when “special circumstances” occur. Additionally, the Board should give regional directors the discretion to examine the complexity of the issues in the petition

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<sup>20</sup> 79 Fed. Reg. at 74,309.

<sup>21</sup> *Id.* at 74,361.

<sup>22</sup> *Id.*

<sup>23</sup> 79 Fed. Reg. at 74,442.

<sup>24</sup> See *PCC Structural*s, 365 NLRB No. 160 (overruling *Specialty Healthcare* and reinstating the traditional community-of-interest standard for determining what constitutes an appropriate bargaining unit in representation cases).

<sup>25</sup> 79 Fed. Reg. at 74,442.

when determining when to schedule the hearing, and to adequately manage their dockets. If a petition raises complicated issues (such as the appropriate bargaining unit or the need to interview numerous witnesses) that could require significant factual gathering before an election can take place, regional directors should have the discretion to provide additional time before holding a hearing. One purpose of the Amended Rules was to expedite the election process, but the goal of speed should not cause the Board to spend the government's and the parties' resources on elections that result from inadequately evaluated petitions. Such an approach merely delays the resolution of the dispute and exacerbates, not eliminates, delay.

2. The Board Should Rescind The Requirement That Employers Post The Notice of Petition For Election.

CDW believes the Board's requirement that employers post the Notice of Petition for Election is unnecessary because the rules already required employers to post a Notice of Election. Under the Amended Rules, "[w]ithin 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places..."<sup>26</sup> The Rules and Regulations provide that "[t]he Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted."<sup>27</sup> They also require employers to "maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election."<sup>28</sup> Finally, the Rules and Regulations require employers to "post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and [to] also distribute it electronically if the employer customarily communicates with employees in the unit electronically."<sup>29</sup>

The Amended Rules changed the name of the "Initial Notice to Employees of Election" to "Notice of Petition for Election" in order to "reflect that...although such petitions seek Board-conducted elections, elections do not necessarily occur in all cases after the filing of such petitions."<sup>30</sup> CDW does not understand why the Board would change the name to "Notice of Petition for Election" based on its acknowledgement that the election may not occur, and then create a requirement that the notice now be posted. Further, the Board failed to explain why it now requires employers to post a Notice of Petition for Election when employers will eventually have to post a Notice of Election if an election is scheduled. The Board has merely concluded that "the Notice of Petition for Election will provide useful information and guidance to employees and the parties."<sup>31</sup> Because the holding of an election is not certain at the time employers are required to post the Notice of Petition for Election, CDW believes it is unnecessary to require employers to post it. Therefore, the Board should rescind that requirement.

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<sup>26</sup> *Id.* at 74,362.

<sup>27</sup> NLRB Rules and Regulations, at § 102.63(a)(2).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at § 102.67(k).

<sup>30</sup> 79 Fed. Reg. at 74,379.

<sup>31</sup> *Id.*

**C. The Board Should Rescind The Amended Rules' Limitations On The Representation Hearings Required By Section 9(c), And Modify The Amended Rules To Require That Eligibility Disputes Be Resolved Before The Election.**

Any discussion about the representation hearing process must start with the statutory requirement in Sections 9(b) and 9(c) of the Act that, read together, state that “in each case,” the Board “shall provide for an appropriate hearing.”<sup>32</sup> Before the Amended Rules, it was well-established Board law that this “appropriate hearing” requirement was necessary not just to determine the existence of a question concerning representation, but also to determine the bargaining unit’s configuration. Indeed, “the ‘appropriate hearing’ requirement has consistently been deemed to require that representation hearings encompass evidence regarding eligibility and inclusion issues.”<sup>33</sup>

Despite this clear statutory language and decades of consistent interpretation, the Amended Rules changed the election procedures to effectively eliminate the Section 9(c) hearing requirement. Pursuant to the Amended Rules, a representation hearing is limited solely to a determination as to whether a question concerning representation exists. The regulations further provide that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.”<sup>34</sup> The main reason announced by the Board for this deferral of inclusion and eligibility resolution was that “[i]n many cases, the delay would...be wholly unnecessary when the issue raised in the pre-election request for review is rendered moot by the election results.”<sup>35</sup>

As CDW argued in 2011 and 2014, such limitations on the hearing process run contrary to the plain language of the Act and are bad policy. While resolving voter eligibility disputes at the hearing stage may not necessarily have a determinative effect on the outcome of all elections, such a measurement does not – and cannot – truly capture whether workers voting in the election enjoy the “fullest freedom” to determine whether they want to vote for union representation. Indeed, in the context of a Board election, for employees to fully exercise their Section 7 rights, they are entitled to know the identity of all other employees that would be in their bargaining unit before they vote for or against collective representation.<sup>36</sup> Voter confusion and uncertainty as to bargaining unit composition creates less – not more – stability in labor relations and is therefore bad policy.

Employers also have a legitimate interest in knowing which workers are considered statutory supervisors for purposes of the election. As the Board well knows, different standards of

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<sup>32</sup> 29 U.S.C. § 159(b)-(c).

<sup>33</sup> See 79 Fed. Reg. at 74,438; see also *North Manchester Foundry Inc.*, 328 NLRB 372 (1999) (representation hearing did not satisfy requirements of Section 9(c) where the hearing officer “precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters, and instead directed that resolution of that issue be deferred to the postelection challenge procedure.”).

<sup>34</sup> NLRB Rules and Regulations, at § 102.64(a).

<sup>35</sup> 79 Fed. Reg. at 74,410.

<sup>36</sup> See *NLRB v. Beverly Health and Rehab. Servs.*, 120 F.3d 262 (4th Cir. 1977) (per curiam) (unpublished) (“Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character . . . the employees have effectively been denied the right to make an informed choice in the representation election”).

election-related conduct apply to workers depending on whether they are a statutory supervisor or an employee. Leaving employers to guess as to the supervisory status of workers could result in unfair labor practices as well as the overturning of election results. Significantly, the Board's election statistics do not capture important information that may happen after the tally of the ballots. This means that the true impact of the deferral of eligibility issues may not be reflected in the Board's statistics.<sup>37</sup>

Recent union elections in the higher education arena demonstrate the failures of a rigid, one-size-fits-all rule for representation elections. Graduate students at Harvard University voted in April 2018 for a second time to determine whether to be represented for purposes of collective bargaining by the Harvard Graduate Students Union-UAW. Yet the original election petition was filed in October 2016 – 18 months ago. The first election, conducted in a massive bargaining unit of over 3,500 eligible voters, resulted in a vote tally of 1,456 to 1,272 against unionization (a 184 vote margin), with 314 challenged ballots. The parties have spent the last 18 months litigating over these challenged ballots, despite the fact that they agreed to a stipulated election and even met prior to the filing of the RC petition to discuss eligibility issues. Even with this initial cooperation, the unique nature of the employer's organizational structure and the short time period established by the Amended Rules for production of the voter list led – perhaps inevitably – to a large number of the workers who voted being subject to challenge and thus the re-run election.<sup>38</sup> The situation at Harvard University is indicative of the problems inherent with a rule based on inflexible timeframes that encourages rushed election agreements, which predictably leads to unresolved matters on election day.<sup>39</sup>

Accordingly, absent an agreement between the parties that is reviewed and approved by the regional director and which the parties waive review thereof, a hearing and subsequent written decision by the regional director should be required in all cases in which any question exists concerning the Board's jurisdiction, the configuration of the bargaining unit, the placement of individuals within or without such unit, and/or the status of any individual or individuals as putative statutory supervisors. Prior to the Amended Rules, this had been the Board's policy dating back to the 1947 Taft-Hartley amendments.

In CDW's 2011 and 2014 comments, it argued that limitations on representation hearings violated Section 9(c) of the Act. This is still true today. The Amended Rules were, and remain, contrary to the plain language of the Act and bad policy. Pursuing speed at all costs is bad policy, especially when pursued at the expense of employees' right to enjoy the "fullest freedom" to determine whether to vote for union representation. CDW urges the Board to return to its long-established practice of conducting comprehensive evidentiary hearings on all disputed issues prior to holding an election.

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<sup>37</sup> See *UPS Ground Freight*, 365 NLRB No. 113, slip op. at \*5 n.18 (2017).

<sup>38</sup> See *President and Fellows of Harvard Colleges' Motion to Stay Proceedings Pending the Board's Decision of Harvard's Request for Review*, Case No. 01-RC-186442 (August 4, 2017).

<sup>39</sup> See *Yale Univ.*, 365 NLRB No. 40, slip op. at \*1 (2017) (Member Miscimarra dissenting) (disagreeing with the majority's denial of employer's expedited request for review of the Regional Director's Decision and Direction of Election on the basis that all parties "should be given the benefit of the Board's resolution of election-related issues before voting takes place").

#### **D. The Board Should Revoke The Delegation Of Its Representation Case Authority To Regional Directors.**

Section 9 of the Act bestows upon the Board the obligation to determine the appropriate unit for collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, and to direct elections.<sup>40</sup> Through this role, the Board is responsible for establishing national labor policy and “obtain[ing] uniform application of its substantive rules and avoid[ing] [the] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.”<sup>41</sup> The Board – not the Board’s hearing officers or regional directors – should serve as the ultimate authority for deciding election disputes. That was the case until the Board issued the Amended Rules. Resting ultimate authority in election disputes with the Board ensures consistency and uniformity across the Board’s 26 regional offices. On the other hand, delegating national labor policy to hearing officers and regional directors in all but a handful of cases contributes to the fragmentation of labor policy into a “variety of local procedures and attitudes,” which is contrary to the consistency and uniformity that Congress sought to maintain by passing the Act.

While Section 3(b) of the Act permits some delegation of authority to regional directors, this delegation has always been subject to the statutory limitation that “the Board may review any action of a regional director delegated to him...”<sup>42</sup> The Board first delegated authority to regional directors in representation cases in 1961.<sup>43</sup> In that year, the Board handled 10,599 representation cases<sup>44</sup> and conducted 6,610 elections.<sup>45</sup> In Fiscal Year 2017, the Board only handled 2,357 representation cases<sup>46</sup> and conducted only 1,579 elections.<sup>47</sup> Thus, the practical caseload considerations that may have warranted delegation in 1961 no longer exist.

Moreover, the Amended Rules violate Section 3(b) of the Act because they eliminate the statutory right to seek pre-election Board review except upon a showing of “compelling reasons” and only with “special permission.”<sup>48</sup> This standard is inconsistent with the right to seek pre-election review of “any action of a regional director.”<sup>49</sup> For example, review of important rulings, such as the Board’s jurisdiction over the employer, whether individuals are statutory employees, whether the election should be barred under one of the Board’s election bar doctrines, and whether one or more employers constitute a single or joint employer are now reviewable only if the Board grants “special permission” to appeal. The Board only granted this special permission eight times

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<sup>40</sup> See 29 U.S.C. § 159.

<sup>41</sup> *Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953).

<sup>42</sup> 29 U.S.C. § 153(b).

<sup>43</sup> See 26 Fed. Reg. 3,911 (1961).

<sup>44</sup> 26th Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1961 at p. 10.

<sup>45</sup> *Id.* at p. 16.

<sup>46</sup> See Number of Petitions Filed in FY17, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/number-petitions-filed-fy17>.

<sup>47</sup> See Number of Elections Held in FY17, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/number-elections-held-fy17>.

<sup>48</sup> 79 Fed. Reg. at 74,309.

<sup>49</sup> 29 U.S.C. § 153(b).

in Fiscal Year 2017 out of 48 pre-election Requests for Review.<sup>50</sup> Additionally, even if the Board grants special permission to appeal, by eliminating the presentation of evidence on fundamental issues of eligibility and inclusion, the Amended Rules undermine due process protections and effectively block any meaningful pre-election review of those issues.

With regard to the Board's post-election review of regional directors' decisions in representation cases, the Board's elimination of its review was intended to shorten the time between the tally of ballots and the final certification of representative or election results. This has not been the case. Instead, employers now must refuse to bargain with the union – inviting a so-called “technical 8(a)(5)” charge—and risk being found in violation of the law. The lack of meaningful review extends the period of uncertainty with respect to employers' legal obligations and interference with the normal operation of their businesses while they navigate the time consuming and expensive process of taking a case to the Board through the unfair labor practice process, and then possibly to federal court. Under the former rules, the Board could review these issues as a matter of right in a post-election appeal. The elimination of the Board's post-election review as a matter of right has resulted in less, not more, efficiency in the representation case process.

#### **E. Alternatively, The Board Should Modify The Election Rules To Mandate Board Review And Resolution Of Issues Raised At The Hearing.**

As explained above, the Amended Rules eliminate meaningful review of decisions by regional directors in derogation of the Board's statutory obligations. The absence of such meaningful review is contrary to Section 9(a) of the Act because it requires employees to vote without requisite information about, for example, who is in the bargaining unit.<sup>51</sup> There is no practical justification for denying the opportunity for Board review before a vote is held. Accordingly, the Amended Rules should be modified to require the Board to fully consider and act upon any request for review before any vote is held. This would merely restore the Board's prior practice.

#### **F. The Board Should Rescind The Expanded Voter Eligibility List Disclosure Requirements And Revert To The Disclosures Required By *Excelsior Underwear*.**

In *Excelsior Underwear*, the Board established the requirement that employers must file an election eligibility list with the regional director within seven days after approval of an election agreement or issuance of a decision and direction of election.<sup>52</sup> The eligibility list consisted of the

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<sup>50</sup> See NLRB's Response to the ABA Practice and Procedure Committee's February 2, 2018 Letter to the Board, available, [https://www.americanbar.org/content/dam/aba/events/labor\\_law/2018/papers/ABA%20Mid-Winter%20Meeting%20Questions%20-%20Answers.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/ABA%20Mid-Winter%20Meeting%20Questions%20-%20Answers.authcheckdam.pdf)

<sup>51</sup> See, e.g., *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524, at \*4 (4th Cir. Aug. 12, 1997); see also *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (finding a post-election change in unit size of about 10% denied employees the right to an informed vote); *NLRB v. Lorimar Prods.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984) (ruling that reduction of unit by 50% and removal of two classifications rendered election results void).

<sup>52</sup> See *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966).

names and home addresses of the employees eligible to vote in the election. The regional director would then make the list available to all parties to the representation case. *Excelsior Underwear* also established that failure to provide the regional director with the election eligibility list during the designated timeframe is grounds for setting aside the results of the election.

The Amended Rules substantially changed the *Excelsior Underwear* requirements, which the Board had employed and parties had relied upon for nearly 50 years. The Amended Rules dramatically expanded the nature and quantity of employee information that employers must provide to regional directors and the parties to the representation case. In addition to providing eligible employees' names and home addresses, the Amended Rules require employers to include the following information in an election eligibility list: employees' personal email addresses, home phone numbers, personal cell phone numbers, work locations, shifts, and job classifications.<sup>53</sup> Despite demanding that employers provide significantly more information in the election eligibility list, the Amended Rules dramatically shortened the time period in which employers must provide that information from seven calendar days to two business days after approval of an election agreement or issuance of a decision and direction of election.<sup>54</sup> An employer's failure to provide the regional director and other parties with the expanded election eligibility list within two business days is grounds for setting aside the results of an election.

The Board should rescind the Amended Rules' expanded disclosure requirements and revert to *Excelsior Underwear* for several reasons. First, the Amended Rules did not adequately address why the Board needed to expand government-mandated, non-voluntary access to employees' personal information. Second, the Amended Rules did not adequately address why the Board's apparent need to expand this access outweighs employees' legitimate and substantial privacy considerations. Finally, the Amended Rules inexplicably demanded that employers produce significantly more information about employees within a dramatically shorter period. The Board lacked adequate justification for implementing each of these enhanced requirements, and it should now take advantage of the opportunity to revert to *Excelsior Underwear*, which established much more reasonable and workable disclosure requirements for employers and employees alike.

1. The Board Failed To Justify Its Expanded, Government-Mandated, Non-Voluntary Access To Personal Information Employees Reasonably Expect To Remain Private.

A glaring flaw in the Amended Rules' expansion of the voter list disclosure requirements was the Board's failure to adequately justify changing what had been good Board law for nearly 50 years. Although the Board correctly recognized that it was required to balance the need for the additional information with the costs of obtaining that information, the only justification it provided for expanding the nature and quantity of employee information that employers must provide was technological advancements.<sup>55</sup> Improvements in technology may justify changing the *format* in which employers must provide employee information (for example, by email instead of U.S. Mail), but they do not, standing alone, justify a dramatic expansion of the *types* and *quantity* of employee information that employers must provide. The Act "does not command that labor

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<sup>53</sup> See 79 Fed. Reg. at 74,335.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 74,339.

organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers.”<sup>56</sup> Just because technology improves does not mean the Board must, or even may, allow unions to contact employees in every conceivable medium. However, with minimal justification, that is exactly what the Amended Rules allow unions to do by requiring employers to provide employees’ home addresses, personal e-mail addresses, home phone numbers, and personal cell phone numbers. Despite the Board’s clear holding in *Steelworkers (Nutone)*, one is left to wonder what communication mediums labor organizations *cannot* use to “reach[] the minds of individual workers.”<sup>57</sup>

2. The Amended Rules Do Not Adequately Address Why Unions’ Purported Need For Additional Employee Information Outweighs Employees’ Substantial And Legitimate Privacy Expectations And Concerns.

Glaringly absent from the Amended Rules’ expansion of the voter eligibility list disclosure requirements is any meaningful explanation by the Board of why unions’ purported need for more information on eligible voters outweighs those voters’ privacy rights in their personal information. Much of the information the Amended Rules now require employers to provide is confidential and sensitive and employees expect their employers not to provide it to third parties without their consent. In adopting the Amended Rules, the Board paid lip service to “the public’s increased concern with privacy issues due to incidents of identity theft, government surveillance and hacking of retailers’ electronic databases,” but it hastily and summarily disregarded these legitimate concerns and insisted that “the risks associated with these speedy and convenient tools are part of our daily life” and are risks that “are worth taking and as a practical matter, must be taken.”<sup>58</sup> The Board never provided an adequate justification for its belief that this risk *must* be taken (inevitably, by the employees whose information is placed at risk), particularly without implementing important safeguards before doing so.

The Board’s insistence that the Amended Rules protect employee privacy concerns by limiting the scope, recipients, permissible usage, and duration for which the employee information can be used rings hollow. The Board asserted, for example, that a cell phone number is not entitled to the same degree of protection as medical records and “may reasonably be viewed as less private.”<sup>59</sup> However, technology experts now warn that hackers and identity thieves are increasingly using personal cell phone numbers to steal personal and confidential information.<sup>60</sup> Moreover, CDW member employers have reported numerous complaints from employees after providing the expanded voter eligibility list to the union about the employer providing their cell phone numbers to third parties who they never wanted to have that information.

Particularly telling of the Board’s disregard for employees’ legitimate privacy concerns was its lack of any meaningful consideration and discussion of giving employees an opportunity to opt out of having their employers share certain pieces of their personal information with unions. Rather, the Board summarily rejected opt-out provisions, arguing that it “has recognized that even

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<sup>56</sup> *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958).

<sup>57</sup> *Id.*

<sup>58</sup> 79 Fed. Reg. at 74,342.

<sup>59</sup> *Id.* at 74,344.

<sup>60</sup> See, e.g., *Hackers Are Coming for Your Cell-Phone Number*, MIT Technology Review, <https://www.technologyreview.com/the-download/608711/hackers-are-coming-for-your-cell-phone-number/>.

unsolicited contact by the union remains an important part of the basic Section 9 process,” and opt-out provisions would conflict with the intent of *Excelsior Underwear* by somehow preventing employees from receiving sufficient information from unions.<sup>61</sup> This argument ignores a fundamental principle of the Act – employee choice – and arrogantly assumes that the Board, not employees, knows what is best for employees. Moreover, it highlights the driving force behind the Amended Rules – namely, a rush to increase union density at the expense of employee privacy and other employee rights, employer due process and stable bargaining relationships.

3. The Amended Rules Inexplicably Require Employers To Produce Significantly More Information About Employees Within A Dramatically Reduced Time Period.

Finally, the Board should rescind the expanded voter list requirements because, again without explanation, the Amended Rules require employers to produce significantly more information about employees in a dramatically shorter time – just two (2) business days. Unsurprisingly, the Board’s justification for the change was that advances in recordkeeping, retrieval, and record transmission technology make it unnecessary to give employers more than two (2) days to compile the required information.<sup>62</sup> This appeal to technological advancements again misses the point and is simply impractical and unreasonable.

The Amended Rules completely ignore the fact that not all businesses use modern technology to conduct their operations. In adopting them, the Board also arrogantly assumed that employers who have received a notice of election have nothing better to do than expend copious amounts of their time, energy, and resources compiling information for unions and the Board. Even for those employers who are more sophisticated, they do not necessarily keep all required employee information in the same databases or in the prescribed format. Furthermore, it is not always a straightforward, simple task for employers to determine who is eligible to vote in an election. To the contrary, in many industries, that determination can be complex and time-consuming. Just as it has elsewhere in the Amended Rules, the Board, without adequate justification, has placed speed and the needs of unions above all other considerations.

4. The Board Should Return To *Excelsior Underwear*’s Voter Eligibility List Requirements.

Thankfully, there is a simple and adequate remedy for the Board’s mistake in needlessly expanding *Excelsior Underwear*’s voter eligibility list requirements – return to the disclosures required by *Excelsior Underwear*. *Excelsior Underwear* proved more than adequate for unions, employers, and the Board alike for nearly 50 years. Employers should once again be required to provide a voter eligibility list that only contains the names and home addresses of employees eligible to vote in the election, and should be given seven (7) calendar days to do so. Additionally, in light of the large number of instances under the Amended Rules where petitioners withdraw after obtaining a voter eligibility list (which can only be required as a means to communicate with eligible voters), such lists should not be made available until there is a final determination as to the configuration of the unit and the inclusion or exclusion of any disputed individuals or

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<sup>61</sup> 79 Fed. Reg. at 74,346.

<sup>62</sup> See *Id.* at 74,353.

categories. Then, once the petitioner is in receipt of the voter eligibility list, if it subsequently withdraws its petition, it should be barred from filing a new petition in the same or similar unit for one (1) year.

### **G. The Board Should Rescind The Blocking Charges Policy.**

The Board's current blocking charge policy is unnecessary because it fails to achieve the Board's express goals when promulgating the Amended Rules. The Board explained that the Amended Rules were intended to "remove the unnecessary barriers to the fair and expeditious resolution of representation cases," to "simplify representation-case procedures," to make best practices "more transparent and uniform across regions," to eliminate "duplicative and unnecessary litigation," and to reduce unnecessary delay.<sup>63</sup> The blocking charge policy undermines instead of accomplishes the Board's stated goals, and should be eliminated.

Before the Amended Rules, unions could file "blocking charges" to delay elections until the charges were resolved. Consequently, elections were often delayed while unfair practice charges were resolved. To eliminate delays caused by the filing of a charge, the Amended Rules require that when:

any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge."<sup>64</sup>

The offer of proof must include "the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony," and "[t]he party seeking to block the processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof."<sup>65</sup> After reviewing the offer of proof, regional directors determine whether objectionable conduct has occurred and whether to stay the processing of the petition.<sup>66</sup> Under the Amended Rules, regional directors will not block a representation election unless the party filing the unfair labor practice charge files a request that the petition be blocked and the required offer of proof.<sup>67</sup> The Board explained that adding the offer-of-proof requirement "codifies what had been best practice while adding an offer-of-proof requirement that will expedite investigation and help weed out meritless or abusive blocking charges."<sup>68</sup>

Yet, the Board failed to explain how the Amended Rules' offer-of-proof requirement expedites the investigation or why a party should have the ability to block an election in the first place.<sup>69</sup> Moreover, the Board failed to establish a timeframe in the Amended Rules by which

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<sup>63</sup> 79 Fed. Reg. at 74,308.

<sup>64</sup> NLRB Rules and Regulations, § 103.20.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Casehandling Man. Pt. 1 Sec. 11700-11886 (N.L.R.B.), § 11730.

<sup>68</sup> 79 Fed. Reg. at 74,310.

<sup>69</sup> *Id.*

regional directors must investigate the claims in the offer of proof. As the dissent to the Amended Rules observed, the blocking charge policy does “not, standing alone, adequately address the frequent substantial delay in processing election petitions caused by blocking charges.”<sup>70</sup> Furthermore, as the dissent noted, the Amended Rules’ “incorporation of the current blocking charge policy with minimal pre-complaint changes provides nothing of meaningful value and leaves completely unaffected the enormous delays caused by this policy.”<sup>71</sup> Because the blocking charge policy does not prevent litigation or reduce unnecessary delay, the Board should eliminate it.

Further, CDW is concerned by numerous reports from its members that regional directors are not applying the blocking charge policy consistently. Eliminating the blocking charge policy would make election proceedings more transparent and uniform across regions. Preventing parties from “blocking” elections would ensure that elections are conducted on a predictable schedule and within a reasonable timeframe, which would benefit employers, unions, and employees. Further, it would ensure that regional directors follow Board law consistently and apply the blocking charge policy to all types of petitions, including RC petitions, RD petitions, and RM petitions.<sup>72</sup> While Board decisions support applying the blocking charge policy to decertification cases,<sup>73</sup> some courts have implied that it might be improper to “block” decertification cases.<sup>74</sup> Abolishing the blocking charge policy would ensure that regional directors preside uniformly over all elections.

Eliminating the blocking charge policy also would protect employees’ fundamental right to vote under the Act. When regional directors stay elections, they place employees’ voting rights in limbo.<sup>75</sup> It can – and often does – take years to resolve the resulting litigation and allow employees to exercise their right to vote. In such cases, many of the employees who signed or refused to sign the election petition have left the workplace disenfranchised.

Finally, eliminating the blocking charge policy would not infringe on the rights of a party who believes that objectionable conduct has occurred. Parties can file post-election objections within seven days after the election.<sup>76</sup> A party’s objections only need to contain “a short statement of the reasons for the objections” and “a written offer of proof identifying each witness the party would call to testify concerning the issue and summarizing the witness’s testimony.”<sup>77</sup> If regional

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<sup>70</sup> *Id.* at 74,455-74,456.

<sup>71</sup> *Id.* at 74,456.

<sup>72</sup> Casehandling Man. Pt 1 Sec. 11700-11886 (N.L.R.B.), § 11730.

<sup>73</sup> See *Multi-Color Co.*, 114 NLRB 1129, 1137 (1955), *enforcement denied on other grounds by NLRB v. Multi-Color Co.*, 250 F.2d 573 (6th Cir. 1957); *International Powder Metallurgy Co., Inc.*, 134 NLRB 1605 (1961) (same).

<sup>74</sup> See *NLRB v. Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968).

<sup>75</sup> See *T-Mobile v. NLRB*, D.C. Cir. Case No. 17-1065 (March 28, 2018) (Sentelle, J., dissenting) (noting that the Board’s blocking charge policy causes “unfair prejudice”); see also *NLRB v. Minute Maid Corp.*, 283 F.2d at 710 (“[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented”).

<sup>76</sup> See NLRB Form 5547.

<sup>77</sup> *Id.*

directors determine that grounds exist to set aside the election, they can hold a rerun election.<sup>78</sup> By shifting litigation from the pre-election phase to the post-election phase, the Board would decrease litigation because a union's prevailing in the election would moot most any objection, promoting the Board's expressed desire for efficiency in the election process. The blocking charge policy is not merely unnecessary, it is counterproductive. The Board should rescind it.

## **H. The Board Should Examine And Redefine The Definition Of "Majority" For Certification Purposes.**

### **1. Background Of The Board's Current Political Majority Rule.**

Section 9(a) of the Act provides that "representatives designated or selected for purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining."<sup>79</sup> When a Question Concerning Representation ("QCR") exists, whether because of an RC, RD or RM petition, the Board has historically held that "a majority" is determined by the majority of those who cast ballots, as compared to the majority of those actually in the unit.<sup>80</sup> The Act, at Section 8(a)(2), prohibits employers from recognizing and bargaining with a union that does not actually represent a majority of the employees in a particular unit.<sup>81</sup> In other contexts, however, the Board does require either that a true majority of voters actually vote for a particular outcome, or that proof of a certain amount of the overall unit desire an outcome or action. For example, in a deauthorization (UD) election, the Board requires that an actual majority of those in a particular bargaining unit vote to eliminate a union security clause. Before an employer may withdraw recognition from an incumbent union, it must possess objective proof that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.<sup>82</sup>

### **2. The Current Political Majority Rule Is Inconsistent With The Act.**

The Board has created tension between two equally important statutory mandates. First, the Act's requirement that employers recognize and bargain in good faith with a union that represents the majority of workers in an appropriate unit; and second, that employers must not recognize and bargain with a union that does not represent a majority of such employees. How the Board determines that majority is different depending on the circumstances. In a Board-conducted election, a simple majority of the employees who vote control the outcome. As a result, unions can win and lose their status as the exclusive bargaining representative of the employees based on the votes of a minority of the employees in the unit. Similarly, employers must bargain with a union that a minority of the employees in a unit supported and voted for, provided a majority of the employees who voted cast their ballots for the union. This result is counter to the statutory mandate

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<sup>78</sup> For example, in *Yale University*, 365 NLRB No. 40 (2017), and *European Imports*, 365 NLRB No. 41 (2017), the Board refused to stay elections, but allowed parties to preserve their pre-election claims – thus leaving the substantive legal claims intact, while making the process more efficient by deferring resolution until after the election, at which time the election results may have mooted those claims.

<sup>79</sup> 29 U.S.C. § 159(a).

<sup>80</sup> See *New England Transp. Co.*, 1 NLRB 130 (1936); *Associated Press*, 1 NLRB 686 (1936); *R.C.A. Mfg. Co. Inc.*, 2 NLRB 159 (1936).

<sup>81</sup> See 29 U.S.C. § 158(a)(2); *Garment Workers (Bernhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961).

<sup>82</sup> See *Levitz Furniture*, 333 NLRB 717, 725 (2001).

that employers not recognize or bargain with unions that do not represent a majority of the relevant unit of their employees.

The Board can comply with both statutory requirements by changing its approach to certifying bargaining representatives and requiring them to actually receive votes from a majority of those they seek to represent in all QCR petitions, just as it requires petitioners in a UD election to receive votes from an actual majority of those that wish to deauthorize a union security clause. This is also consistent with the Board's requirement that an employer have objective proof the union no longer represents a majority of the unit before it can withdraw recognition. If a union in a RC, RD or RM election does not receive the votes of a majority of the unit, the Board should not certify it as the exclusive bargaining representative of the employees in the unit. The statute, when read as a whole, requires that result. Moreover, the secrecy of employee votes will be maintained in the same way as in a UD election. In a UD election, not voting is essentially the same as voting to keep the union security clause. If such a result is appropriate in resolving UD elections, there is no rational basis for applying a different standard in a RC, RD or RM election.

3. The Board Should Invite Public Comment On Requiring Labor Organizations To Actually Represent A Majority Of A Unit Before The Board Certifies Them As The Exclusive Representative.

For approximately 75 years, and until June of 2010, the National Mediation Board ("NMB") interpreted nearly identical statutory language as requiring unions to receive votes from an actual majority of the unit before the union could be certified. The NMB, via rulemaking, changed the standard in 2010, and courts affirmed its right to do so. The Board should re-evaluate its practice and policy of certifying labor organizations as the exclusive bargaining representatives unless the union actually obtains majority support among the unit as a whole. The Board should invite stakeholders to submit comments on this important issue related to the Board's statutory responsibility and then engage the rule making process to ensure that both Section 9(a) and 8(a)(2) and the rights of all employees are truly safeguarded under the Act. A union that cannot prove it represents a majority of a workforce should not be certified by the Board.

### **III. Conclusion**

CDW opposed the Board's changes to its election rules in both 2011 and 2014. In the approximately three years that the Amended Rules have been in effect, many of CDW's initial concerns with the proposed changes have come to fruition. Indeed, the Amended Rules provide little or no benefit, but have significant negative consequences as applied in the real world. The Amended Rules do violence to Congressional intent in promulgating the NLRA, contain obligations that fall disproportionately on employers, sap stakeholder resources, set unyielding timelines that do nothing to effectuate the purposes of the Act, and invade employee privacy, among other problems. Consequently, the Amended Rules should be revoked in their entirety, or alternatively, modified as described above in order to return proper balance to the labor-management landscape.

Respectfully submitted,  
THE COALITION FOR A DEMOCRATIC WORKPLACE

**Appendix 1**  
**Participants – The Coalition for a Democratic Workplace**

**The Coalition for a Democratic Workplace**

The Coalition for a Democratic Workplace encompasses hundreds of employer associations, individual employers and other organizations that collectively represent millions of businesses of all sizes. They employ tens of millions of individuals working in every industry and every region of the United States. The following CDW member organizations join in the filing of these comments.

**National Organizations (72)**

American Fire Sprinkler Association  
American Foundry Society  
American Hotel & Lodging Association  
American International Automobile Dealers Association  
American Pipeline Contractors Association  
American Rental Association  
American Supply Association  
American Trucking Associations  
ARGENTUM  
Arkansas State Chamber of Commerce  
Asian American Hotel Owners Association  
Associated Builders and Contractors  
Associated Equipment Distributors  
Associated General Contractors of America  
Associated Industries of Arkansas, Inc.  
Auto Care Association  
Building Service Contractors Association International  
Capital Associated Industries  
Center for the Defense of Free Enterprise  
Coalition of Franchisee Associations  
Consumer Technology Association  
Franchise Business Services  
Global Cold Chain Alliance  
HR Policy Association  
Independent Electrical Contractors  
Independent Office Products & Furniture Dealers Alliance  
Industrial Fasteners Institute  
Interlocking Concrete Pavement Institute  
International Foodservice Distributor Association  
International Franchise Association  
International Warehouse Logistics Association  
Manufacturer & Business Association

Metals Service Center Institute  
Minnesota Grocers Association  
Motor & Equipment Manufacturers Association  
National Apartment Association  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Truck Stop Operators  
National Association of Wholesaler-Distributors  
National Automobile Dealers Association  
National Club Association  
National Council of Chain Restaurants  
National Franchisee Association  
National Grocers Association  
National Lumber and Building Material Dealers Association  
National Multifamily Housing Council  
National Office Products Alliance  
National Precast Concrete Association  
National Restaurant Association  
National Retail Federation  
National Small Business Association  
National Tooling and Machining Association  
Nevada Manufacturers Association  
North American Die Casting Association  
Northeastern Retail Lumber Association  
Office Furniture Dealers Alliance  
Precious Metals Association of North America  
Precision Machined Products Association  
Precision Metalforming Association  
Restaurant Law Center  
Retail Industry Leaders Association  
SNAC International  
Society for Human Resource Management  
The Employers Coalition of North Carolina  
The Linen, Uniform and Facility Services Association  
Truck Renting and Leasing Association  
U.S. Chamber of Commerce  
United Motorcoach Association  
Virginia Small Business Partnership  
Western Carolina Industries  
World Millwork Alliance